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Dear Dr Butlin

## SA Productivity Commission - Development Referral Process Review

Thank you for providing an opportunity to respond to the SA Productivity Commission's ('Commission's') review of development referral process.

We note that this review is focussing on referrals to Environment Protection Authority ('EPA'), Native Vegetation Council ('NVC') and Department of Infrastructure and Transport ('DIT') with particular regard to changes implemented as part of the planning reforms. While we have contained our comments to the referral agencies the focus of this review, we consider that a review of referrals to other referral agencies would also be beneficial.

As a preliminary comment in respect of the Commission's review, we consider that it is being undertaken very soon after the full implementation of the Planning and Design Code ('Code') in South Australia. As such, Hickinbotham, and we suspect other developers, have not had significant experience with referral process under the Code and how the changes made to referral processes may benefit or disadvantage development outcomes. Hickinbotham intends to make further comment on the review during the second round of consultation by which time further experiences under the new system may have been had. In addition, we consider that a further review of referral processes would be warranted at a later time once developers have had an opportunity to experience the new system more broadly.

### Pre-lodgement Discussions with Referral Agencies

The process for referrals is similar to what was previously provided under the *Development Act 1993*, with an applicant lodging an application and the application then being referred to the referral agencies. The ongoing difficulty with this process is that developers are generally kept at arm's length from referral agencies, and vice versa, with limited opportunities for direct engagement between applicants and referral agencies at pre-lodgement stage of a development.

This lack of early engagement can cause delays in the application process. Often it will be up to the applicant to assume what referral agencies may require as part of an application. As a result, referral agency can require amendments and additional information during the referral process and this can result in delays in the assessment process.

Formalised opportunities to discuss proposed developments with referral agencies pre-lodgement would enable developers to address significant matters for referral agencies at the pre-lodgement stage of an application. From our experience this can assist in streamlining the formal referral process and subsequently the assessment process.

### **Accountability of Referral Agencies**

Hickinbotham does consider there will be effects as a result of the shift to a predominantly direction role for referral bodies and implications for development application conditions.

While the shift to referral agencies having direction does place greater accountability on referral bodies, we consider that this shift may also result in additional requirements being placed on development through provision of additional information and conditions.

While appeals against referral agencies are now available, instituting an appeal has implications including additional expense, delays and no certainty of the outcome for applicants.

### **Determining whether a referral is required**

The ability to determine whether a referral is going to be required for a development varies significantly between referral agencies. For example, requirements for referrals to DIT are quite clear and developers can ascertain before lodging when an application will require a referral. For other agencies determining whether a referral is required is not as clear, particularly for the EPA and NVC where a referral requirement may only be known after an expert assessment has been undertaken. This creates uncertainty in the application process.

### **Native Vegetation Referrals**

It appears that little to no review of the NVC referral process has taken place as part of the planning reforms. While protection and management of native vegetation clearance is an important consideration for new development, we consider that this is a referral area that requires significant review, refinement and improvement, including:

- Further refinement and clarification of the referral triggers to the NVC. The referral trigger under the *Planning, Development and Infrastructure (General) Regulations 2017* and the Code should be amended to ensure clarity in respect of when a referral is required and that where native vegetation clearance falls within an exemption, no referral is required.
- Review of the Native Vegetation Overlay to determine if all properties currently identified in the Overlay should be included. In this regard the Overlay currently contains a number of allotments that are in built up regional, rural or hills areas (for example Blackwood, Eden Hills, Belair) that are unlikely to contain native vegetation due to the history of development that has occurred in respect of land.
- Remove overlaps between the Native Vegetation Overlay and Regulated and the Significant Tree Overlay in the Code so that land is only subject to one set of requirements in relation to vegetation. Under the current system some parcels of land are subject to both the Native Vegetation Overlay and the Regulated and Significant Tree Overlay and this creates uncertainty about what provisions apply in respect to vegetation on land.
- The definition of native vegetation in the *Native Vegetation Act 1991* could be amended to provide further exclusions, including properties where there is evidence that native vegetation has been cleared as a result of past land uses/development.

- Provide better guidelines to assist landowners/developers determine whether native vegetation exists on land and also the nature of clearance (i.e. Level 1, 2, 3 or 4 clearance) that may be required.
- Where referral is required, the process required to be undertaken by the NVC results in duplication of other processes including the need for sub-referrals, consultation and potentially a public hearing. These processes are not anticipated by or achievable within the 20 day referral timeframe currently provided under the *Planning, Development and Infrastructure Act 2016*.
- Additional and appropriate exemptions for native vegetation clearance that negates the need for expensive native vegetation reports for relatively straightforward development matters.

## **Environment Protection Authority Referrals**

### Planning Consents and Environment Licencing

Separating licencing requirements to obtaining planning consent has positive benefits as it provides applicants with an early indication of project viability through the planning consent and confidence in preparing detailed information necessary for an EPA licence once the applicant has greater certainty about a project.

Development authorisations are also a once off regulatory decision, whereas EPA licences require regular updating as technology and knowledge of environmental impact are better understood. So keeping some separation between the two processes is appropriate for this reason.

A potential risk in the current referral process is that the EPA may seek a level of information as part of a development application that is more appropriately provided as part of the EPA licencing process. This could result in delays and expense to applicants without certainty of the projects viability (i.e. the need to provide further information without planning consent being granted).

Advice from the EPA about what is required for an EPA licence is useful at the development application stage but should not delay the grant of consent. In this regard, at the development application/referral stage the EPA should be confident that an EPA licence can be granted and make its requirements known. The requirements could form part of a planning consent by way of condition or reserve matter without the need for additional information relevant to the EPA licence being required at the application stage.

### Site Contamination and Changes to More Sensitive Land Use

In accordance with the planning reforms a referral to the EPA will be required where a development results in a change in the use of the land to a more sensitive use and site contamination exists or may exist as a result of (specified) classes of previous contaminating activities. This is different from the previous planning system where relevant authority directly considered issues of site contamination and suitability of land use.

Under the new planning system, where a change in land use to a more sensitive use is proposed, an applicant is required to undertake a preliminary site investigation ('PSI'), provide a signed declaration and other additional information. Where the previous use of land gives rise to suspected/possible contamination (including in relation to previous activities that have occurred on the land) a referral to the EPA will be required. If referral is required, the EPA may direct the applicant to:

- proceed with the application on the basis that the PSI has shown no risk/acceptable risk of contamination and a declaration has been signed by an environmental consultant to confirm this; or

- if the PSI raises the possibility/existence of contamination a detailed site investigation (DSI) may be required.

Under the new system a relevant authority can issue a planning consent on the basis that further testing and remediation is required, however a Certificate of Occupancy cannot be issued until testing/remediation works have occurred and an appropriately qualified person has signed the Statement of Suitability.

The only authority that can request a site audit is the EPA, which occurs at the DSI stage. This decision was previously left to relevant authorities.

The benefit of the new process is that it provides greater consistency in the approach and assessment of site contamination. It also reduces risks for decision-makers relating to land where site contamination may exist.

A potential downside is that the EPA could be very conservative/risk adverse when compared to independent environmental specialists. This could slow down application processes and add significant costs during an assessment that may not be necessary.

Practice Direction 14 has been developed to assist in determining processes for determining when development is moving to a more sensitive land use and classes of activities that trigger referral to the EPA. While slightly outside of the specific EPA referral process we consider further refinement of the Practice Direction would be helpful to avoid the need for a preliminary site assessment for sites where potential for site contamination is unlikely (for example, Residential development 1 and Residential development 2 should fall within the same category of land use sensitivity as they are both residential uses and site contamination issues are unlikely to arise).

The comments provided are preliminary in nature. We look forward to reviewing the Commissioner's final report and providing further feedback at this stage.

Please contact me on 08 8366 0018 should you have any questions.

Yours sincerely,  
**Hickinbotham Group**



**Michael Hickinbotham**  
Managing Director