

OFFICIAL



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EPA CE-21-0218

Mr. Adrian Tembel
Chairperson
South Australian Productivity Commission
C/o: Ms Christine Bierbaum christine.bierbaum@sa.gov.au

Dear Mr Tembel,

Thank you for the opportunity to provide feedback on the draft report of the South Australian Productivity Commission's *Inquiry into reform of SA's regulatory framework*. The South Australian Environment Protection Authority (EPA) is South Australia's lead environmental regulator which takes a proportional and risk based approach to regulation. It has a culture of continuous improvement in undertaking its statutory functions.

The EPA has reviewed the draft report of the South Australian Productivity Commission's *Inquiry into reform of SA's regulatory framework* and is pleased to provide comments on the report and further information for the inquiry team to consider prior to finalising the report. The information is provided as attachment A.

For further information on this matter, please contact Steven Mudge, Manager – Legislation and Policy, 8204 2105, steven.mudge@sa.gov.au.

Yours sincerely

A handwritten signature in black ink that reads 'Circelli'.

Tony Circelli

**CHIEF EXECUTIVE
ENVIRONMENT PROTECTION AUTHORITY**

Date: 16/9/2021

Section 1.2 – Best practice regulation

In general, the OECD recommendations on regulatory policy, and the Sparrow and Hodges examples have been part of EPA's longer term compliance approach rationale (in particular Sparrow's works) and are generally consistent with the EPA's commitment and approach to regulatory reform. The EPA is supportive of these recommendations and examples being used as benchmarks to drive regulatory improvements across government regulators.

With reference to the comment on behavioural elements of compliance, the EPA has supported research into behavioural sciences informing regulatory practice approaches. The EPA has also established an intelligence function to support compliance activity. Further consideration by government of the value of intelligence and behavioural sciences within the State's regulatory agencies is supported.

The Australian Government guide referenced on page 30 mentions regulatory capability and culture. This however is not strongly reflected in other chapters or the recommendations in the draft SAPC report but is a very important contributor to improving regulatory performance. Some states have a Public Service Capability Framework (NSW, Vic) and WA are pursuing a Regulatory Capability Framework. Australasian Environmental Law Enforcement and Regulators network (AELERT) has developed a regulatory officer capability framework that the EPA is looking to use for improving Authorised Officer Capability – in particular, the core regulatory capability for regulatory practice. This could also provide a framework for draft recommendation 3.3. and dedicated training that could be rolled out across regulatory agencies.

Section 2.3 – Regulatory Impact Assessment

The Better Regulation Handbook, introduced in 2011 together with training from Cabinet Office for the preparation of Regulatory Impact Statements (RISs), was welcomed by the EPA.

Prior to the introduction of a formal regulatory impact assessment framework via the 'handbook', the EPA had long been applying an impact assessment framework for the development of policy and regulation under the *Environment Protection Act 1993* (the Act). As a RIS requires the documentation of thinking that should be done in the development and reform of regulation, the introduction of formal requirements for the preparation of RIS's did not present a challenge to the EPA. Rather, it provided a formal and welcome mechanism for the EPA to highlight the rigorous thinking and analysis it undertakes in pursuing its responsibilities under the Act. It was also welcomed by the EPA because it would ensure a more 'level playing field' by requiring all agencies to undertake and document a rigorous process in the development of regulations, and also provided an opportunity for better consideration of environmental costs and benefits by other agencies in decision making.

Section 2.3.2 indicates that the regulatory impact assessment process set out in the Better Regulation Handbook is no longer being rigorously adhered to by all agencies. This is unfortunate as it means that a 'level playing field' in the development of regulations no longer applies and the rigour in decision making is potentially limited. The EPA is supportive of RIS requirements being proportionate to the potential impact of a proposal. The EPA continues to prepare detailed RIS's regarding significant reforms, for example the introduction of mass balance reporting for resource recovery facilities and the site contamination planning instruments incorporated into the new planning system under the *Planning Development and Infrastructure Act 2016*. For less controversial reforms impact assessment through general cabinet documentation should be considered sufficient.

The EPA supports the publication of RIS's on either the Department of Premier and Cabinet website (as was formerly the case) or agency websites as this provides transparency to the public regarding the rigour of decision making processes that affect the community. However, such a policy needs to be considerate of commercial in confidence information obtained during development of the policy that is included in a RIS. There may need to be an option for a RIS summary to be published in lieu of the RIS submitted to Cabinet in such circumstances.

Section 3 – Regulator practices

The EPA continues to apply best practice principles developed by the OECD in its better regulation program and has contributed to the development of the Modern Regulation Improvement Tool (MRIT) with the AELERT. The EPA chaired AELERT during 2014-17, particularly focusing on a common capability development framework for regulatory practitioners, as well as the MRIT.

The EPA has also applied the SA's High Performance Framework (HPF) since 2013 as a tool for assessment and continuous improvement. The EPA continues to use the HPF as a tool for improvement and works with other agencies and the Office of the Commissioner for Public Sector Employment on public

sector capability development. This has also led to a well-developed organisational performance framework aligned to key organisational services and outcomes.

The EPA is currently working with the Department of the Premier and Cabinet on the development of an Integrated Performance Framework to be used across public sector agencies. The Integrated Performance Framework provides a framework for performance measurement across government and is aligned to CE performance agreements (PC029).

The EPA Annual Report contains information about our key operations and initiatives in accordance to PC013. We also provide information on our performance against our Corporate Plan, Compliance Plan and KPIs, including a dashboard, as well as our regulation programs.

The recommendation for the SA Government to provide statements of expectations, aligns with the current CE Performance Appraisal process (PC029), which provides for an agreement between Ministers and CEs on performance objectives.

In our experience, performance measurement is a necessary tool to assess performance, to provide insights to areas for improvement. It requires consistency and ongoing commitment of resources to develop and mature, and is part of a 'business as usual' culture within EPA. Developing a policy framework and guidance for performance measurement across government would be beneficial. It is also important to develop capability and invest at the agency level to ensure that performance measurement is sustained and improved over time, including investment in ICT, tools for automation, data analysis and intelligence capabilities are also key areas for consideration.

Commitment and investment in the regulatory capability of the organisation and its people is a key aspect of good regulatory practice. It has been included in the MRIT (mentioned above) and continues to be a focus for the AELERT Better Regulation Working Group in driving common language, skills, knowledge and attributes to build regulatory practitioners capability.

The EPA has a culture of continuous improvement and a dedicated area focusing on continuous improvement to regulatory practice. The aim is to ensure regulation policy, approaches and outcomes are effective and efficient for both the EPA and licensees.

Section 4 – Managing the stock of regulation (linkage to section 2 – Regulatory Impact Assessment)

This section of the report states that cost benefit analysis involves quantifying in monetary terms the present value of all the costs and benefits of a development proposal, so that a clear conclusion can be drawn as to its net value to society. Where estimated benefits are less than the costs the regulatory initiative would not normally proceed. In the social and environmental domains not everything can be confidently valued in monetary terms. The government could develop better methodologies for the consideration of these issues, possibly for use alongside the Better Regulation Handbook. Alternatively non-monetary value considerations in decision making should be incorporated into the assessment process.

Section 4.7 outlines challenges and opportunities for reform. One challenge for agencies seeking to drive reforms to regulation and to regulatory practice is the potential for financial disincentives in the way that agencies (and reforms) are funded. Reforms that require expenditure or reduce revenue will generally require an agency to find equivalent savings within its budget. There is a view that lost revenue can be offset by reduced costs however that assumes that the regulator function can be made more efficient and/or downsized and/or that regulator costs are fluid. This approach can be particularly detrimental to agencies that are already lean, efficient and undertake strong and disciplined budget management. It also may also be a disincentive for regulatory reform, for example removing regulation of low risk activities that provide significant revenue.

To remedy this, options could be recommended by SAPC to better support more regulatory reform or innovation. For example, an annual innovation or reform fund available to regulators that can offset budget losses where it can be demonstrated that there is an equivalent or greater long term financial return resulting from a regulatory reform in the form of industry expansion or net state economic benefit. This would encourage regulatory reform while limiting budget impacts and impacts on organisational capacity to deliver regulatory services.

The formal consideration of long run economic benefits arising from regulatory activities and/or innovation and reform when considering regulatory impact should be embedded into not only regulatory impact statements but also factored into decision making related to reducing regulatory impact, including positive regulatory impact.

Information request 6.1: appeals processes

Are the processes for appealing decisions by SA regulators, including both internal and external appeal pathways, effective, efficient and timely?

1) Appeals to the Court

Part 13 – *Appeals to Court* of the EP act outlines the regulatory decisions of the Authority that can be appealed. A wide range of EPA regulatory decisions can be appealed to the Court. An appeal must be made in a manner and form determined by the Court, setting out the grounds of the appeal. Further the EP Act states:

(3) *Subject to this section, an appeal must be made—*

(a) in the case of an appeal against an environment protection order, information discovery order, clean-up order, site contamination assessment order or site remediation order or variation of such an order—within 14 days after the order is issued or the variation is made;

(b) in any other case—within two months after the making of the decision.

(4) The Court may, if it is satisfied that it is just and reasonable in the circumstances to do so, dispense with the requirement that an appeal be made within the period fixed by this section.

(5) An appeal must be referred in the first instance to a conference under section 16 of the Environment, Resources and Development Court Act 1993 (and the provisions of that Act will then apply in relation to the appeal).

Powers of the ERD Court on appeal are:

108—Powers of Court on determination of appeals

(1) The Environment, Resources and Development Court may, on hearing an appeal under this Part—

(a) confirm, vary or reverse any decision or order appealed against;

(b) order or direct a person or body to take such action as the Court thinks fit, or to refrain (either temporarily or permanently) from such action or activity as the Court thinks fit;

(c) make any consequential or ancillary order or direction, or impose any condition, that it considers necessary or expedient.

(2) However, no order for costs is to be made unless the Court considers such an order to be necessary in the interests of justice.

2) Review by the Ombudsman

Administrative acts can be reviewed by the SA Ombudsman. The Ombudsman's Act defines administrative act as:

administrative act means—

(a) an act relating to a matter of administration on the part of an agency to which this Act applies or a person engaged in the work of such an agency; or

(b) an act done in the performance of functions conferred under a contract for services with the Crown or an agency to which this Act applies,

13—Matters subject to investigation

(1) Subject to this Act, the Ombudsman may investigate any administrative act.

(2) The Ombudsman may make such an investigation either on receipt of a complaint or on the Ombudsman's own initiative and, where a complaint is made, the Ombudsman may investigate an administrative act notwithstanding that, on the face of it, the complaint may not appear to relate to that administrative act.

(3) The Ombudsman must not investigate any administrative act where—

(a) the complainant is provided in relation to that administrative act with a right of appeal, reference or review to a court, tribunal, person or body under any enactment or by virtue of Her Majesty's prerogative; or

(b) the complainant had a remedy by way of legal proceedings, unless the Ombudsman is of the opinion that it is not reasonable, in the circumstances of the case, to expect that the complainant should resort or should have resorted to that appeal, reference, review or remedy.

(3a) The ability to lay a complaint for disciplinary action against a person is to be disregarded for the purposes of subsection (3).

And...

(4) The Ombudsman may investigate any administrative act, notwithstanding any enactment that provides that that administrative act is final or not to be appealed against, challenged, reviewed, quashed or called into question.

(5) A reference in this or any other provision of this Act to an administrative act will be taken to include a reference to the service, activity or omission to which a prescribed child protection complaint relates.

3) Internal review

No formal internal review mechanism for regulatory decisions in the EP Act as such.

The EPA Complaints Policy provides an avenue for people to raise matters that they are dissatisfied about with the agency. The scope of the policy is:

We will manage your complaint under this policy where it involves your dissatisfaction with the service or action of the EPA or its staff, and you are directly affected.

Some complaints about certain decisions we make under legislation are required to be managed in different ways using the relevant legislation, policy or procedure. We will advise you where this is the case and the appropriate way to raise any issues or complaints.

As such where there is the option of a review by the Court available then this takes the matter outside the scope of the policy given that the time it takes for the review of a complaint internally may reduce the time period for the person to undertake a legal review with the Court.

Issues

Court rules may create delays for people seeking a review of an EPA decision and court action generally takes time. Court action can also be expensive, potentially limiting its use by those impacted by EPA regulatory decisions.

The Ombudsman is not legally able to investigate an administrative act with a right of appeal, reference or review to a court, tribunal, person or body under any enactment. Similarly, in alignment with the policy established by the Ombudsman Act, the EPA Complaints Policy does not cover decisions where a right of Court appeal exists.

There may also be jurisdictional overlap (Commonwealth/State) in some areas.

Are the processes for appealing decisions by SA regulators, including both internal and external appeal pathways, effective, efficient and timely?

There is insufficient data to reach a firm conclusion. The EPA's Complaints Policy has brought in a less formal means of challenging decisions, but doesn't cover regulatory decisions with a formal appeal option. The Small Business Advocate can also advocate on behalf of businesses.

Court processes are outside control of regulatory agencies. Whilst there could be an argument for a separate Tribunal process that would provide independent review it should be noted that the outcomes may have less rigour given the court system is better equipped with subject-specific knowledge and understanding.

There may be scope for legislative change that supports the use of alternative dispute resolution mechanisms – mediation etc. to resolve disputes although courts/tribunals generally have capacity to order these. There may also be scope to increase capacity for online dispute resolution to reduce demands on industry.