



Draft Report

Development Referrals Regulatory Review

2 July 2021



Government of
South Australia

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About the South Australian Productivity Commission

The Commission provides the South Australian Government with independent advice on facilitating productivity growth, unlocking new economic opportunities, supporting job creation and removing existing regulatory barriers.

Premier and Cabinet Circular, *The South Australian Productivity Commission (PC046)* sets out the objectives and functions of the Commission; how inquiries are referred to the Commission, undertaken and reported on; and how the Commission and public sector agencies work together.

The Commission is supported by the Office of the South Australian Productivity Commission (OSAPC) which is an attached office of the Department of the Premier and Cabinet. The Chair of the Commission also serves as the Chief Executive of the OSAPC.

Commission's approach

The Commission is required to take a broad perspective in developing advice for the South Australian Government. It must consider the interests of industry, business, consumers and the community, regional South Australia, social-economic implications and ecological sustainability.

The Commission conducts its own independent quantitative and qualitative analysis. It also draws on the experience, evidence and views of all inquiry stakeholders.

The release of this issues paper supports interested parties to participate in the inquiry by highlighting the key issues and by raising questions to generate feedback.

It is important to emphasise that the Commission has no predetermined views on the matters covered by the inquiry. This issues paper sets out the Commission's initial understanding of the relevant matters. Feedback from stakeholders will assist further analysis and review that will contribute to the development of a draft report.

Making a submission

The Commission invites submissions on the draft report by 6 August 2021. Submissions may address any of the issues covered by the report and the terms of reference.

Submissions are also accepted from South Australian Government agencies if approved by their Chief Executive or Minister.

An electronic submission in Word or PDF format is preferred, along with any supporting documentation containing facts, figures, data or examples:

- through our website www.sapc.sa.gov.au; or
- via email at sapc@sa.gov.au; or
- via post at: GPO Box 2343, ADELAIDE SA 5001.

Key dates

9 March 2021

Notice of inquiry

26 March 2021

Issues Paper published

March – May 2021

Initial public consultation

7 May 2021

Submissions to issues paper due

2 July 2021

Draft report published

July - August

Draft report public consultation

6 August 2021

Submissions due on draft report

9 September 2021

Final report presented to the Premier

8 December 2021

Final report made public

Confidentiality

Transparency is an important part of the Commission's independent process for gathering evidence and other elements of the inquiry process. The Commission will publish the submissions that it receives on its website unless the author clearly indicates that the submission is confidential or the Commission considers the material to be offensive, potentially defamatory, beyond the scope of the inquiry's terms of reference, or an abuse of process.

Disclosure

The Commissioners have declared to the South Australian Government all personal interests that could have a bearing on current and future work. The Commissioners confirm their belief that they have no personal conflicts in regard to this inquiry.

More information

For more information on the Commission, including circular PC046, how to communicate with the Commission and details on the Commission's approach to handling confidential material visit our website at www.sapc.sa.gov.au, email to sapc@sa.gov.au or call 08 8226 7828

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Key messages

The South Australian Productivity Commission was tasked to advise on how referrals processes in South Australia's development assessment system can be improved to raise the competitiveness of the state as an investment destination. The task focuses on referral processes relevant to development activity of environmental significance, and affecting native vegetation and transport routes that together account for a significant volume and complexity of referral activity. Both Code assessed and impact assessed development (major project) pathways are considered.

While the emphasis is on short to medium term benefits through changes primarily in regulator practices, the Commission may make recommendations on amendments to regulation. The *Planning, Development and Infrastructure Act 2016*, the Planning and Design Code and complementary reforms are outside the terms of reference.

The development assessment system is designed to synthesise the public interests relevant to land use, including the interests protected by the referral agencies, in reaching decisions on development applications. The Commission has focused on identifying improvements that would improve this synthesis by lifting the efficiency, effectiveness and timeliness of decision making without compromising public interests.

Its work has been guided by diagnostic principles developed from OECD best practice to examine end-to-end regulatory process.

In this draft report, based on the evidence to date, the Commission:

- mainly in relation to Code assessment, found structured and largely efficient processes that varied among the regulators reflecting their role, cultures and regulated industries;
- proposes a recommendation that regulators further develop and monitor the impacts of early engagement with proponents;
- heard of disproportionate requirements placed on proponents; and
- found evidence that all referral bodies showed improvement in regulatory practice through internal and external reviews.

The work on major project approvals is less advanced than for Code assessed approvals and will have an increased focus in the final report.

The Commission considers that employment, investment and productivity are central to the state's future. There are 'economic' dimensions of public interest that are intrinsic elements of the referral process in project approvals. The Commission considers this objective in the work of regulators needs to be strengthened in general. It intends to develop this as a key theme in further consultations on this draft report and across the Modern Regulation Projects.

Executive summary

This draft report sets out the Commission's understanding of the issues affecting the regulatory practice and performance of three of the state's referral bodies: Environment Protection Authority South Australia, Native Vegetation Council/Department for Environment and Water, and Commissioner of Highways. It also considers the effect of referral body input on major project assessment processes. The Commission has accounted for the transition from the *Development Act 1993* to the *Planning, Development and Infrastructure Act 2016* (*PDI Act*). There are several areas where additional information is requested, and further consultation will occur.

The Commission has consulted with applicants and their agents, the referral bodies, Planning and Land Use Services (PLUS), industry and professional associations and other interested parties. The Commission has engaged with 34 organisations and held 45 meetings of which more than half were with regulators and 35 per cent were with businesses or associations. The Commission received 8 public submissions in response to its issues paper, these are available on its website and listed in Appendix 2.

A disproportionately high number of interested parties were only prepared to engage with the Commission on a confidential basis. Risk of prejudice in retaining future work, and the potential to compromise relationships with relevant authorities and referral bodies were cited as reasons. The Commission has endeavoured to maintain its commitment to a high level of transparency without losing the value of the feedback received.

The Commission considered several matters of regulatory and system design that impact on regulatory performance. Given the terms of reference for this review are focused on regulatory practice, the Commission has identified these matters but generally refrained from detailed analysis of the underlying issues. These matters will be summarised in the final report for future consideration by government.

The state's interest in land use

The state interests in planning and land development are primarily captured in the *PDI Act* and State Planning Policies, which cover a combination of economic, social and environment protection areas. The referral process creates the opportunity for referral bodies to exercise their regulatory mandate in relation to land use. This early intervention is intended to avoid potential costly delays later and project changes for applicants in ensuring compliance with regulatory requirements. Ideally, the referrals process supports the state's interest by enabling investment, development and growth without compromising the specific public interests the referral bodies must protect.

The development assessment process requires a balanced consideration of the direct economic benefits of development, with social objectives, public safety and environment preservation outcomes. The extent to which these respective mandates align, and are, in practice, synthesised in the development assessment process (a form of regulatory value chain), the higher the prospects of meeting the state's economic objectives and other public interests.

Referral body process, practice and performance

The Commission had strongly engaged with the referral bodies and has developed a substantial understanding of their regulatory practice. The Commission has made one draft

recommendation at this time and will build on its analysis through consultation on this draft report. Several areas for further consultation have been flagged.

The Commission's work has been guided by diagnostic principles developed from best practice by the Organisation for Economic Cooperation and Development to evaluate the efficiency and effectiveness of a regulator in an end-to-end assessment process. Those principles cover accountability, early engagement, customer service, proportionality and risk, culture and capability, post-assessment arrangements and continuous improvement.

Overall, the Commission found structured and efficient regulatory practice across the referral bodies. Unsurprisingly, they varied in their practices against the diagnostic principles, in part because of different roles, organisational cultures, and the industries regulated. The use of consultants to prepare applicant information for assessment is a critical part of the regulatory practice of all three referral bodies and overall system capability. This illustrates the importance of the private sector in the assessment. Concerns were raised about referral bodies both accrediting consultants and assessing their reports in the referral process.

Informal early engagement practices were apparent in all referral bodies. Formalisation of these high-value arrangements is recommended to quantify the investment by applicant and regulator in this early part of the assessment process. Guidance available to applicants was generally of a high quality, albeit Commissioner of Highways relies heavily on traffic consultants in this regard.

Some feedback was received about disproportionate information requirements being placed on applicants, and where in the regulatory value chain this is required. Bringing forward expenditure unnecessarily early in the assessment process without certainty of approval was the main concern. Variable qualities of data are kept by referral bodies in relation to information requests. The Performance Indicators (System) Scheme may provide additional accountability and insight on this matter going forward. The ePlanning system may constrain the ability of applicants and referral bodies to resolve matters quickly and pragmatically outside of the structured assessment process.

While some feedback indicated concerns about access to referral body technical specialists, no specific issues were identified in relation to in-house capability to perform the referral body function. Effective strategies were identified to provide continuity between development assessment approvals and conditions, and subsequent operating approvals from the referral bodies as part of their broader regulatory role.

All referral bodies demonstrated improvements in regulatory practice over time arising from internal and external reviews. There are variable approaches and emphases on using continuous improvement cycles to inform better practice and performance.

Referrals and major projects

State-significant projects warrant assessment processes with scrutiny and accountability commensurate with their impact on the state economy, employment and growth prospects. The Commission's understanding of impact assessed development and major projects is not as advanced as it is for Code assessed development. Under the state planning reforms major projects have not been subject to the extent of reform other development types have. Areas for potential improvement and further consultation have been identified. Those matters focus on accountability and timeframes, capacity to evaluate and improve the assessment process, and better alignment and prioritisation of projects with governments economic objectives.

Enhancing performance and further analysis

The Commission observes several process and practice improvements from a systemic perspective. Pre-lodgement and continuous improvement arrangements are areas of focus. Further cost modelling work is flagged subject to obtaining relevant data. Further work to inform final report recommendations will focus on strengthening the state's economic objectives in the regulatory practice of the referral bodies, within their public interest mandates.

Summary of information requests and draft recommendations

Information request 2.1: Use of native vegetation accredited consultants

Stakeholders are invited to provide to the Commission specific examples of their experiences in relation to native vegetation referrals having regard to:

- mitigation strategies and environmental offsets recommended by accredited consultants and whether those recommendations led to certainty or a positive outcome for the proponent; and
- delays to an applicant's project arising from wait times to engage an NVC-accredited consultant.

Information request 2.2: Access to Environment Protection Authority technical specialists

Given Environment Protection Authority (EPA) referral response outcomes often rely on the input of their technical and specialist staff, clarification from those staff can be an important part of progressing an applicant's development application. Stakeholders are invited to provide to the Commission examples of their experiences in seeking to consult with EPA's internal specialists, including the nature of the enquiry the applicant was making, and whether barriers to accessing the relevant specialist led to a delay in obtaining the referral response.

Information request 2.3: Commissioner of Highways guidance materials

What benefits to applicants and/or consultants would come from Commissioner of Highways publishing information about their referral procedures and assessment requirements? To what extent do the current arrangements act as a barrier to entry for traffic consultants seeking to enter the South Australian market?

Information request 2.4: Publishing 'on request' referral body guidance materials

What benefits to applicants and consultants would come from publishing referral body guidance material that is currently only available on request? Would this additional transparency support a customer focus approach and reduce ambiguity about the requirement for, and content of, accredited or professional consultant's reports?

Information request 3.1: Major project assessment and the state's interest

Does the current major project assessment process reasonably enable the state to make a development decision that effectively balances regulators' input and the economic interests of the state?

Information request 3.2: Improving major project assessments through proponent feedback

How do proponents and their agents currently provide feedback on the major project assessment process? How is that feedback considered? To what extent does it influence regulator practice in assessing developments? What arrangements are in place in other

jurisdictions that provide an effective feedback loop to help in improving regulator practice regarding major project assessment?

Information request 3.3: Declaration of major projects

What has been the experience of proponents going through the process to be declared a major project? What guidance, procedures or other process-related material were provided to support them through the process to declaration?

Information request 3.4: Where case managers are not the relevant authority

What has been the experience of proponents in relation to major projects where the appointed government case manager is not the relevant authority? What impact did this arrangement have on the proponent's understanding of who is managing the process and who is accountable?

To what extent did the appointment of a case manager from a regulator with a specific mandate impact on the extent to which the assessment process considered the state's overall interests when assessing a major project?

Draft recommendation 4.1: Formalising pre-lodgement arrangements

For Code assessed developments, the Commission recommends referral bodies formalise their pre-lodgement arrangements to facilitate more frequent and earlier engagement by:

- producing and publishing guidance material to make clear to applicants and their consultants or agents what can be expected from the pre-lodgement process with that referral body;
- ensuring suitably experienced staff are involved in pre-lodgement engagements with applicants that can identify key issues, information requirements and show-stoppers; and that remaining staff are trained and mentored in these skills;
- where pre-lodgement agreements are not used, record and share the outcomes of the pre-lodgement process with the applicant to support a clear and mutual understanding between the parties, including the extent to which pre-lodgement advice can be relied upon in relation to any subsequent development application and assessment process;
- supporting an evidence-based approach to calculating the value of pre-lodgement activity in the referrals process by capturing the following metrics:
 - applicant name/company, type of proposed development activity etc;
 - the duration of the pre-lodgement process;
 - the number of instances of interaction between the referral body and applicant during the pre-lodgement period;
 - the number of requests for information (RFIs) required by a referral authority for a development application that was subject to a pre-lodgement process; and
 - the referral response time of a development application that was subject to a pre-lodgement process with the referral body.

Definitions

Applicant/Proponent	The person or organisation responsible for lodging a development application. These terms are used interchangeably in this report. Proponent is often used to describe the applicant in relation to a major project application/assessment process.
Major project	Projects declared as such by the Minister. 'Major projects' is used interchangeably in relation to both major projects or developments under Part 4, Division 2 of the ceased <i>Development Act 1993</i> , and impact assessed development declared by the Minister under section 108(1)(c) of the <i>Planning, Development and Infrastructure Act 2016</i> .

Acronyms

CFS	Country Fire Service
CoH	Commissioner of Highways
DAP	Development Application Processing (system)
DEW	Department for Environment and Water
DIT	Department of Infrastructure and Transport
EIS	Environmental impact statement
EPA	Environment Protection Authority
<i>EP Act</i>	<i>Environment Protection Act 1993</i>
FTE	Full-time equivalent
KPIs	Key performance indicators
LGA	Local government authority
<i>NV Act</i>	<i>Native Vegetation Act 1991</i>
NVAP	Native Vegetation Assessment Panel
NVB	Native Vegetation Branch (DEW)
NVC	Native Vegetation Council
<i>PDI Act</i>	<i>Planning, Development and Infrastructure Act 2016</i>
OECD	Organisation for Economic Cooperation and Development
PIAB	Planning and Impact Assessment Branch (EPA)
PLUS	Planning and Land Use Services (Attorney-General's Department)
RFI	Request for Information
SAPC	South Australian Productivity Commission
SCAP	State Commission Assessment Panel
SEB	Significant environmental benefit
SPC	State Planning Commission
SPP	State planning policy
TAS	Transport Assessment Section (Commissioner of Highways)
UDIA	Urban Development Institute of Australia

1. The referrals process

1.1 Introduction

The Commission has been tasked to review development referrals processes as part of building on the recent state planning reforms. The focus is on short to medium-term benefits to the state that can be realised through changes in regulatory practice, regulator structure and systems, business processes, technology, capability and culture. The emphasis is on the way select state regulators perform their role as a referral body, and the relationships they have with applicants, and whether related improvements may support investment without compromising existing regulator mandates. Regulatory design matters will generally be accepted as having been dealt with as part of the state planning reforms. Where feedback received about regulatory practice has a causal link with legislation or regulation the Commission will address it.

Chapter 1 sets the tone for this draft report. The regulatory framework applicable to the referrals process and the role referral bodies play in the development assessment process in South Australia is broadly established. This is complemented by a discussion of the regulatory value chain from business (applicant) and regulator (referral body) perspectives. The understanding and alignment of the perspective and priorities of referral bodies and business illustrate the extent to which referrals processes are an efficient and effective end-to-end process that meet the overall public interest. These statutory and economic perspectives are built on as the draft report progresses through consideration of what the Commission has heard, the typical applicant's journey, analysis of referral body process, practice and performance, and issues specific to impact assessed development.

In chapter 2 the Commission considers the regulatory practices, processes and performance of referral bodies. It sets out the Commission's interim conclusions and initial directions for improvements. Chapter 3 considers impact assessed development and whether there is opportunity to improve the way referral body inputs are managed given the impact major projects have on employment, investment and the economy. Chapter 4 addresses the extent to which systemic referral body process, practice and performance may, without compromising their statutory obligations, be improved to support economic growth, employment and investment attraction.

The report concludes there is scope to improve the contribution of referral bodies to the state's performance on employment, investment and living standards by adoption of better regulatory governance and practice. For the final report, the Commission will build on the precision of its understanding and identify additional specific areas for improvement based on the extent to which specified performance indicators are present in referral body regulatory practice.

1.2 Referrals and the development assessment regulatory framework

The *Planning, Development and Infrastructure Act 2016* (the *PDI Act*) is the principal legislation regulating development in South Australia. Its primary object is to support and enhance the state's liveability and prosperity in ways that are ecologically sustainable, and meet the needs and expectations of, and reflect the diversity of, the community. This is achieved through an effective, efficient and enabling planning system, which is linked with other laws¹. This linkage with other laws includes the incorporation into the development assessment process of regulators (known in this review as referral bodies) who have

¹ *Planning, Development and Infrastructure Act 2016* s 12 (*PDI Act*).

regulatory mandates applicable to development activity. The participation of referral bodies in development assessment is known as the referrals process.

The principles of good planning support the objects of the *PDI Act* and underpin the planning system.² These principles have guided the development of statutory State Planning Policies (SPP) for South Australia, which collectively set out the state's overarching goals and requirements for the planning system³, define the state's land use interests, and are to be taken into consideration in implementing all planning instruments and schemes, including the Planning and Design Code (the Code).⁴ The SPPs are also relevant to the assessment of impact assessed (major project) development (but not Code assessed development).⁵ The SPPs are flexible insofar as they can change over time through a consultative process, reflecting the state's and the communities' changed land use priorities in strategic planning policy.⁶

To meet these planning outcomes, relevant authorities responsible for making decisions in relation to development applications (DA) necessarily rely on expert scientific and technical knowledge that reside in state (and Commonwealth) regulators. The *PDI Act* provides for referral to other authorities or agencies where a development application of a prescribed class is to be assessed by a relevant authority.⁷ The *Planning, Development and Infrastructure (General) Regulations 2017 (PDI Regulations)* list 22 prescribed classes of development requiring referral. The *PDI Regulations* specify the prescribed class of development for which each prescribed (referral) body is responsible, and the nature of their functional response i.e. direction or advice. Prescribed bodies can give direction to a relevant authority to refuse, approve, or apply conditions to a planning consent. Some referral bodies are responsible for more than one prescribed class of development.

In addition to the referral provisions in the *PDI Regulations*, the Code identifies the purpose of a referral, the relevant referral body, the applicable statutory policy and the class of development activity which triggers the referral. Statutory referrals will only apply if the Governor is satisfied that the prescribed body has recognised policies in the Code.⁸ These policies generally reflect the statutory mandates of referral bodies under their establishing legislation and are usually expressed in the Code's overlays and state-wide referrals.⁹

The referrals process enables an integrated approach to development assessment, enlivening the regulatory mandates of applicable regulators early in the process to ensure intended land use is also consistent with the state's broader environmental, social and economic interests.

For each of the three referral bodies in scope for this review, the purpose of their referral is:

- Environment Protection Authority (EPA): which provides expert technical assessment and direction to the relevant authority on the assessment of the potential harm from

² Ibid s 14.

³ Ibid s 58.

⁴ State Planning Commission, *State Planning Policies for South Australia* (23 May 2019) 10 (SPPs). <https://plan.sa.gov.au/__data/assets/pdf_file/0005/552884/State_Planning_Policies_for_South_Australia_-_23_May_2019.pdf>

⁵ Ibid.

⁶ Department of Planning, Transport and Infrastructure, *Setting the scene for the future planning and development of the State* (Fact Sheet) <https://plan.sa.gov.au/__data/assets/pdf_file/0011/283889/Factsheet_-_Setting_the_scene_for_the_future_planning_and_development_of_the_State.pdf>

⁷ *PDI Act* (n 1) s 122.

⁸ SPPs (n 4) 12.

⁹ Planning and Design Code pt 9 (the Code).

pollution and waste aspects arising from activities of environmental significance and other activities that have the potential to cause serious environmental harm.

- Native Vegetation Council (NVC): which provides expert assessment and direction to the relevant authority on the potential impacts of development on native vegetation.
- Commissioner of Highways (CoH): which provides expert technical assessment and direction to the relevant authority on the safe and efficient operation and management of all roads relevant to the Commissioner of Highways as described in the Code.¹⁰

If a relevant authority is directed by a referral body to impose a condition regarding development authorisation and the condition is the subject of an appeal, both the referral body and the relevant authority are respondents to the appeal. However, if a relevant authority is directed by a referral body to refuse an application and the refusal is the subject of an appeal, the referral body is a respondent to the appeal and the relevant authority may join as a party to the proceedings.¹¹ This judicial accountability is an important and complementary part of the shift to referrals for direction under the state planning reforms.

A intended primary outcome of the state planning reforms was to minimise the number of referrals required to achieve a development application outcome by codifying development activity that does not require a referral (i.e. approved and deemed-to-satisfy development). For remaining Code assessed developments (performance assessed development) the focus is on minimising the time it takes to obtain a DA decision by confining referral body responses to their prescribed mandate and (with few exceptions) for direction only.¹² This is intended to focus the responses provided by referral bodies and avoid burdening a relevant authority with unnecessary advice.

1.3 Referral body mandates and the state's interest

Referral bodies are established as regulators under statute with objects, functions and governance arrangements, including a body, to achieve specified public interests. Those interests include protecting the natural environment, ensuring public safety, and providing for important future infrastructure. Their role as a referral body under the planning regulatory framework is about ensuring that those public interests are considered, at the right time, in relation to relevant development.

The referral process authorises referral bodies to exercise their mandate as government intended, avoiding potential costly delays and additional and avoidable development activity in subsequent processes for applicants to comply with referral body statutory requirements. Ideally, the referrals process supports the state's interest in employment, investment and growth without compromising the specific public interests of the referral bodies.

*Referrals should not necessarily be viewed as a burden on the development assessment process. Referrals should be viewed as an opportunity to identify crucial information and highlight issues to be addressed and overcome as early in the assessment process as possible, thereby saving time and money for both the proponent and any assessing agencies.*¹³

¹⁰ State Planning Commission, Submission DR7 to South Australian Productivity Commission, *Development Referrals Review* (3 May 2021) (SPC submission).

¹¹ *PDI Act* (n 1) ss 122(7) and (8).

¹² Attorney-General's Department, *Guide to Development Assessment – PDI Act* (Guide, 21 January 2021) 26 (AGD Guide) <https://plan.sa.gov.au/__data/assets/pdf_file/0008/699353/Guide_to_Development_Assessment_-_PDI_Act.pdf> (PDI Act Guide).

¹³ City of Adelaide, Submission DR2 to South Australian Productivity Commission, *Development Referrals Review* (17 May 2021) 2 (City of Adelaide submission).

The state interests captured in the SPPs are diverse and cover a combination of economic, social and environment protection policy areas, including but not limited to primary industry and mineral and energy resources, housing supply and diversity, and biodiversity and climate change.¹⁴ The notion of linking the requirement for a development referral to the mandates of regulators was examined prior to the state planning reforms by South Australia's Expert Panel on Planning Reform who recommended that 'Referral agencies should be required to have policies that detail the criteria on which a referral advice is given and the type of conditions that may be imposed'.¹⁵ The incorporation of referral body policies in the Code aligns their public interest mandate with the state's land use interests, and confines their remit to matters for which they have lawful authority to regulate.¹⁶

The mandates of the in-scope referral bodies is outside the Commission's terms of reference. The Commission's focus is on the extent to which referral bodies take account of the state's economic interests in the way they exercise their mandate through their regulatory processes, practice and performance in the referrals process.

1.4 Regulatory value chain: applicant and regulator priorities

The distinction between the specific mandates of referral bodies and the state's overall economic priorities in the development assessment context can also be expressed as a balanced consideration of competing interests broadly characterised as the:

1. direct and indirect economic and employment benefits that are derived from infrastructure, residential and other commercial developments, and supply chain activities; and
2. social policy and community safety objectives, and environmental preservation outcomes.

Generally, business generates the direct economic and productivity benefits arising from development, whereas regulatory bodies ensure that development follows the state's social, environmental and broader community interests. Optimising these public interests supports effective land use, improved productivity, economic development and improved liveability and sustainability.¹⁷

These contrasting perspectives and priorities can be mapped against a development assessment regulatory value chain. The extent to which respective priorities can be synthesised at each of the value chain's stages indicates the efficiency and effectiveness of the referrals process, and whether the state's overall interests are being met.

The key stages in this regulatory value chain are discovery/identification of land, proposal for land use, approval to develop, approval to operate (a business), and closure of operation/change of land use. Figure 1.1 illustrates the different perspectives and priorities of business and regulators throughout the regulatory value chain.

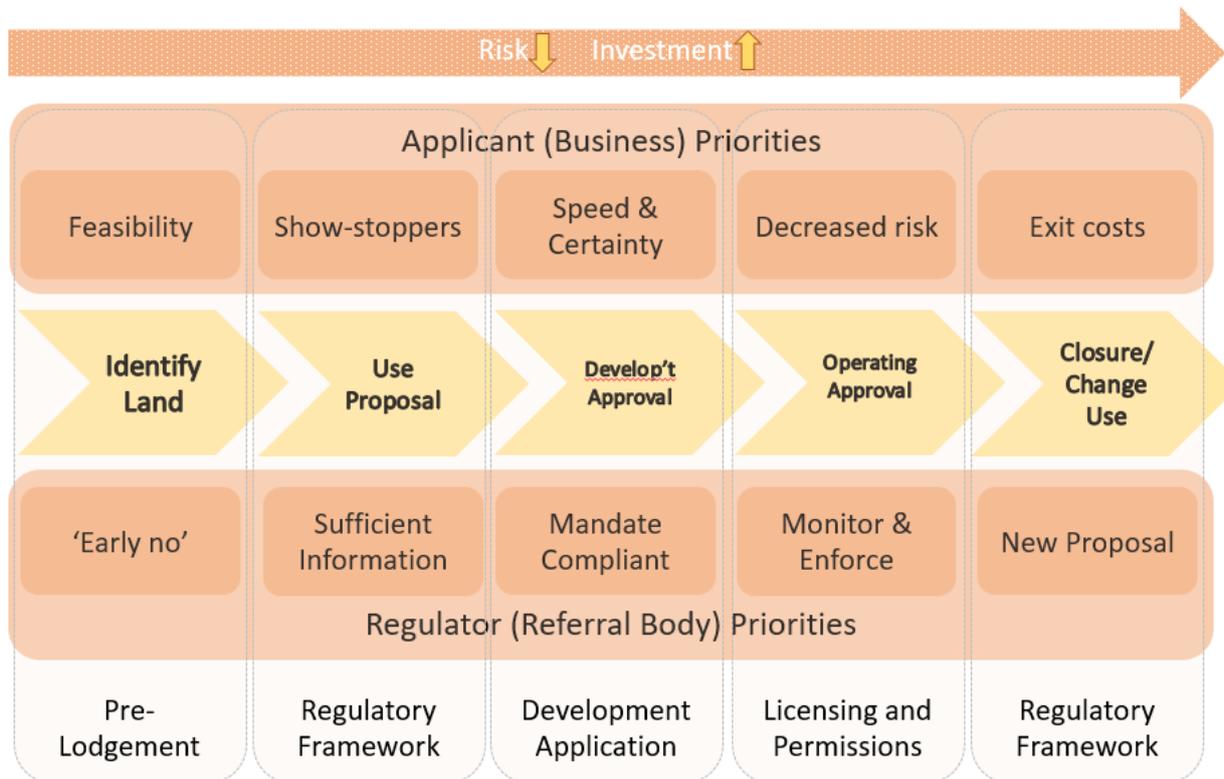
¹⁴ SPPs (n 4) 9-12.

¹⁵ South Australia's Expert Panel on Planning Reform, *Our Ideas for Planning Reform* (August 2014) Reform 24.5 122 <https://saplanningportal.sa.gov.au/__data/assets/pdf_file/0018/360351/Expert_Panel_-_Our_Ideas_for_Reform.pdf>.

¹⁶ *PDI Act* (n 1) s 122(2).

¹⁷ Deloitte Access Economics, *Land use planning and the South Australian economy* (Report, August 2018) [2.1]-[2.3] <https://plan.sa.gov.au/__data/assets/pdf_file/0005/513329/Land_Use_Planning_and_the_South_Australian_Economy.pdf>.

Figure 1.1: Regulatory value chain: referral body and applicant priorities



Source: Office of the South Australian Productivity Commission.

The priorities for a business applicant move from determining the feasibility of one (of possibly several) proposals to quickly identify any 'show-stoppers' (i.e. matters that would rule out the development) in relation to the preferred option. An 'early no' from regulators at this point saves time and money for proponents and creates the opportunity to invest elsewhere. Once a proposal submitted (as a development application) to the decision-maker (relevant authority), business seeks the applicable approvals as quickly as practicable and wants certainty as to any conditioning of the proposal and any post-approval licensing or other permissions. If this happens, risks are moderated and certainty increases further along the value chain, and the preparedness to invest increases commensurately.

The regulators' (referral bodies') priorities are established by their statutory mandate. This means starting by considering whether the proposal conforms with, or is it capable of conforming with, the statutory mandate. The regulator's immediate consideration is whether the applicant has provided sufficient information to assess the proposal against the regulatory framework. Further interactions may be required to obtain information to determine: whether the proposal can be approved in its current form; may require conditioning or, will not be able to meet regulatory requirements. Timeliness and clarity in this part of the value chain is an important consideration for the applicant as it materially effects financial viability and whether the project proceeds at all.

Once the DA outcome is determined and the applicant has been advised, the regulator's priorities turn to monitoring licensing arrangements and other applicable monitoring where that is a relevant under the regulator's mandate. Where they have a post-DA approval mandate, those referral bodies preferably integrate those arrangements into the DA assessment process to ensure continuity through to the operate phase.

The key alignment considerations in this regulatory value chain are:

- Cost and timeliness are an applicants' key motivators which is especially true for businesses where holding costs can materially affect the proposals risk profile, the financial viability of a proposal and whether it proceeds.
- Regulators must ensure a proposal conforms to their statutory mandate and there is enough information from the applicant to assess the proposal.

The state's interest includes improving the alignment of the perspectives of applicants and referral bodies in the referrals process having regard to cutting time, cost and risk. This requires improving the performance of referral bodies both to cuts costs and improves efficiencies for applicants in this part of the development assessment process, without compromising the public interests referral bodies are responsible for protecting. There is a role here too for applicants to prepare DAs with the correct information and an appropriate level of detail from the outset. Proportionality and role clarity are also important considerations here.

1.5 Scope and approach

The Commission received considerable feedback about the timing of this review having regard to the recent implementation of the final and most significant phase (urban areas) of the state planning reforms in March 2021. Stakeholders would have appreciated more time to consider the impact of the reforms on referrals processes before participating in a review. The Commission also heard that broadening the scope to include more referral bodies would be beneficial in terms of the application of any government supported recommendations.

The Commission consulted with a wide group: applicants and their agents, the referral bodies, Planning and Land Use Services (PLUS), industry and professional associations; and other interested parties. The Commission engaged with 34 organisations and held 45 meetings, of which more than half were with regulators and 35 per cent were with businesses or associations. The Commission received eight public submissions in response to its issues paper, these are available on its website and listed in Appendix 2. Several stakeholders requested confidentiality. This is discussed in detail in section 1.5.2. The Commission will consult further with stakeholders on the draft report.

The terms of reference acknowledge the recent state planning reforms and focus on regulatory processes, practices and performance. This approach can elicit short- and medium-term improvements that can be achieved relatively quickly through changes to regulatory practice, and do not necessarily require changes to the design of regulation. Matters of regulatory design in the planning system are not in scope. Where regulatory design has been identified as creating a barrier to effective and efficient regulatory practice, the Commission has considered those matters.

Reviewing the regulatory practice of referral bodies at this time is intended to ensure that the macro and design improvements achieved through the state planning reforms are given their intended effect. Aligning regulatory practice with redesigned regulation is expected to improve coherence in the referrals process and improve the applicant's journey. The Commission's key considerations as to the scope of this review are set out in the remainder of this section.

1.5.1 Data, information and analysis

The Commission relies on referral body and other agency data and information. It uses formal information and data requests to obtain this information, accompanied by several meetings with referral body staff to explain, clarify and confirm the information and data sought by the

Commission. These requests are made in a consistent format to obtain consistent responses from agencies, able to be compared. The Commission's Guideline: Use of Information – Public Sector Agencies sets out how information is managed by the Commission.

Agencies provided different types and amounts of information and data in response to the Commission's requests. This is usually a consequence of agencies storing and retrieving information and data differently. Consequently, the Commission has not been able to consistent comparative data for the referral bodies. The Commission's analysis has limitations and as a result different charts, figures and tables may appear in this report, or there may be no representations of data in some circumstances.

The Commission sought data from PLUS in relation to major projects and continues to work with PLUS to obtain a response to that request. This is discussed in section 3.3.2.

1.5.2 Concerns of interested parties

The Commission takes an evidenced-based approach. It relies, in part, on feedback from interested parties. This can take the form of formal submissions published on the Commission's website, bilateral meetings with stakeholders and, often after the draft report is published, roundtable discussions on specific issues to provide deeper levels of analysis to inform the Commission's recommendations.

The Commission heard from several industry and professional associations, planning and related consultants, legal practitioners and applicants/proponents. Much of that feedback was relevant to the review's terms of reference and instructive in providing the Commission with an understanding of an applicant's experience. The Commission found many interested parties prepared to share their experiences only on a confidential basis. They cited the risk of prejudice to future work, the risk of prejudicing a current DA assessment process, and compromise to existing relationships with relevant authorities and referral bodies. Consequently, they were not prepared to make a public submission, or otherwise be cited.

This situation, while understandable, is unfortunate. It compromises the credibility of the evidence. A better arrangement for obtaining credible evidence is needed.

The Commission must be rigorous, transparent and independent. The Commission will not refer to feedback about a current assessment process and has made some feedback anonymous. In so doing the Commission has maintained its commitment to a high level of transparency while not losing the value of the feedback received.

It is uncommon for businesses to express concerns when providing public comments about regulators practices and processes. Such concerns may indicate insufficient oversight and/or an absence of impartiality in planning processes. This may be an opportunity to consider a feedback loop to referral bodies to create an opportunity for applicants to provide feedback safely without the risk of compromising future work or an adverse response by a regulator from an assessment process.

The Commission considers these matters further in chapter 3 in the context of major projects.

1.5.3 Planning consent

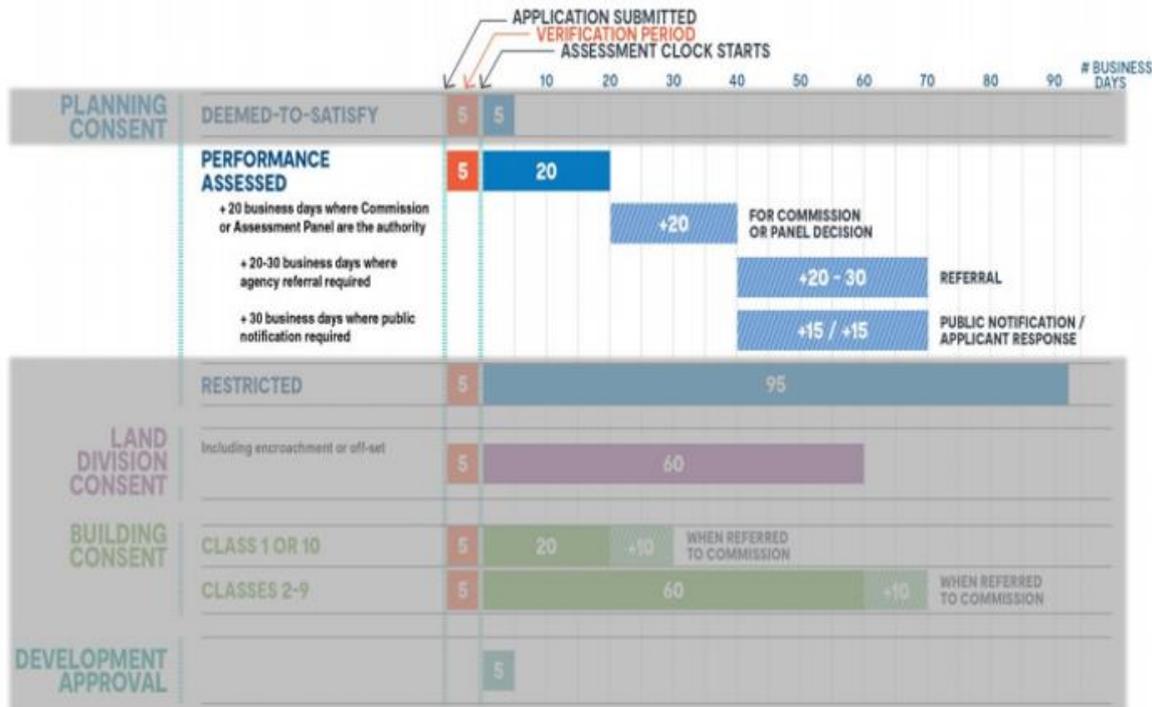
Development can only be undertaken in South Australia if approved.¹⁸ To obtain that consent proposed development may be subject to one of several assessment processes.¹⁹ The Commission will generally confine its analysis in this review to referrals undertaken to obtain

¹⁸ *PDI Act* (n 1) s 101.

¹⁹ *PDI Act Guide* (n 12) 10-12.

planning consent as this is required for most forms of development. Both Code and impact assessed development will be considered, the latter given the significant effect major projects can have on the state’s economic growth, employment and investment attraction. Figure 1.2 shows the statutory timeframes applicable to each type of development assessment. The figure has been edited by the Commission to show the focus on performance assessed development in this review.

Figure 1.2: Planning consent timeframes



Source: PlanSA, Assessment timeframes in the new planning system (Fact Sheet)
https://plan.sa.gov.au/_data/assets/pdf_file/0010/698320/Fact_Sheet_-_Assessment_timeframes_in_the_new_planning_system.pdf

1.5.4 Relevant authorities

A relevant authority must manage the DA process and decide on it. DAs may be managed by one of several relevant authorities depending on the assessment pathway (i.e. an Assessment Panel, a council, the State Planning Commission, the Minister for Planning and Local Government, Assessment Manager or Accredited Professional).

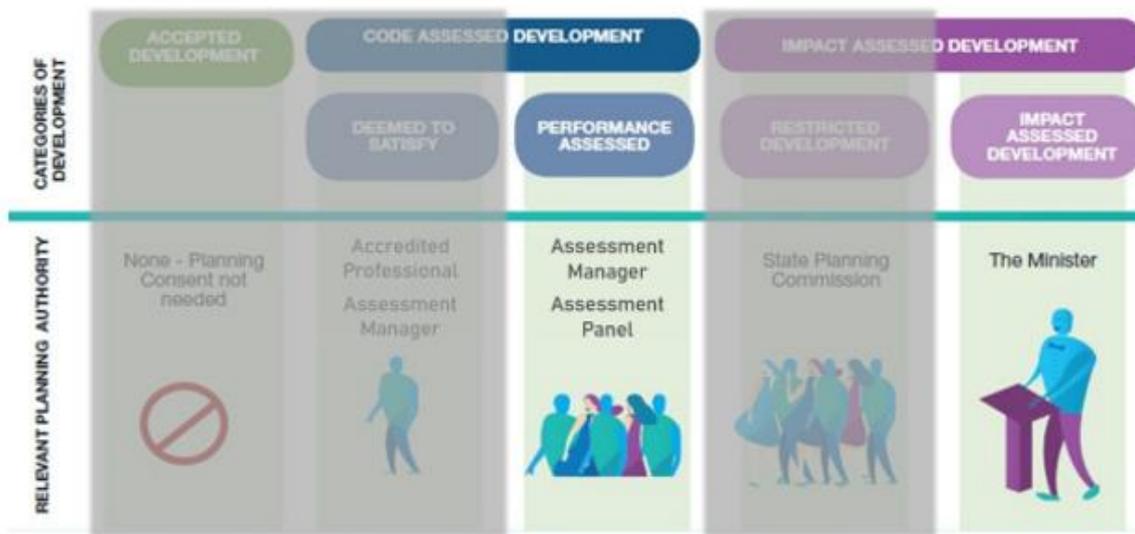
The relevant authority’s role includes: triaging DAs to assessment pathways; early engagement on major projects; and determining the necessary referrals. The relationship between a relevant authority and a referral body is important as the relevant authority is the bridge between the applicant and the referral body. This means the exchange of information between the referral body and the applicant is subject to the performance of the relevant authority. This three-way relationship is of interest to the Commission to the extent that a relevant authority’s role impacts on the ability of a referral body to perform its statutory referral function, and ultimately on when a DA decision is made.

The Commission is interested in contrasts between the way referral bodies respond to DAs for Code assessed and impact assessed developments. The extent to which the ePlanning system changes the relevant authority/referral body relationship will be considered, along with the resultant impact on applicants. This is expected to include efficiencies in the transactional processes between the parties that cut the time to obtain a planning consent. This may

identify whether referral-related transactions are subject to a dynamic where individual people and organisations are seen as having a disproportionate influence on an outcome, or a neutral and systematic process that is equal for all comers. The extent to which relevant authorities, in conjunction with the relevant referral bodies, effectively manage applicants’ expectations about post-DA approval licensing and other permissions may also be considered.

Figure 1.3 sets out which relevant authority assesses a DA for each category of development in the new planning system. The source has been edited to show the Commission’s focus will be on performance (Code) assessed development and impact assessed development where referrals are a feature of the development assessment process.

Figure 1.3: Relevant authorities in the new planning system



Source: Attorney-General’s Department, Guide to Development Assessment – PDI Act (Guide, 21 January 2021) 21 <https://plan.sa.gov.au/__data/assets/pdf_file/0008/699353/Guide_to_Development_Assessment_-_PDI_Act.pdf>

1.5.5 Referral pathways

The Commission considers both the Code (performance) assessed development and impact assessed development (major projects) pathways. The two pathways differ significantly. The Commission is interested in differences between in the way referral bodies interact with the relevant authority in each context, to identify potential efficiencies in the referrals process in either or both pathways.

Code assessed development

Under the new planning system’s assessment pathways, Code assessed development refers to development applications that are assessed on their merit against the Code and will be subcategorised as either deemed-to-satisfy development or performance assessed development.

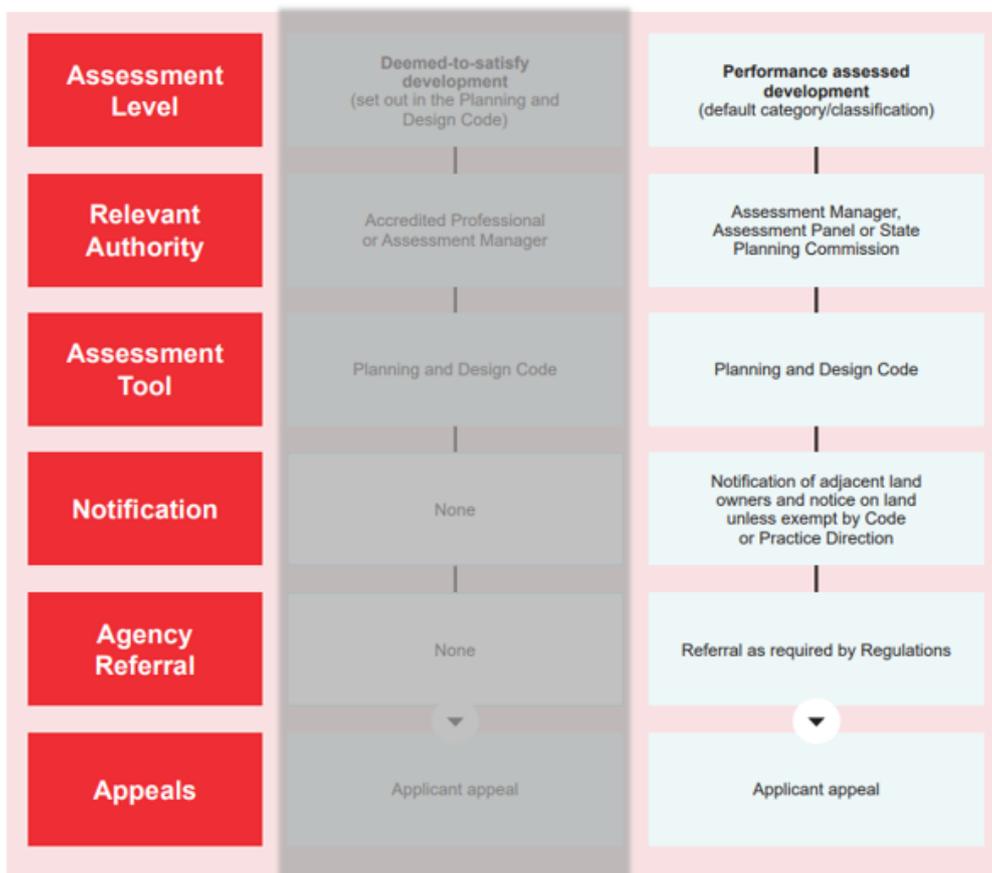
Deemed-to-satisfy development, such as a detached house in a residential zone will be fast-tracked as this type of development meets established criteria, is measurable and is an

appropriate land use in its zone. Referrals are not required for deemed-to-satisfy development.²⁰

The Commission’s focus is on performance assessed development that incorporate complex applications, such as a multistorey building, that are subject to performance-based assessment by an assessment manager, assessment panel, or the State Planning Commission (State Commission Assessment Panel). This type of development can have impacts beyond the site’s boundaries which can be managed and minimised.²¹ These impacts, or types of development activity, are captured in the overlays and statewide referrals found in the Code and are the triggers for a referral process.

Figure 1.4 illustrates the steps in the Code assessed development pathway, amended by the Commission to focus on performance assessed development.

Figure 1.4 Code assessed development pathway.



Source: PlanSA, Code Assessed Development (flow chart, July 2020)
https://plan.sa.gov.au/__data/assets/pdf_file/0012/282999/Flowchart_-_Code_Assessed_Development.pdf

The most important changes to assessment timeframes in the new planning system according to PlanSA are:

²⁰ PlanSA, Code Assessed Development (flow chart, July 2020)
https://plan.sa.gov.au/__data/assets/pdf_file/0012/282999/Flowchart_-_Code_Assessed_Development.pdf.
²¹ PlanSA, Assessment Pathways: How Will They Work? Technical Discussion Paper (August - October 2018)
https://www.saplanningportal.sa.gov.au/__data/assets/pdf_file/0004/487003/Assessment_Pathways_-_How_Will_They_Work_-_Technical_Discussion_Paper.pdf.

- a new verification process that will enable relevant authorities to check that applications have been submitted to the right authority with the right information, and to charge the relevant fees, before the 'assessment clock' begins;
- where notice of an application must be given, neighbours and the community will be given more time to provide feedback. For Performance-Assessed developments, this time has increased from 10 business days to 15 business days; for more complex restricted proposals, this time has increased from 10 business days to 20 business days'
- where the relevant authority exceeds the timeframe for assessment, the applicant being able to serve a notice that provides automatic planning consent;
- for performance-assessed developments, the assessment body only being able to 'stop the clock' (once) to request further information, and needing to issue such a request within the first 10 business days of assessment time; and
- the time it takes for assessment bodies to make their decisions to be published on the SA Planning Portal as part of performance targets and monitoring.²²

The Commission notes that most of these changes are aimed at improving the speed of the process and requiring clarity earlier in the process. Some issues the Commission has received feedback on may be addressed by some of these changes. For example, several requests for the applicant to provide additional information may be addressed by the combined effects of the five-day verification process, the single use of the 'stop the clock' power and the request having to be made within the first 10 days of the assessment. Figure 1.2 shows the timeframes applicable to performance assessed development.

The Commission is interested in referral bodies' internal businesses processes and whether their practices will implement these new efficiency measures. Reflecting feedback, the Commission will also consider whether the more structured ePlanning process has affected an applicant's ability to resolve complex issues with and referral bodies. That is, is there enough flexibility in the process to enable a pragmatic approach to be taken and a solution found, or the DA is refused without avoidable delay and expense.

Impact assessed development

The Commission has confined its focus to developments of significant commercial and economic value to the state to impact assessed developments, otherwise known as development declared by the Minister for Planning, and formerly known as major projects under the *Development Act 1993 (Development Act)*. Other impact assessed development, including restricted and Crown developments, are not the focus of this review. The Commission is focusing on major projects given the feedback it has received from interested parties in relation to major projects, and because of their significant effect on the state's economy, employment and future prosperity. The Commission is also advised that while there have been several changes to the governance of major projects under the *PDI Act*, the development assessment process is largely the same as it was under the *Development Act*.

The Minister is responsible for declaring impact assessed development under the *PDI Act*,²³ which is published in the Gazette and on the SA Planning Portal. The declaration made by the

²² PlanSA, *Assessment timeframes in the new planning system* (fact sheet) <https://plan.sa.gov.au/__data/assets/pdf_file/0010/698320/Fact_Sheet_-_Assessment_timeframes_in_the_new_planning_system.pdf>

²³ *PDI Act* (n 1) s 108(1)(c).

Minister may be made in relation to a specific development, a kind of development or development generally within a specified part of SA.

The major projects development assessment process is often characterised as a ‘state-assessed’ process because major projects are more complex developments with potentially high environmental, social and economic impacts. As such, they require tailored assessment requirements that are established by the State Planning Commission under a practice direction and in consultation with referral bodies, Australian Government agencies are independent specialists.²⁴ Those assessment requirements are issued as a guideline to the proponent.²⁵

Impact assessed development declared by the Minister requires an Environment Impact Statement (EIS) be prepared in relation to the development, usually by the proponent.²⁶ The EIS forms part of the assessment guideline. Once the proponent has prepared the EIS and provided it to the Minister, it is released for public and agency comment for at least 30 business days, or a longer period if determined necessary by the Minister.²⁷

The proponent makes a written response to matters raised during the public consultation period which is provided to the Minister, and the State Planning Commission (SPC) prepares an assessment report. That report is provided to the Minister for a decision – approve, refuse or approve with conditions.²⁸ There are no grounds for appeal of the Minister’s decision.²⁹

An EIS may be amended for several reasons, including to ‘...take account of more accurate or complete data or technological or other developments not contemplated when the document was prepared...’ and ‘...make such other provision as may be necessary or appropriate given the content or purpose of an EIS or Assessment Report.’ While the Minister cannot amend an EIS they can direct the proponent to review it and if, in the Minister’s opinion the change affects the substance of the EIS, any proposed change must be subject to a further public consultation process.

The Commission will take an interest in the frequency of EIS amendments, the effectiveness of the pre-lodgement process in identifying all material issues and the proportionality and reasonableness of referral body advice leading to amended EIS’.

PLUS advise that the main changes to major projects arrangements from the *Development Act* to impact assessed development declared by the Minister under the *PDI Act* are:

- The Minister for Planning is now the final decision maker (relevant authority) instead of the Governor.
- A practice direction supplements the legislated processes and sets out the requirements for preparing the EIS, the requirements for assessing the level of impact, and information that must be provided by the proponent.

²⁴ *PDI Act* (n 1) ss 109, 111 and State Planning Commission, *Practice Direction 4, Restricted and Impact Assessed Development 2019* <https://plan.sa.gov.au/__data/assets/pdf_file/0006/565044/Practice_Direction_4_-_Restricted_and_impact_assessed_development.pdf> (Practice Direction 4).

²⁵ See for example: State Planning Commission, *Guidelines for the preparation of an Environmental Impact Statement, Whalers Way Orbital Launch Complex Southern Launch Space Pty Ltd* (23 July 2020) <https://plan.sa.gov.au/__data/assets/pdf_file/0006/717405/Guidelines_for_the_preparation_of_an_Environmental_Impact_Statement_-_Whalers_Way_Orbital_Launch_Complex.pdf>.

²⁶ *PDI Act* (n 1) s 111(2)(e).

²⁷ *Ibid* s 113(5) and *Planning, Development and Infrastructure (General) Regulations 2017* r 71.

²⁸ *Ibid* ss 113(8) and (9), 115.

²⁹ *Ibid* (n 1) s 115(10).

- Certain classes of development such as windfarms in marine areas and new landfills can now be specified as being Impact Assessed by regulation.
- The EIS replaces three categories of report required under the *Development Act* (the levels of assessment being an EIS, Public Environmental Report and Development Report).
- The SPC now has responsibility to set the assessment guidelines for a proposal (replacing the Development Assessment Commission).
- The SPC is the author of the Assessment Report instead of the Minister.

1.6 An applicant's perspective

To augment its understanding of the experience of applicants and referral bodies the Commission has endeavoured to consider both Code and impact assessed development application journeys from the perspective of the applicant. The intention is to identify processes, practices and performance matters that are not apparent from open-source material. This supports the Commission's approach of determining the extent to which the perspectives and priorities of applicant and referral body are aligned.

1.6.1 Code assessed development

The Commission considered the new timeframes applicable to Code assessed development. The new five-day verification process is intended to 'enable relevant authorities to check that applications have been submitted to the right authority with the right information, and to charge the relevant fees, before the "assessment clock" begins.'³⁰

The Code assessed pathway links with the ePlanning system to provide the electronic framework through which applications will be lodged, assessed and determined. The SPC indicated that '...the processing of development applications will be streamlined by enabling applications to be lodged and tracked online'.³¹

The SA Planning Portal provides the entry point to the new ePlanning system and has been updated to improve access, making it more transparent, improving consistency and providing better ease of use. As of April 2021 the new planning system has over 7520 active users and has received over 1395 development applications worth over \$628 million from within metropolitan Adelaide.³²

System adoption

The Commission considered stakeholders' views on the new ePlanning system. The most common themes include demands for a simpler process and for concise, publicly available information on the referral process for applicants.

³⁰ PlanSA, *Assessment timeframes in the new planning system* (Fact sheet, 26 May 2021) <https://plan.sa.gov.au/__data/assets/pdf_file/0010/698320/Fact_Sheet_-_Assessment_timeframes_in_the_new_planning_system.pdf>.

³¹ SPC submission (n 10).

³² Attorney-General's Department, Planning and Land Use Services, *Planning Ahead e-newsletter* (8 April 2021) <https://plan.sa.gov.au/news/view_newsletter?newsitem=805398> (PLUS April Newsletter).

*The Process could still be made simpler, with the use of flow charts to clearly show applicants the approval process, with the who and why aspect explained for different additional referrals.*³³

*To improve efficiency and accessibility of the referral process, the ePlanning [sic] system should be refined to ensure all referral information is in one easily accessed location, for example a central referral table that consolidates the tables from each overlay. Tables should also be set up so only tables relevant to the overlay are called up in a property query.*³⁴

The Commission notes the ePlanning system has been recently introduced. The SA Planning Portal offers publicly available learning sessions that are available online and face-to-face. They are aimed at providing practical knowledge of the new planning system and assisting applicants through their development application.³⁵

In addition, PLUS hosted over 76 training sessions with over 5200 registrations from industry, council, government and community members as part of the adoption and optimisation process.³⁶ Of those organisations that provided feedback to the Commission about improvements to the ePlanning system, not all of them had availed themselves of the learning and system adoption resources that are available. PLUS also provides an instructional module and videos for relevant authorities and referral bodies explaining how to respond to an external referral request.³⁷

For applicants, the SA Planning Portal offers an online library of support material for proposed applications including fact sheets, flow charts, and guides. This material considers how to use planning regulation, information requirements and how to develop and submit a DA.³⁸ By entering a property's address into the Approval Wizard, an applicant can see if approval is required for the proposal, how to apply for approval and who to contact for more information.³⁹ DA's can be tracked through the development application register. The limitations of that function and links to other useful resources, such as the South Australian Property and Planning Atlas are available at the access point to the development application register.⁴⁰ Applicants can also complete a support form or email PlanSA directly.⁴¹

Following this line of enquiry, the Commission emailed PlanSA about where applicants can get information on referrals when lodging their development applications. The request was initially provided to the PlanSA support desk and the Commission was subsequently contacted by a PLUS support staff officer. It was directed to visit the online Code web page which resolved the initial enquiry and was advised the response time to answer all external inquiries received via the PlanSA website is one working day.

³³ Murraylands and Riverland Landscape Board, Submission DR6 to South Australian Productivity Commission, *Development Referrals Review* (6 May 2021) (Murraylands submission).

³⁴ Local Government Association, Submission DR5 to South Australian Productivity Commission, *Development Referrals Review* (7 May 2021) (Local Government Association submission)

³⁵ PlanSA, *Learning* (Web page, 26 May 2021) <https://plan.sa.gov.au/about/learning_and_support>.

³⁶ PLUS April Newsletter (n 32).

³⁷ PlanSA, *Respond to an External Referral Request - Instructional guide for: Relevant Authorities, Referral Bodies, Applicants* <https://plan.sa.gov.au/__data/assets/pdf_file/0005/682889/Module_11_Guide_-_Respond_to_an_External_Referral_Request.pdf>.

³⁸ PlanSA, *Submit an application* (Web page, 26 May 2021)

<https://plan.sa.gov.au/about/support_library/submit_application>.

³⁹ PlanSA, *Find out if you need approval* (Web page, 31 May 2021)

<https://plan.sa.gov.au/development_applications/before_you_lodge/find_out_if_you_need_approval>.

⁴⁰ PlanSA, *Development application register* (Web page, 28 May 2021)

<https://plan.sa.gov.au/development_application_register>.

⁴¹ PlanSA@sa.gov.au.

The Commission acknowledges there will be a transition period and probably some costs to applicants with using the new ePlanning system. This is to be expected with any significant change of this nature. The Commission's interest lies in any new or additional burdens placed on applicants that did not form part of the development assessment process under the *Development Act*. This will extend to any assessment processes or requirements that have shifted the burden from the state to the applicant. Where an assessment requirement is deemed required, the Commission seeks a better understanding of whether the cost and resources for responding to that requirement should rest with the applicant or the referral body. Where that response is required in the regulatory value chain, considering competing risk and investment interests will be a focus.

Referrals information

The Commission sought to hear the experience of business in dealing with the new transactional process for referrals. Stakeholders such as MasterPlan noted the new system was challenging, particularly for their 'mum and dad' clients indicating that the level of understanding of the new process corresponds with how experienced applicants are with planning regulation.

The Code is called the single source of planning policy. Applicants can enter an address into the search function of the Code to identify what policies apply to a type of development at that address, or policies applicable to that address more broadly.⁴²

A search returns the following information:

- zone: e.g. general neighbourhood;
- assessment pathways: development types that attract accepted, deemed-to-satisfy, code assessed and impact assessed development for this zone are listed;
- overlays: applicable overlay desired outcomes, performance outcomes and referrals are listed. Referrals are identified here, including the class of development, the referral body, the referral purpose and the head power e.g. reference to the *PDI Regulations*. Statutory referral time frames for referral responses are not listed here; and
- general development policies: e.g. site contamination, resource extraction etc; desired and performance outcomes are listed here but referrals are not.

A search of the Code for a specific address returns substantial information.

Some consultancy business stakeholders commented that applicants have to consult several sites to obtain sufficient information to complete a DA. The Commission has identified that PlanSA's ePlanning platform provides considerable key information for applicants and directs applicants to standards and assessment criteria including the Development Application Processing (DAP) system, South Australia's Online Planning and Design Code Practice Directions and the South Australian Property and Planning Atlas. Information that is not accessible or not directly available from the platform includes referral body legislation, regulation and policies and *PDI Regulations* for statutory referral timeframes.

1.6.2 Impact assessed development

Impact assessed development requires a 'state assessed' process. In this respect it differs significantly from a Code assessed development as the proponent must address bespoke

⁴² PlanSA, *South Australia's Online Planning & Design Code* (Web page, 26 May 2021) <<https://code.plan.sa.gov.au/home>>

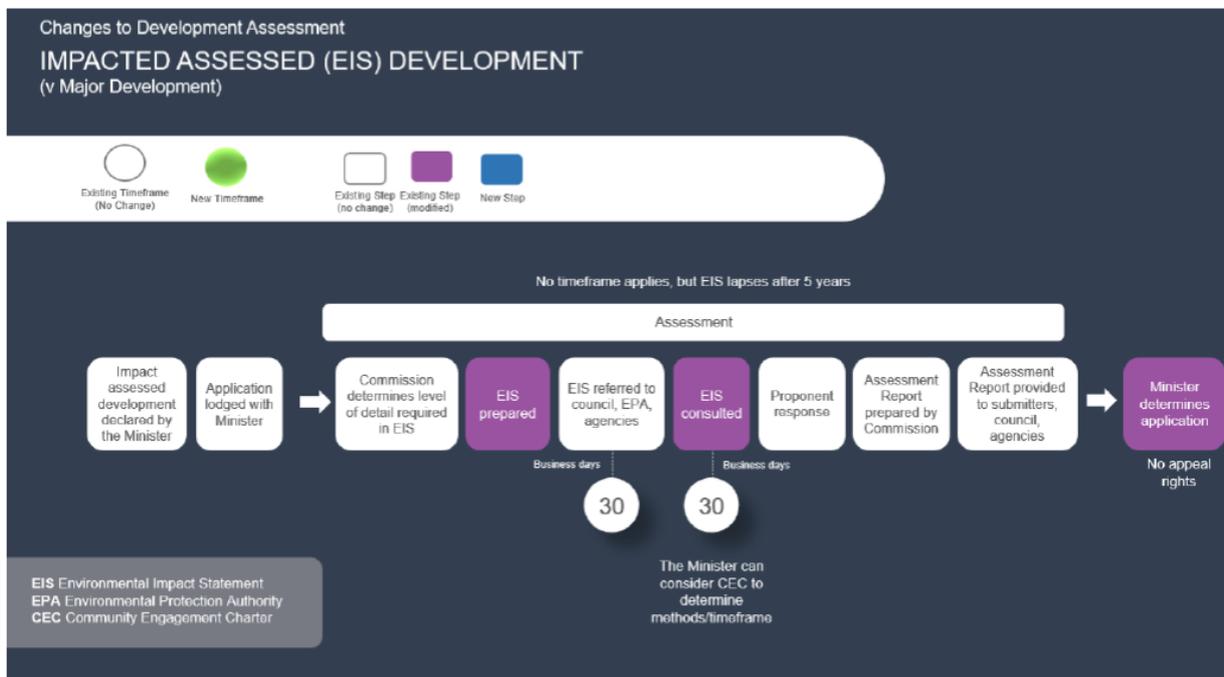
assessment requirements that are developed by the state, in consultation with referral bodies, for the specific development being proposed. Code assessed requirements can generally be established by an applicant or their agent by consulting the applicable planning regulation and policies (see section 1.6.1), albeit the Commission has heard different views about access to relevant information.

From the proponent’s perspective the impact assessed process may be perceived as involving discretion by regulators and the relevant authority. The Commission has heard from proponents that while the process for impact assessed development may have elements of common understanding between PLUS and the proponent at the commencement of the project, additional steps not previously notified are introduced as the process progresses.

The guidelines for impact assessment development and expectation of proponents are based on Practice Direction 4 issued by the SPC. The guidelines, once set, must be adhered to by the applicant in preparing an appropriate EIS based on supporting expertise and documentation. PLUS advised that the frequency and nature of engagement with proponents can vary according to the potential impacts and how appropriately they are avoided, mitigated and managed.

The Commission is advised that the impact assessed development process under the *PDI Act* is effectively the same as it was for major projects under the *Development Act*, with some modifications. Figure 1.5 illustrates changes in the major project assessment process arising from the state planning reforms. PLUS advised that staff administering major project applications continue to use internal procedures and practices based on the *Development Act* major project assessment process. There is a current project to update these procedures to reflect the *PDI Act* impact assessed development assessment process.

Figure 1.5: Major project assessment process reforms



Source: *Planning and Land Use Services* (25 May 2021).

The relatively minor changes in this process are relevant to the Commission’s analysis because feedback the Commission receives in relation to major projects will reflect experience under the *Development Act*. Subject to acknowledging the relevance of the modifications to

the process, the Commission will be able to make reasonable assumptions that the previous experience of proponents will continue to be similar under the impact assessed development assessment process. The focus will be on referrals processes, and specifically the interactions between the relevant authority (staff responsible for managing the process) and referral bodies, not the major projects process more broadly.

The Commission's focus is on the extent to which efficiencies can be achieved in the impact assessed development assessment process. This will consider feedback from interested parties, the views of staff acting on behalf of the relevant authority and the Commission's assessment of the alignment of their respective perspectives and priorities in the regulatory value chain. The value of transparency in what is innately a complex assessment process will be considered, as will how the performance of the process is captured, analysed and fed back into a continuous improvement cycle. The utility of triage and pre-lodgement arrangements, and how the relevant authority manages potential regulatory interdependencies between referral bodies are also relevant. The Commission considers these matters in chapter 3.

2. Referral body process, practice and performance

2.1 Model regulator principles

The Commission must make recommendations to streamline the operations of referral bodies without compromising the specific public interests they are mandated to protect. This approach requires the Commission to evaluate the processes, practices and performance of the in-scope referral bodies. Improvements in regulatory practice and regulator performance can often be achieved without change to legislation and regulation, offering opportunities for relatively quick change.

The Commission's assessments have been guided by diagnostic principles developed to evaluate the efficiency and effectiveness of a regulator in an end-to-end assessment process. While the Commission is aware of several evidence-based frameworks applicable to evaluating regulator performance,⁴³ it has drawn on global regulatory best practice and governance principles in its development of specific diagnostic principles.⁴⁴ Those global standards were developed through extensive OECD consultation and policy work and designed to assist countries to translate the outcomes from that process into practice.⁴⁵ The Commission's specific diagnostic principles were developed to enable an evaluation of the in-scope referral bodies relevant to the review's terms of reference i.e. that could consider internal regulator business processes and practices, without assessing regulator mandates or regulatory design in a very recently reformed planning regulatory framework.

The Commission's diagnostic principles for this review are:

- **Accountability and efficiency in business process** (section 2.3.1): to what extent are the priorities of the applicant and regulator aligned at each stage of the regulatory value chain in the development assessment process?
- **Early engagement and pre-lodgement** (section 2.3.2): do regulators provide information to support applicants providing the right information and right level of detail in their application at the beginning of the process, limiting requests for information (RFIs) and re-work? Are show-stoppers identified and advised on early?
- **Customer-centred guidance** (2.3.3): does the regulator understand the business impacts of their process on applicants? Are appropriate materials publicly available to inform and guide applicants and their agents about and through the referrals process?
- **Information requirements, proportionality and risk** (section 2.3.4): are referral body information requirements reasonable and confined to their regulatory mandate? Do regulators use Standard Operating Procedures or other assessment tools to provide a consistent and equitable assessment process every time?

⁴³ See for example Australian Government, *Regulator Performance Framework* (Report, 2014) <https://www.pmc.gov.au/sites/default/files/publications/Regulator_Performance_Framework.pdf> and Australian Productivity Commission, *Regulator Audit Framework* (Report, March 2014) <<https://www.pc.gov.au/research/supporting/regulator-audit-framework/regulator-audit-framework.pdf>>.

⁴⁴ OECD, *The Governance of Regulators - OECD Best Practice Principles for Regulatory Policy* (2014) (OECD Best Practice Principles).

⁴⁵ OECD, *Recommendation of the Council on Regulatory Policy and Governance* (Web page, 7 June 2021)

<<https://www.oecd.org/governance/regulatory-policy/2012-recommendation.htm#:~:text=Recommendation%20of%20the%20Council%20on%20Regulatory%20Policy%20and%20Governance,-%E2%80%8C%20%E2%80%8C&text=The%20Recommendation%20is%20the%20first,ministries%2C%20regulatory%20and%20competition%20agencies>>.

- **Capability and resources** (section 2.3.5): do regulators have adequate resources to fulfil their referral body role? Are available resources managed and used as effectively as possible?
- **Post-development assessment arrangements** (section 2.3.6): to what extent does each referral body consider the operating approvals and licensing it will be responsible for later as part of the referrals process?
- **Performance monitoring and continuous improvement** (section 2.3.7): how does each referral body capture feedback and data on its performance to continuously improve its processes, practices and performance, and ultimately provide for a more efficient and effective experience for applicants?

The Commission has sought to identify tools, policies and practices that indicate or demonstrate best practice regulatory and governance principles. While it has made substantial headway in its understanding of referral body practice there is more work to be done. Chapter 4 concludes by acknowledging what has been achieved so far and foreshadowing the consultation and analysis still to be undertaken. The final report aims to make additional recommendations about the extent to which referral bodies can contribute to the state's economic objectives through improved regulatory governance and practice.

The model regulator principles for this review are strongly aligned with other work being undertaken as part of the Commission's Modern Regulation Project. The inquiry into South Australia's Regulatory Framework is considering regulator behaviour and processes for making regulation across the sector. That work includes assessment of several sets of principles of best practice regulation, and what makes a quality regulatory regime.

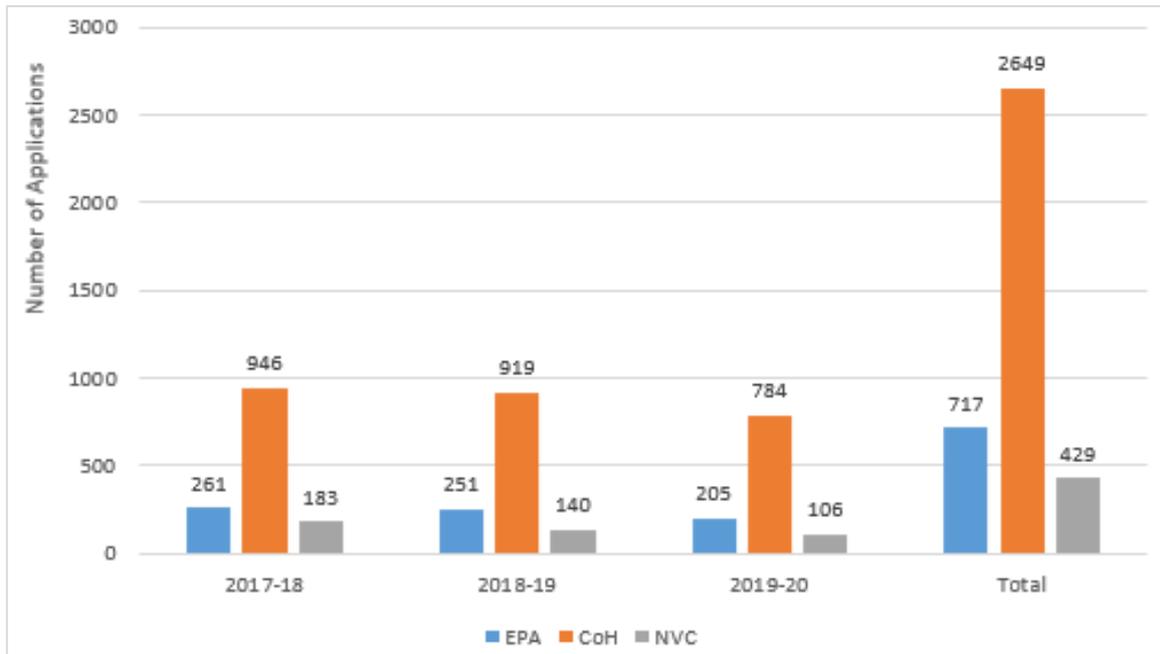
The remainder of this chapter starts with introducing the three in-scope referral bodies in terms of their mandates and how their referral function fits into each regulator's business. A detailed analysis of each referral body follows using the Commission's diagnostic principles.

2.2 Referral bodies in focus

The Commission has been tasked to make recommendations that improve the efficiency of referral bodies to make it easier to obtain a DA approval, and not compromise the regulatory mandates of those bodies. The three in-scope referral bodies: Environment Protection Authority, the Native Vegetation Council and the Commissioner of Highways each have significantly different regulatory remits. Two have environment protection mandates and the other a future infrastructure and road and transport management mandate. Taken together these referral bodies account for a significant volume and complexity of referral activity in the state. Figure 2.1 shows the number of referrals to the in-scope referral bodies 2017-18 to 2019-2020.

The diversity in the referral body statutory responsibilities, the number and nature of the referrals they receive, and their organisational arrangements and culture create the opportunity to compare and contrast referrals processes from different perspectives. Matters specific to impact assessed development are considered in chapter 3.

Figure 2.1: Number of developments referred to EPA, CoH and NVC per annum, 2017-18 to 2019-2020[^]



Source: Generated by the Commission from data provided by CoH, EPA and NVC.

[^] Note that referrals to the NVC were not statutory. CoH and EPA do not include referral activity in relation to major project.

2.2.1 Environment Protection Authority (Activities of environmental significance)

EPA is the state's independent environment regulator and an instrumentality of the Crown governed by a board. EPA is established under the *Environment Protection Act 1993 (EP Act)*. Its functions include developing environment protection policies, authorising activities of environmental significance, providing advice and assistance in relation to development and implementation of best environmental management practices.

The *EP Act* defines the criteria for EPA decisions in relation to referred development applications.⁴⁶ Importantly, when assessing a referral made under the *PDI Act*, EPA must have regard to, and seek to further, the objects of the *EP Act*, and have regard to the general environmental duty, any relevant environment protection policies and the waste strategy for the state adopted under the *Green Industries SA Act 2004* (if relevant).

The *EP Act* provides for making environment protection policies to secure the objects of the *EP Act*, and which determine environmental authorisations in relation to referrals under the *PDI Act*.⁴⁷ Those statutory instruments include the *Environment Protection (Air Quality) Policy 2016*, *Environment Protection (Noise) Policy 2007*, *Environment Protection (Waste to Resources) Policy 2010* and the *Environment Protection (Water Quality) Policy 2015*.

The *PDI Regulations* prescribe the activities of environmental significance that must be referred to EPA, often called referral triggers. The specific classes of development activity of 'environmental significance' include:

⁴⁶ *Environment Protection Act 1993* s 57 (*EP Act*).

⁴⁷ *PDI Act* (n 1) s 27.

- a range of activities of environmental significance including energy generation and storage facilities, petroleum and chemical, manufacturing and mineral processing, resource recovery and waste disposal, food, animal and plant production, materials handling and transportation;
- activities that pose a high risk of polluting surface and/or groundwater in water protection areas; and
- proposed changes in using the land to a more sensitive use where site contamination exists or may exist because of certain (high risk) classes of previous contaminating activities.⁴⁸

Although there is no formal process for coordinating or collaborating with other referral bodies, informal communication occurs to coordinate responses where there is a risk of regulatory interdependency or ambiguity as to the referral body mandates of EPA and other referral bodies that apply to a DA. EPA indicated that it and the Department for Environment and Water (DEW) have regular three monthly meetings of the Environment and Water Portfolio Planners group where issues of mutual environmental planning and development assessment importance are discussed. DEW and EPA have agreed that where there is an overlap of agency interests in a DA, officers collaborate and coordinate to ensure efficient assessment.

EPA receives between 200 and 300 development applications annually, which may relate to one or more of their referral triggers. Table 2.1 shows the annual volume of development applications received for the period 2017-18 to 2019-20 by referral trigger. A total of 711 development applications were referred to EPA during this period that related to 841 triggers. Most development applications referred were in relation to activities of major environmental significance listed in Schedule 22 of the *Development Regulations 2008 (Development Regulations)* (now ceased). During this period EPA received 6 referrals under the *PDI Act*.

Table 2.1: Number of referral triggers received 2017-18 to 2019-20

Financial Year	Trigger R29 land division referred by SCAP	Trigger Schedule 8 non-complying Water Protection Areas	Trigger Schedule 8 wind farms	Trigger Schedule 21	Trigger Schedule 22	Trigger S49 Crown	Informal	Total referral trigger
2017-18	21	50	5	72	144	22	5	319
2018-19	11	44	2	98	116	15	2	288
2019-20	2	46	0	65	108	12	1	234
Total	34	140	7	235	368	49	8	841

Source: EPA data provided to the Commission on 17 May 2021.

EPA advised that as part of developing the new planning system, it reviewed its referral triggers to streamline and simplify the development assessment process and ensure assessment is proportional to likely environmental risk. This work led to the EPA referrals in the Code and overlay-relevant referrals (e.g. the Mt Lofty Ranges Watershed Overlay specifies a referral to EPA is required for certain classes of development).

EPA advised it had a total head count of 215 staff (including 198 full-time equivalent (FTE)) with 6 FTE assessing referred DAs located in the Planning and Impact Assessment Branch

⁴⁸ *Planning, Development and Infrastructure (General) Regulations 2017 sch 9 (PDI Regulations)*.

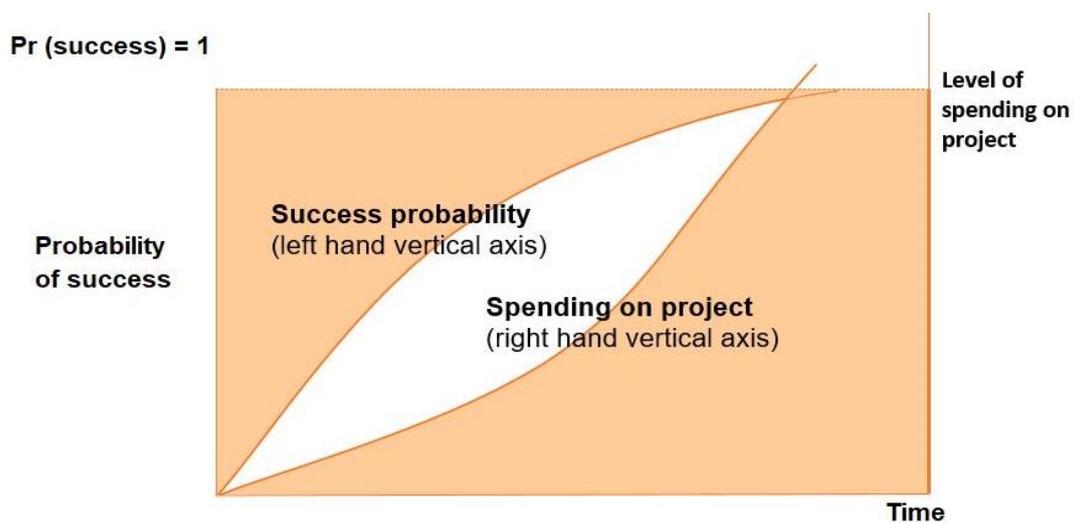
(PIAB). Approximately 67 EPA staff are involved in the assessment of DAs, including specialist advisers in various branches across the agency, who provide technical and scientific advice on an occasional basis, and staff dedicated to the coordination and management of referral responses in PIAB. These specialist advisers have technical expertise in relevant fields such as noise, marine environment, water quality, air; some staff hold science PhDs. Staff with planning qualifications, who are responsible for reviewing and coordinating the referral process, work in PIAB. EPA specialist and technical advisers work across the Compliance Branch, the Environmental Science Branch, Site Contamination Branch and the Mining and Radiation Branch.

The primary role of staff in PIAB is to liaise with DA proponents (from pre-lodgement through to post-application approval) and their consultants, relevant authorities and other agencies in relation to development assessment matters. This may include clarification of the nature of the referral, or provision of relevant information for assessment, or local/site specific knowledge.

Site contamination

The Commission received feedback from several businesses and industry associations in relation to the new site contamination referral process commenced under the *PDI Act*. Several concerns were raised including the extent of work this requires very early in the development assessment process, and the costs associated with using accredited consultants for site investigations. The overarching issue was what applicants' see as bringing forward expenditure unnecessarily early in the assessment process with no certainty of receiving a DA approval. This is said to challenge project feasibility and prospects of securing further necessary investment at this stage of the development value chain. Earlier spending on experts (without a commensurate reduction in risk) increases project costs. The issue is ensuring a proportionate requirement for the information needed to make the appropriate decision at the right time in the value chain. Figure 2.2 illustrates a regulatory system that supports the probability of project success before major spending by an applicant is required.

Figure 2.2: Risk management, project success probability and iterative investment



Source: stylised figure from Roderick Carnegie and Matthew Butlin, *Managing the Innovating Enterprise (The Business Library)* 215.

Planning consultants and legal practitioners indicated that site remediation is never a show-stopper, rather it is a question of the time and cost required to clean up the site, and that this is a matter for the applicant to address before the development assessment process is completed or is made a condition of approval. It was suggested that applicants are prepared

to accept liability for site remediation, as long as it before occupation of the site. Other concerns included the potential delays associated with having to use accredited site contamination consultants who are a finite resource in a niche market.

The Urban Development Institute of Australia, SA Division (UDIA) supported concerns that the current arrangement 'front-loads' investment without certainty in the assessment process, while indicating they are strongly in favour of actions to support public safety. They also observed that:

While the Practice Direction has a mechanism that enables a site contamination consultant to conduct a preliminary site investigation (and where required a detailed site investigation) and an ability to sign off that the land is suitable for a more sensitive use if appropriate, we are concerned that many consultants will be reticent to do so based on other factors including risk to reputation, insurance premiums and ongoing practice approval by the EPA.⁴⁹

These comments were echoed by other stakeholders concerned about site contamination consultants' capture that could be characterised as systemic consequences of the form and structure of the current arrangements.

UDIA, industry consultants and applicant representatives indicated they made representations to EPA over several years to improve current arrangements and during development of the Practice Direction. The issues raised will be subject of further consultation with EPA.

2.2.2 Native Vegetation Council (Native vegetation clearance)

Native vegetation clearance is the statutory responsibility of the Native Vegetation Council (NVC) under the *Native Vegetation Act 1991 (NV Act)*.⁵⁰ DEW provides administrative and technical support to the NVC in relation to native vegetation development referrals. The NVC functions with a formal instrument of delegation that allows specified roles within the Native Vegetation Branch (NVB) of DEW to make decisions on behalf of the NVC. DEW's Coordinator Complex Assessments is also a delegate of the NVC for statutory matters referred to the NVC.

The NVC has only been a referral body since the commencement of the *PDI Regulations* in September 2020 following the introduction of phase 2 of the Code as part of the state planning reforms. Prior to the reforms, the NVC received no statutory referrals under the *Development Regulations*. DEW advise that the way development was prescribed in the referral trigger meant no statutory referrals were made.⁵¹ There were six main pathways through which matters were referred to the NVC or NVB for comments:

- from the State Commission Assessment Panel (SCAP) for development applications via the land use application system (Appian);
- from local government relating to subdivisions or boundary realignments via EDALA (Electronic Land Division Lodgement site);
- via the Minister responsible for the administration of the *River Murray Act 2003*;

⁴⁹ Urban Development Institute of Australia, Submission DR8 to South Australian Productivity Commission, *Development Referrals Review* (24 May 2021) 4 (UDIA submission)

⁵⁰ *Native Vegetation Act 1991* pt 3 div 1 (*NV Act*)

⁵¹ *Development Regulations 2008* sch 8 (*Development Regulations*) provide that a referral was required 'If the relevant Development Plan contains a map showing an area of substantially intact native vegetation, development within, or within 20 metres if, the area shown on the map, other than development in a River Murray Protection Area under the *River Murray Act 2003*. DEW advise that no Development Plans contained such maps.

- via DEW for NVB advice and comment. (Noting that this is not a referral to the NVC; however, the Branch will provide comments as a sub-referral authority in relation to the administration of the *NV Act*);
- through ad hoc matters from local government seeking advice to support their assessment of a development application; and
- through Major projects declared under the *Development Act*.⁵²

For development assessments under the Code, the NVC has an active referral for native vegetation clearances risk assessment levels 3 and 4 for the Native Vegetation Overlay, and an active referral for native vegetation risk assessment levels 2, 3 and 4 in relation to the State Significant Native Vegetation overlay.⁵³ Under the Code, if development occurs where the Native Vegetation Overlay or the State Significant Native Vegetation overlay applies, and approval of native vegetation is not required for clearance, developers can declare as part of the development application that no native vegetation will be impacted by the development or that no native vegetation is present. If the relevant authority agrees with the applicant, there is no need for a referral to the NVC.

Where an exemption under the *NV Act* is sought, the accredited consultant data report will contain an application for exemption and the application is administered as if part of the development referral process. Table 2.2 presents the total number of referrals to the NVC via all six pathways over the past three financial years.

Table 2.2: Non-statutory referrals to the Native Vegetation Council, 2017-18 to 2019-20*

Financial year	Sub-referrals from River Murray Minister	Non-statutory referrals	Crown projects	Major projects	Total
2017-18	37	122	24	N/A	183
2018-19	15	112	12	1	140
2019-20	17	65	16	8	106
Total	69	299	52	9	429

Source: Native Vegetation Council data provided to the Commission on 3 May 2021. *Some applications may be referred to the NVC or NVB through multiple channels – there may be some double counting of the total number of non-statutory referrals for development applications.

The NVC require applications for clearance to be undertaken by an NVC-accredited consultant. The accreditation ensures that the person or body that undertakes the assessment and prepares a report relating to proposed clearance of vegetation is appropriately trained and qualified. This scheme is established under the *NV Act*.⁵⁴ The accredited consultant policy requirements are under the *Native Vegetation Regulations 2017 (NV Regulations)*.⁵⁵ A regulation expanded the requirements for reports prepared by accredited native vegetation consultants to include development related applications under regulations.

The Commission has heard from stakeholders on the use of accredited consultants for native vegetation referrals regarding issues of cost and their role in the referrals process.

⁵² *Development Act 1993* (ceased) s 46 (*Development Act*).

⁵³ the Code pt 3.

⁵⁴ *NV Act* (n 50) s 28(5).

⁵⁵ *Native Vegetation Regulations 2017* r 18(2)(a) (*NV Regulations*).

Stakeholders indicated that while consultants are trained in native vegetation assessment to provide for consistent assessments, there is a concern that consultants consistently reach a predetermined and unchangeable outcome. The Commission is interested in the role of consultants and their ability to advise that adds value to the regulatory outcome, meets requirements of the regulator and represents the interests of the applicant.

Information request 2.1: Use of native vegetation accredited consultants

Stakeholders are invited to provide to the Commission specific examples of their experiences in relation to native vegetation referrals having regard to:

- mitigation strategies and environmental offsets recommended by accredited consultants and whether those recommendations led to certainty or a positive outcome for the proponent; and
- delays to an applicant's project arising from wait times to engage an NVC-accredited consultant.

The NVC and Country Fire Service (CFS) have separate mandates on native vegetation: the NVC's role is for clearance consent relating to new development, while the CFS role is to determine clearances required to reduce the risk of bushfire to life and property. Once the CFS have made their determination, the NVC incorporate their requirements for offset obligations. These are two discrete roles that intersect with decision making for both statutory authorities driven by two different pieces of legislation.

The Keelty review into the 2019-20 bushfire season⁵⁶ looked at the overlap in the role between NVC and CFS regarding native vegetation management and approvals process. That review did not consider native vegetation clearance from a development application perspective *per se*. The review found a lack of public understanding of the NVC role in native vegetation management and that the processes involved in seeking approval for fuel reduction strategies from the CFS are confusing and poorly understood by the community.

2.2.3 Commissioner of Highways (Road and transport network)

The Commissioner of Highways (CoH) is the statutory body responsible for development referrals affecting arterial road transport routes and corridors, future road widening and advertisements near signalised intersections. The CoH is established by the *Highways Act 1926* and has the role of carrying that Act into effect. The purpose of that Act is to make further and better provision for the construction and maintenance of roads and works.

The Department of Infrastructure and Transport (DIT) provides resources to support the CoH referral function and referrals are coordinated primarily by the Transport Assessment Section in the Transport Planning and Program Development Division. This section manages development applications, assesses and respond to DAs, addresses related planning matters and proposals that interface with the road and transport network with up to 4.5 FTE, as at May 2021. For more complex referrals this group is supported by a wide range of specialist areas

⁵⁶ Government of South Australia, *Independent Review into South Australia's 2019-20 Bushfire Season* (Report, June 2020) <<https://safecom-files-v8.s3.amazonaws.com/current/docs/Independent%2520Review%2520into%2520SA%2527s%25202019-20%2520Bushfire%2520Season%2520-%2520Web%2520Upload.pdf>>

and functions in DIT, including strategic transport planning, traffic network management and design. For those staff, development referrals are ancillary to their core role.

The state planning reforms have introduced seven transport overlays into the Code. The purposes of the CoH referrals are to 'provide expert technical assessment and direction to the Relevant Authority on the safe and efficient operation and management of all roads relevant to the Commissioner of Highways as described in the Code'.⁵⁷

The CoH advised that the overlays for which it is responsible in the Code provide improved transparency of arterial road referral elements that can assist planning authorities and applicants. The new CoH overlays in the Code include major urban transport route, nonstop corridors, urban transport routes, key outback and rural routes, advertising near signalised intersections, future road widening and traffic generating development.

The Commission heard in relation to the traffic generating overlay that:

The 'Traffic Generating Development' Overlay of the Planning and Design Code does not spatially apply to roads managed by the City of Adelaide. As you can appreciate many of these roads carry significant volumes of vehicles and support a relatively high number of pedestrians and cyclists, however there is no referral mechanism to the Department of Transport (DIT).⁵⁸

The CoH receives the highest number of statutory referrals annually, with 747 in 2019-20, down from 835 in 2018-19. Table 2.3 shows the number of development applications referred to the CoH in the period 2017-18 to 2019-20.

Table 2.3: Statutory referrals to the Commissioner of Highways, 2017-18 to 2019-20

Financial year	Total number of referrals	Crown projects – Minister [^]	Major projects*	Total
2017-18	900	46	N/A	946
2018-19	835	84	N/A	919
2019-20	747	37	N/A	784
Total	2,482	167	N/A	2,649

Source: PLUS data provided to the Commission on 15 March 2021. *Major projects data not available at the time of writing. [^]Crown projects data sourced from CoH.

CoH advised approximately 60 per cent of the total referrals received were for low complexity, smaller subdivisions and land uses. These referrals are for safe and efficient access onto arterial roads and to access locations. Local government is the predominant planning authority for approximately 90 per cent of referrals CoH receives; the remainder are from the SPC. In 2020, 85 per cent of applications were in the metropolitan area with larger metropolitan councils generating most referrals.

CoH advised that approximately 98 per cent of referrals are approved. Those refused relate to smaller land division applications and CoH provides recommendations to the applicant in response, to support a subsequent application. CoH advised that many of the small subdivision referrals will now be deemed-to-satisfy development under the Code, which is expected to reduce the high volume of DAs that were referred under the *Development Act*.

CoH advised they have relationships with relevant authorities and other referral bodies and liaise in several ways in relation to pre-lodgement matters and referral agency stakeholder forums. They also advised that their regulatory mandate under the *Highways Act 1926*

⁵⁷ SPC submission (n 10) 6.

⁵⁸ City of Adelaide submission (n 13) 1.

(*Highways Act*) is clear, reducing the potential for overlapping mandates with other referral bodies. The delineation of responsibilities for the CoH and local government, the latter the authority for local roads, is well established outside of the planning system through legislation including the *Highways Act*, *Local Government Act 1999* and the *Road Traffic Act 1961*.

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.⁵⁹

For major projects and complex Code assessed developments, CoH requires a comprehensive traffic impact assessment to be undertaken by a recognised professional traffic consultant. Applicants indicated traffic consultants have good relationships with the staff of the CoH, who are effective in dealing with traffic and road issues in a proactive way. The common understanding of the transport and traffic impacts associated with development and the applicable regulatory framework and engineering standards are expected to support this efficiency, albeit at potentially significant cost to the applicant.

2.3 Diagnostics and evaluation

This section considers the extent to which each of the model regulator principles are reflected in the work of each of the referral bodies. At the start of each agency sub-section is a boxed synopsis which indicates the Commission's view of that agency's commitment to the principle, how it is measured or demonstrated, and how the referral body is accountable for that commitment.

The process maps in this section were developed in close consultation with and endorsed by each referral body.

2.3.1 Accountability and efficiency in business process

Environment Protection Authority

EPA has a structured, centralised approach to managing referral responses that also involves specialised staff from across the organisation. The DA assessment process and subsequent licensing approvals processes are integrated providing continuity for applicants from land use proposal to operations in the regulatory value chain.

EPA has an assessment system where the DA coordinator is the central point for inquiries and facilitates meetings between applicants and EPA specialist advisers when necessary. The DA coordinator is a professional planner with experience and knowledge who can deal with most inquiries.

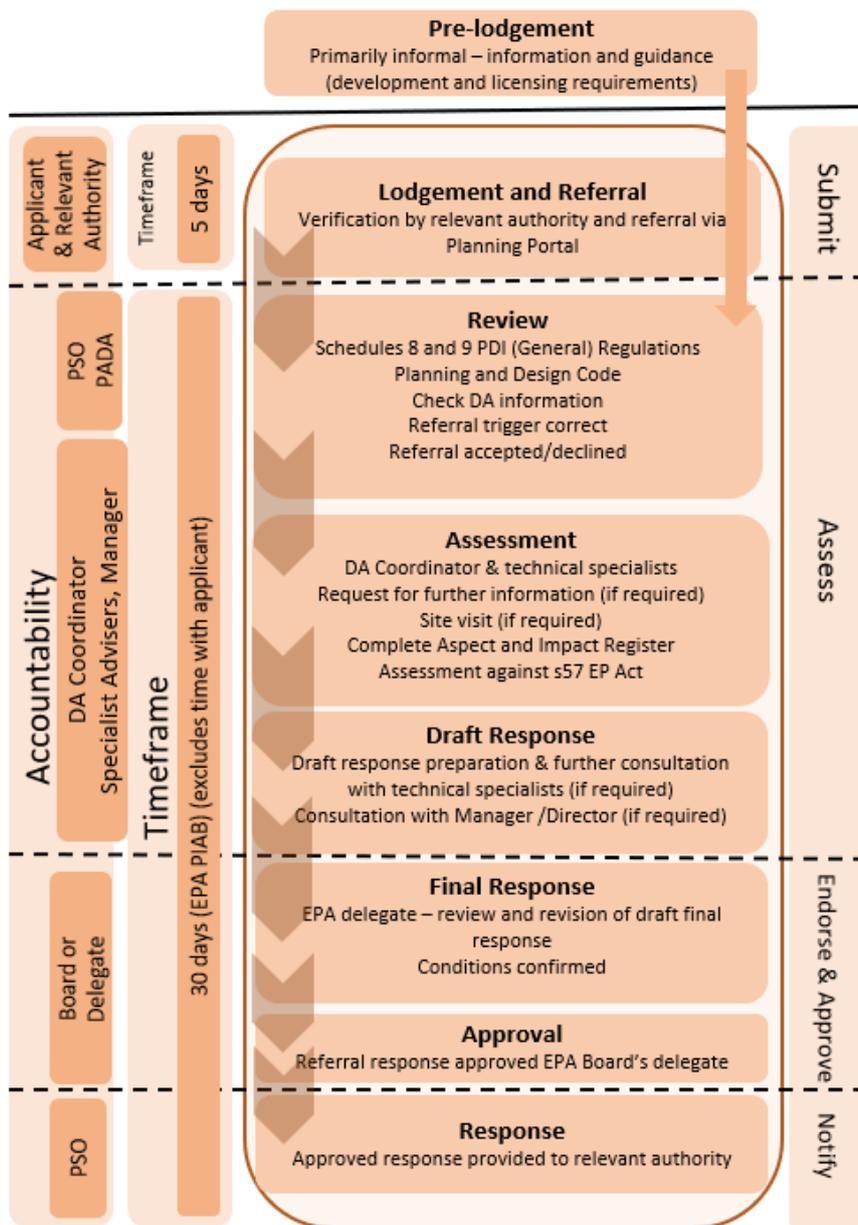
EPA advised assessment of development application referrals is a collaborative effort across several branches of the organisation, given the variety of expertise and knowledge required to prepare a referral response in relation to the several referral triggers relevant to the EPA. Environmental licensing functions are incorporated into the referrals process to ensure that the linkages between DA approval and subsequent environmental licensing are developed, and there is continuity for applicants through to the operate stage in the regulatory value chain.

⁵⁹ Hickinbotham Group, Submission DR4 to South Australian Productivity Commission, *Development Referrals Review* (10 May 2021) 2.

EPA built a specific IT business system (known as the GENI DA module) for tracking, assessing and responding to DAs referred to EPA under the *Development Act*. This system is being reviewed given the implementation of the *PDI Act*.

The primary role of PIAB is to coordinate the assessment process and engage with applicants and their consultants, relevant authorities and other public sector agencies in relation to assessment matters. PIAB is responsible for finalising the response for consideration by the EPA Board or delegated authority. Figure 2.3 illustrates the steps of the EPA development application referral assessment process for Code assessed development.

Figure 2.3: EPA’s internal business process for preparation of Code assessed development referrals.



Source: Developed by the Commission based on information provided by EPA.

Pre-lodgement

EPA advised it provides a pre-lodgement site-specific service for applicants seeking development approval. This enables EPA to provide early advice regarding matters that they may need to address in the development application. The pre-lodgement is a good opportunity to ensure applicants are well informed about EPA's requirements, such as the need for expert reports, potential costs to be incurred and specific activities that need to be undertaken (e.g. before and after environmental monitoring). EPA advised that the vast majority of DAs subject to pre-lodgement discussion are of a better quality.

Submit

On receipt of a DA via the SA Planning Portal, the PIAB planning support officer, in consultation with the planning adviser development assessment, undertakes an initial review to determine if EPA is the correct referral agency for the DA and that adequate information has been provided as per Schedules 8 and 9 of the *PDI Regulations*. This occurs on the same day the application was received, or following day. If the information is insufficient the planning support officer may request the relevant authority to seek further information from the applicant at that time. This initial review can be very short and may take up to one day depending on the complexity of the application. The Planning Support Officer liaises with the relevant authority if further information is required.

The statutory timeframe of 30 days for the EPA's response begins once the application has sufficient information to enable the EPA to complete its assessment. A referral may be declined by the EPA if insufficient information is provided and the DA may have to be resubmitted.

Assess

The principal adviser development assessment allocates the DA to a development application coordinator (DA coordinator), who undertakes a detailed review of the application to determine the required internal assessment process. The DA coordinator may liaise with specialist advisers to determine information adequacy. The principal adviser development assessment, senior planning adviser and/or manager PIAB may also be consulted depending on the nature and complexity of the DA.

Where the information provided is inadequate specialist advisers provide requests for further information (RFI) to the DA coordinator. The DA coordinator prepares the RFI, which is uploaded to the SA Planning Portal. RFI's are made on the grounds that insufficient information was provided with the DA to undertake the required assessment under the *EP Act*.⁶⁰ EPA advised it takes a proactive approach, preferring to ensure that details are adequately set out in the DA documentation rather than using conditions as a way of clarifying information and/or changing the nature of the proposal. Conditions are predominantly used to reinforce critical components of a development application approval to meet general environmental duty e.g. using a certain type of air quality technology. In the Commission's view this approach may lead to a level of detail being requested by EPA on matters that could be subsequently conditioned, where the means to achieve an outcome are not prescribed.

EPA advised that applicants or their agents can clarify RFI requirements, including why the information is necessary and the level of detail required, with the DA coordinator whose contact details are provided with the RFI. The contact can be made via email, phone or a meeting, which may involve attendance of specialist advisers. Meetings are only required to

⁶⁰ *EP Act* (n 46) s 57.

discuss information requests for more complex DAs. Once adequate information is obtained the DA coordinator assesses the DA against the general environmental duty in the *EP Act*. The Commission considers interactions with specialist advisers further in section 2.3.3.

EPA advised aspect and impact registers are used for most referrals to document its assessment of activities that will require a subsequent licence to operate under the *EP Act*. The register is completed for most referrals with exceptions such as petrol stations, site contamination referrals and minor developments. Specialist advisers complete the registers with information including potential conditions and any advisory notes to assist the applicant to understand their environmental obligations.

The DA coordinator uses the register to assist drafting the referral response. The register can also be used by EPA Compliance Branch staff as part of any subsequent licence application assessment process as it summarises the nature of the development application and referral, key details relating to the site and locality, and EPA's assessment and conditions.

EPA can direct approval or refusal as well as direct conditions to be attached to the DA on all activities of environmental significance being referred by the relevant authority including site contamination and site contamination-land division.⁶¹ Once completed by the DA coordinator the draft response document is then forwarded to the EPA's delegate for approval.

The DA referral assessment is primarily an internal process supported by in-house specialist expertise. Importantly, the assessment process is integrated with the licencing process that follows (when a licence is required). The Compliance Branch, responsible for the operational aspects of the development in relation to issuing the licence for its operation and compliance with development conditions, is consulted throughout the assessment process.

Endorse and approve

The draft final response document is reviewed by the Board's delegate for approval as soon as possible. The EPA board is rarely consulted. The Board has appointed several senior staff members as delegates who can sign the response on its behalf. The delegates are professionals classified at PO3, PO4 or PO5 level.

Notify and appeal

If approved by the Board or delegate, the response document, including conditions and notes, is returned to the relevant authority through the SA Planning Portal. The time each step of the EPA referral response process takes depends on the DA's complexity and adequacy and quality of information provided by the applicant.

Native Vegetation Council

Referral response processes are well documented and understood by assessing staff, including the delegation of matters from the NVC. It is too early to determine the impact, if any, the new NVC referrals will have on the native vegetation clearance assessment function. Notwithstanding the introduction of Code-based referrals, applicants are still required to obtain a subsequent approval to clear native vegetation under the NV Act.

Before the introduction of the *PDI Act*, development referrals involving native vegetation assessment often commenced after planning consent had been granted (or late in the that process). The Commission has heard that this sequential process sometimes resulted in

⁶¹ *PDI Regulations* (n 48) sch 9.

delayed decisions, inconsistent information requirements, confusion and uncertainty for applicants. The UDIA noted that:

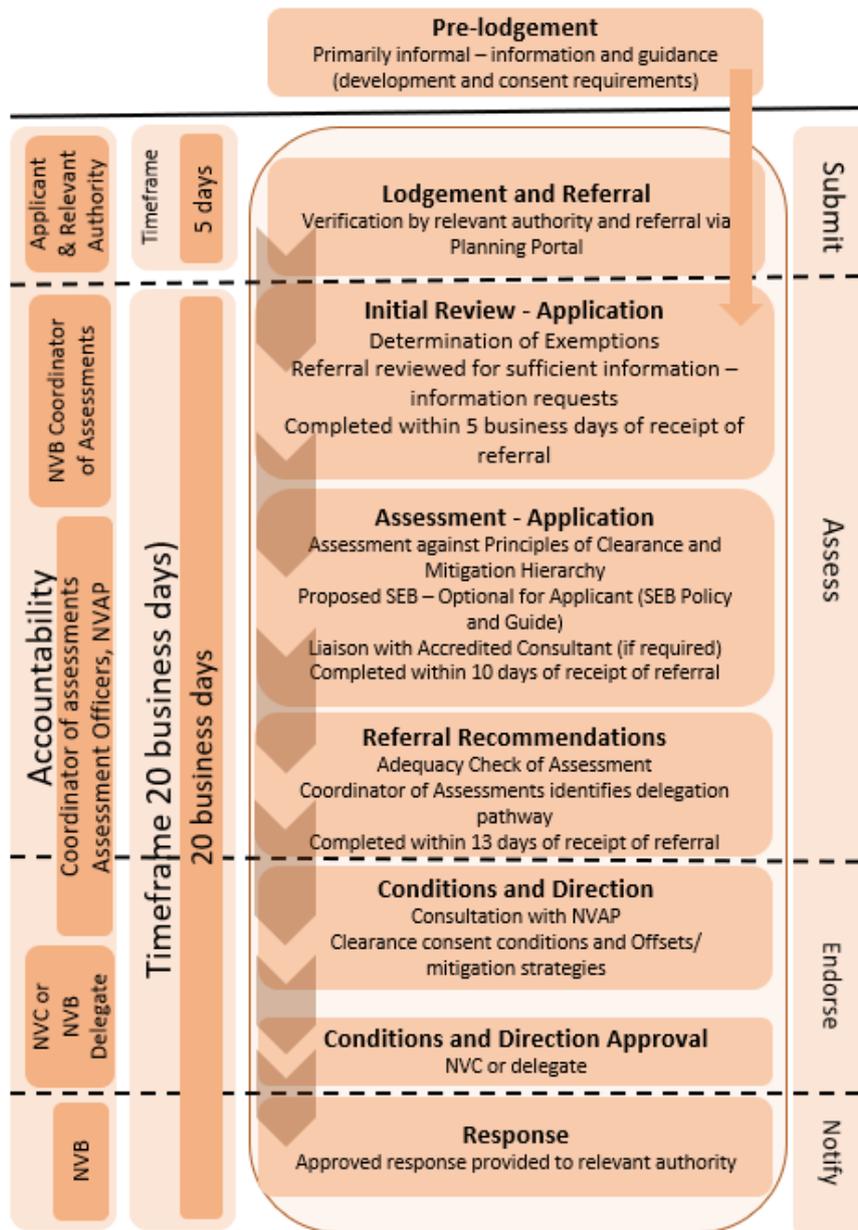
At present the Native Vegetation Act and Regulations do not contain any provisions which ensure that a proposal for clearance which has been the subject of a referral to the NVC under the PDI Act is not also required to go through an approval process under the NV Act and Regs.⁶²

While a mechanism for referral under the *Development Regulations* existed previously it had not operated in practice due to native vegetation mapping being absent from local council development plans.⁶³ The introduction of Code-based native vegetation referrals is expected to address most concerns. That said, the Commission heard that, where a DA including native vegetation clearance has received planning consent through a referral response, a subsequent application under the *NV Act* is still required. The Commission discusses this in more detail in section 2.3.6. The business process used by NVC and DEW to assess native vegetation referrals for Code assessed development is set out in Figure 2.4. DEW has told the Commission that the internal timeframes at each stage have been developed as their most efficient method of meeting the statutory 20-day timeframe.

⁶² UDIA submission (n 49) 3.

⁶³ The trigger for an NVC referral under the *Development Regulations* was the development Plan containing '...a map showing an area of substantially intact native vegetation, development within, or within 20 metres of, the area shown on the map, other than development in a River Murray Protection Area under the *River Murray Act 2003*.'

Figure 2.4: NVC/DEW internal business process for preparation of Code assessed development referrals.



Source: Developed by the Commission based on information provided by Native Vegetation Branch (DEW).

Pre-Lodgement

DEW encourages pre-lodgement for potential applicants seeking development approval in order to provide early advice regarding information requirements. These approaches are usually facilitated through the accredited consultant and the applicant relies on their expertise and knowledge of department staff to navigate the process. Early engagement with applicants is often informal to facilitate developing a preliminary proposal into a form ready to be submitted.

Submit

DA's are triaged based on their complexity and the availability and experience of staff in the NVB. More complex referrals, in line with the level of proposed vegetation clearances, are

managed by the coordinator of complex assessments with the more routine referrals managed by the coordinator of assessments. The NVB monitors the applications by level of native vegetation impact and publishes internal monthly monitoring reports tracking the statutory timeframe outcomes.

Assess

Once initial adequacy checks are complete the NVB coordinator of assessments checks the data report for quality and completeness and may also initiate a site inspection to verify the information. If the information required is incomplete, the NVB discusses the matter with the accredited consultant before considering 'stopping the clock' on the statutory timeframe for preparation of the referral response. DEW advise that RFIs tend to be related to clarification of matters such as confirmation of the development footprint. The NVB will make an RFI through the SA Planning Portal, usually supported by a phone call to the relevant authority to alert them to the incoming request.

An NVB assessment officer prepares an assessment report based on information supplied in the data reports and considers the proposed clearance against the requirements of the *NV Act* and *NV Regulations*, including principles of clearance⁶⁴ and the mitigation hierarchy⁶⁵. The NVB assessment report includes recommendations on granting of consent and any conditions to be imposed. The offset is assessed as part of the referral if the DA includes an offset proposal, however this is not essential as the applicant can elect to finalise the offset through the subsequent application to the NVC. The NVB internal processes aim to complete the assessment and review phase within thirteen business days of receipt of the referral.

Endorse and approve

The assessment report is supplied to the applicant as well as being submitted to the NVC or delegate for a decision on whether to approve the clearance.

Under the *NV Act* the NVC can delegate its functions and powers to a committee or a person.⁶⁶ The Native Vegetation Assessment Panel (NVAP) has been established as a decision-making and advisory committee, appointed by the NVC, to assist the NVC to carry out its functions. The terms of reference of the NVAP provide for matters that can be delegated to the NVB or must be dealt with by the NVAP.⁶⁷ The NVAP comprises an NVC member elected by the NVC, the manager of the NVB and the coordinator of complex assessments.

The NVAP may choose at any time to refer a matter directly to the NVC, where NVAP considers the matter warrants the review of the Council as a whole. The following matters referred under the *PDI Act*⁶⁸ *must* be referred to the NVAP for decision, and decisions not made under delegation by staff of the NVB:

- a referral that is determined to constitute a level 4 application under the guide to applications to clear native vegetation;⁶⁹
- a referral where refusal is recommended by the assessing officer; and

⁶⁴ *NV Act* (n 50) sch 1.

⁶⁵ *NV Regulations* (n 55) r 1(5).

⁶⁶ *NV Act* (n 50) s 14.

⁶⁷ Native Vegetation Branch, *Native Vegetation Assessment Panel Terms of Reference* 1-3.

⁶⁸ *Ibid.*

⁶⁹ Native Vegetation Council, *Guide for applications to clear native vegetation under the Native Vegetation Act 1991 and Native Vegetation Regulations 2017* (July 2020) section 3 (NVC clearance guide).

- a referral subject to conditions of approval that the applicant objects to and the delegate cannot resolve the matter with the applicant.

The NVAP may decide on all other referrals for direction under the Code. It is not clear to the Commission whether the NVAP will delegate the decisions, on all matters where they are not required to deliberate, to the NVB in their entirety or whether the involvement of the NVAP is discretionary. This is an area that the Commission will investigate further.

The assessment report for each proposal is considered by the relevant delegate. The NVAP will not make decisions inconsistent with the objects and principles of the *NV Act* and will consider relevant NVC policy and guidelines.

Notify

Responses to referrals to the relevant authority are coordinated through the coordinator of assessments. under the delegation instrument approved by the NVC and the Minister for Environment and Water, the coordinator of complex assessment or the manager of the NVB approves the the response to the relevant authority. The NVC provides the following directions to the relevant authority on referral matters:

- acceptance of the proposal, assessed using the accredited consultant report, with no conditions imposed;
- acceptance of the proposal, assessed using the accredited consultant report, with comments or conditions, for example relating to avoiding impacts on native vegetation; and
- a direction for refusal if the proposal does not meet the requirements of the *NV Act*.

The referral response informs the applicant of the requirement to seek clearance consent and to contact the NVB on the requirements of the subsequent approval under the *NV Act*, the mechanics of that process and the required documentation.

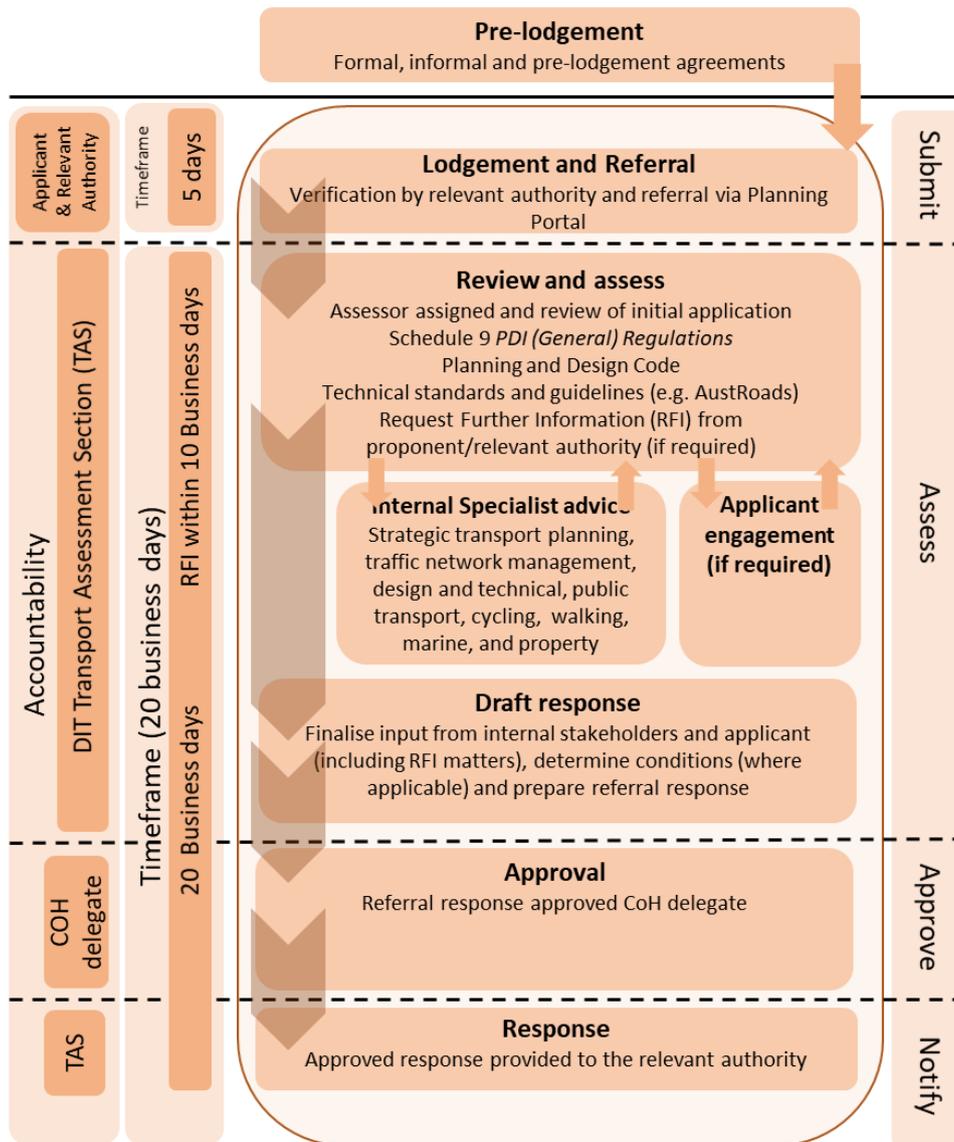
Commissioner of Highways

CoH referrals often necessarily involve professional traffic consultants who have established relationships with CoH assessing staff and understand CoH requirements. This may explain why assessment information is not published. Publishing this information may address a potential barrier to entry for other traffic consultants.

CoH reportedly has effective engagement arrangements that support assessment requirements. Meeting Australian standards and other engineering guidelines are a feature of the assessments conducted by CoH.

The assessment of DA referrals is a collaborative effort where a core CoH assessment group work with DIT technical specialists with expertise and knowledge required to prepare a referral response. CoH require traffic engineering reports for moderate to larger complex developments as part of the application. Applicants generally understand this requirement. These reports are provided by professionals with recognised traffic engineering and transport credentials in the relevant discipline e.g. from Engineers Australia. These applications are reviewed by CoH staff in line with departmental modelling and performance requirements. Funding mechanisms for road upgrades triggered by the development are also considered. Figure 2.4 sets out CoH's internal referral response process.

Figure 2.5 CoH internal business process for preparation of Code assessed development referrals.



Source: Developed by the Commission based on information provided by CoH (DIT).

Pre-Lodgement

CoH encourages pre-lodgement for potential applicants seeking development approval to provide early advice regarding information requirements. Early engagement with applicants is often informal, with many of these discussions not resulting in DA's.

Submit

Responses to referrals are coordinated through the Transport Assessment Section (TAS) in the Transport Planning and Program Development Division. When TAS receives a referral through the SA Planning Portal the DA is allocated to an assigned assessor for assessment and to ensure adequate information has been provided. Allocation of DA's is determined by staff availability and the complexity of the application. The initial review by TAS staff is completed within one or two working days.

Assess

The CoH assessor evaluates the DA for road impacts and the complexity of the development. DAs are assessed against several documents (the majority of which are national or state traffic engineering and transport planning guidelines), the *PDI Regulations* and the Code. The referral response is coordinated by the assigned assessor with internal engagement and input from specialist sections including;

- Network Management Services;
- Road Assets;
- Transport Network planning; and
- Marine Services.

The specialist team members normally have two weeks to respond within the overall statutory referral response timeframe. The internal stakeholders identify issues or seek clarification in the first 10 days to support a RFI (if required). CoH communicates directly with an applicant at all stages of the development process using several communication methods including meetings with developers and/or their traffic consultants.

CoH advised that there has been an increased focus by CoH staff on improving timeliness and quality of responses as well as fostering timely engagement with applicants on any RFIs to support an efficient assessment. The increased number of CoH referrals responded to within the statutory timeframe (see section 2.3.7) are an outcome of this focus. The Commission received feedback from legal professional representing applicants and from planning consultants about effective two-way engagement with the CoH as part of the referrals process.

Endorse and approve

When liaison with specialist advisers and applicants is complete, the referral response is drafted by the TAS assessor. The response is approved by the CoH delegate.

Notify and appeal

The approved response is returned to the relevant authority via the PlanSA Planning Portal. Data provided by the CoH indicates there have been very few appeals of CoH referral decisions with only one identified in the last 10 years.

Conclusions

All three referral bodies use a variation of a 'hub and spoke' model to manage referral responses. All use specialist in-house advisers to assess, evaluate and recommend conditions for referrals (where applicable). The coordinating function– the hub – incorporates the use of specialist advice when drafting the referral response and seeking the necessary internal approvals before responding to the applicant through the relevant authority.

While native vegetation clearance is now subject to statutory referrals, a subsequent approval under the *NV Act* must grant clearance and determine the Significant environmental benefit (SEB). There may be opportunity to further streamline this process and mitigate the risk of avoidable delay, particularly given almost all of the same information is used for both assessments.

Concerns were raised about the NVC-accredited consultant scheme regarding the value of the reports used and the perception that the consultants are captured by the accrediting regulator, impacting on consultants' assessments. Similar concerns were raised about

consultants used in relation to EPA's site contamination referral. The Commission canvasses these issues from a systemic perspective in section 4.3.3.

The new site contamination referral received important feedback indicating that it is unnecessarily bringing forward investment by applicants to manage public safety liabilities that can be managed later in the development assessment process.

Feedback also indicated applicants' expectations have not always been met regarding access to EPA's in-house specialist advisers during the referral response process, with applicant's suggesting this has led to delays in progressing referral responses.

The referral response statutory timeframes and additional reporting expected to be available through ePlanning arrangements may mitigate the risk of delay in relation to RFIs in the future. However, it remains unclear to the Commission how direct interactions between referral body and applicant, which can be critical to timely assessment, will be achieved as part of these new data and reporting arrangements.

Delegates are usually used to approve responses and the Commission was not made aware of any potential for delay in this part of the internal assessment process.

2.3.2 Early engagement and pre-lodgement

Environment Protection Authority

EPA uses informal pre-lodgement arrangements to clarify information requirements for expected referrals, and sometimes to determine if an EPA referral will be required for proposed DAs. Substantial information is publicly available to support applicants in relation to EPA's assessment requirements before they lodge a DA. Feedback indicated contrasting views about the value of EPA's preparedness to offer pre-lodgement information. This may be a matter for EPA confining the extent of advice it is prepared to provide based on limited information made available by the applicant early in the process. EPA does not consider the impact of their pre-lodgement arrangements on the overall referral response process.

EPA advised it uses pre-lodgement to ensure applicants understand EPA's public interest legal mandate and the information requirements to support an efficient process once the DA is referred. The pre-lodgement advice service is free. Pre-lodgement information is available to relevant authorities and applicants on EPA's website, as part of its approach to early engagement.⁷⁰

Information can be prescriptive, e.g. guideline for construction environmental management plans,⁷¹ and advice relating to the risks presented by landfill gas and the basis on which the EPA addresses referrals related to this matter.⁷² This information aims to reduce costs for applicants and ensure all necessary information is provided with the DA, mitigating the need for RFIs, which are then mainly used to clarify matters rather than obtain new information not accompanying the DA. Contact details of a planning support officer are available on the

⁷⁰ EPA, *Environmental Info, Advice and Assistance* (Web page, 1 July 2021)

<https://www.epa.sa.gov.au/environmental_info/environmental_planning/advice-and-assistance>.

⁷¹ EPA, *Construction environmental management plan (CEMP)* (Guideline, September 2019)

<https://www.epa.sa.gov.au/files/12330_guide_cemp.pdf>

⁷² EPA, *Waste: Landfill gas and development near landfills—advice for planning authorities and developers* (Information sheet, February 2012) <https://www.epa.sa.gov.au/files/47793_info_landfill_gas.pdf>

website to discuss DA queries and pre-lodgement arrangements. EPA advised that DAs subject to a pre-lodgement discussion, are likely to be of better quality and more complete, contributing to greater efficiency in the referral process.

The Commission heard from some business stakeholders that they engaged the EPA before finalising a proposal to seek advice on its assessment requirements and this early engagement assisted them to adapt their plans based on EPA's feedback prior to submission. Conversely, the Commission heard that:

Councils have reported to the LGA that the Environment Protection Authority is generally unwilling to engage in pre-lodgement discussions or provide informal advice at officer level. It is recommended that given the significance of the EPA in the referral and licencing process they should consider regularising pre-lodgement discussions with the relevant authority and the applicant.⁷³

EPA advises that pre-lodgement discussions are recorded in a working file that can be called on by assessors during the referral response process. EPA indicated that pre-lodgement agreements are used rarely as they generally take longer than dealing with the EPA-relevant issues through the referrals process.

While the pre-lodgement service primarily assists applicants regarding a proposed DA known to trigger an EPA referral, it can also be used to determine if an EPA referral is required.

Native Vegetation Council

DEW supports early engagement of both applicants and accredited consultants involved in referrals. The approach is informal with no procedural documentation or measures of outcomes identified by the Commission. The informal approach to pre-lodgement is generally viewed constructively by councils and the practice works in conjunction with the use of accredited consultants.

The Commission has not been advised of any formal pre-lodgement arrangements used by DEW or the NVC in relation to DAs involving native vegetation clearance. The LGA has reflected that integrating native vegetation referrals into the planning system has resulted in positive outcomes:

Native vegetation issues that can impact on the development assessment process include firstly, a common and reasonable practice, where an application for Planning Consent is submitted at Preliminary Design stage and does not allow for native vegetation impacts to be fully understood...the issue has previously been managed adequately by applicants seeking pre-lodgement advice from the Native Vegetation Council.⁷⁴

DEW advised that their experience is the earlier applicants are engaged in the referral process the smoother and faster the process is and with better outcomes achieved for both the applicant and NVC. Where proposed clearance does not meet the objects, principles or mitigation hierarchy in the *NV Act*, NVC staff work with the applicant to determine suitable refinements to the clearance so that the development or activity is consistent with regulatory requirements.

The Commission notes that early engagement and informal pre-lodgement arrangements have been effective for the brief period of operation of native vegetation referrals in the new

⁷³ Local Government Association submission (n 34) 6.

⁷⁴ Ibid.

planning system. The informal approach to pre-lodgement is supported by the input of specialist advice from accredited consultants who understand and are trained in the statutory assessment requirements.

Commissioner of Highways

CoH supports pre-lodgement and early engagement for both applicants and industry-accredited consultants that act as their agents. Stakeholders indicated an effective pre-lodgement experience with CoH. CoH pre-lodgement arrangements are usually informal, and they do not have any published documentation about their pre-lodgement process. CoH do not consider the impact of their pre-lodgement arrangements on the overall referral response process.

CoH encourages pre-lodgement for potential DA applicants as this enables it to provide early advice regarding information requirements and key issues. It also encourages proponents to engage prior to lodging major project applications.

CoH has not published pre-lodgement guidance material. It advised that the professional traffic consultants understand pre-lodgement arrangements, which often revolve around applying AustRoads and other engineering standards. CoH indicated that the move to the Code and deemed-to-satisfy development criteria adequately capture its requirements in relation to the smaller developments and appropriate guide those applicants.

CoH advised early engagement with applicants is often informal. Data provided by PLUS supports this, indicating only two pre-lodgement agreement requests were received by CoH in 2019-2020.⁷⁵

It also advised that informal discussions with developers are constructive in providing proponents with early advice about regulator's requirements while early engagement is good practice, the time and money required early in the process to achieve pre-lodgement agreements may not be available to all applicants.

When informal pre-lodgement discussions are used CoH advised there are, in its view, several material benefits, including providing early clarification of assessment requirements, an appreciation of how transport and access impacts can be managed effectively, a better-quality application, a reduced need for RFIs. This view was supported by the LGA who commented in relation to CoH that:

...in past instances, pre-lodgement consideration of whole of site issues, in consultation with all relevant referral bodies, has been beneficial in achieving an efficient assessment process and appropriate development outcome.⁷⁶

Conclusions

The referral bodies considered early engagement with applicants to identify show-stoppers and clarify information requirements before a DA is lodged. This was validated by applicants the Commission heard from. It is unclear whether ePlanning can capture all pre-lodgement activity, particularly informal discussions which appear to enable a pragmatic approach and provide high value to applicants and referral bodies alike in resolving issues quickly.

⁷⁵ Planning and Land Use Services (PLUS) *Planning System Information Database* (20 January 2021).

⁷⁶ Local Government Association submission (n 34) 7.

2.3.3 Customer-centred guidance

Environment Protection Authority

EPA provides substantial publicly available referrals process guidance material. Its customer focus is on ensuring applicants properly understand its public interest legal mandate and the administration of the EP Act. Some applicants have an expectation about access to EPA's specialist advisers that differs from EPA's referrals response coordinating process. EPA captures and reports complaints and public enquiries for continuous improvement purposes.

Information providing guidance to applicants is readily available on the EPA website, including a summary of relevant legislation and EPA's role in the planning system.⁷⁷ The substantial materials are easily accessible by applicants and available upon request for those who cannot access the website. The information is updated regularly. A development referral checklist available on the website provides guidance in relation to information that must be provided to EPA as part of the referral process.⁷⁸ EPA advised the checklist is provided to applicants during pre-lodgement discussions and to relevant authorities, and DA coordinators can clarify for applicants and relevant authorities any queries about the guidance materials.

EPA advised that as part of its assessment coordinating model, specialist advisers are usually available for pre-lodgement discussions and advice when the EPA is contacted by proponents and/or their representatives. Information about this service is available on EPA's website and is managed via staff in PIAB.⁷⁹

The Commission heard from legal professionals and planning consultants that it is difficult to find and engage with EPA's specialist advisers to discuss matters relevant to progressing a DA referral response. There appears to be an expectation from some applicants and/or their representatives about the level of access to EPA's specialist advisers that does not align with EPA's referrals response process.

Information request 2.2: Access to Environment Protection Authority technical specialists

Given Environment Protection Authority (EPA) referral response outcomes often rely on the input of their technical and specialist staff, clarification from those staff can be an important part of progressing an applicant's development application. Stakeholders are invited to provide to the Commission examples of their experiences in seeking to consult with EPA's internal specialists, including the nature of the enquiry the applicant was making, and whether barriers to accessing the relevant specialist led to a delay in obtaining the referral response.

EPA operates a formal enquiries database named CARES which also captures all calls made by the public to the general EPA phone number and tracks the time EPA took to respond to

⁷⁷ EPA, *Environmental Info, Planning* (Web page, 26 June 2021)

<https://www.epa.sa.gov.au/environmental_info/environmental_planning>

⁷⁸ EPA, *Environmental Info, Planning - Advice and assistance* (Web page, 26 June 2021)

<https://www.epa.sa.gov.au/environmental_info/environmental_planning/advice-and-assistance>.

⁷⁹ Ibid.

enquiries. Records for 2017 indicate that staff in PIAB responded to 49 enquiries about development applications and the average response time was 15 minutes per enquiry. This information is also used as part of EPA's continuous improvement focus. EPA also has a dedicated complaints function regarding the services it provides. This reporting is used to inform feedback to the relevant EPA staff. Continuous improvement arrangements are discussed in more detail in section 2.2.7.

EPA data indicates that during the period 2017-20 EPA gave direction to refuse one activity of major environmental significance and recommended 8 refusals out of 640 DAs referred during that period.

Its strategic objectives for 2018-2022 include enabling innovative and sustainable industry practices via the provision of scientific and planning advice for new developments and working with communities and industry to manage environmental challenges.⁸⁰

Native Vegetation Council

The NVC and DEW provide substantial guidance to applicants on the DA and clearance consent processes, albeit some is not available publicly and must be requested by the applicant. Material to support accredited consultants has been developed over time to support consistent and improved assessments. The Commission has not received feedback from applicants or consultants about the value of this material.

NVC has developed a guide for applications to clear native vegetation under the *NV Act* and the *NV Regulations*. The guide outlines:

- the various types of applications to clear native vegetation, including those related to development;
- SEB information and obligations;
- supporting information for risk assessments;
- assessing against principles of clearance; and
- mitigation hierarchy and strategies for mitigating native vegetation clearance.⁸¹

NVB has also developed a guide for preparing DAs having regard to native vegetation assessment process requirements.⁸² This guidance material is not available on the DEW or NVC websites but is provided on request to an applicant. The guidance material relates to Code assessed (performance assessed development) applications. That guidance:

- helps applicants determine whether a development requiring approval under the *PDI Act* involves the clearance of native vegetation; and
- supports applicants through the steps involved in making the clearance determination and obtaining any required consents from the NVC.

⁸⁰ Environment Protection Authority, *Strategic Directions* (2018-2022) <https://www.epa.sa.gov.au/files/13720_strategic_1822.pdf> (EPA strategic directions)

⁸¹ NVC clearance guide (n 69).

⁸² DEW Native Vegetation Branch, *Native Vegetation Assessment Process – A Guide for Applicants 1*.

The guide contains a brief process map and steps for lodgement of application, definitions of types of development that need to be assessed and methods of reducing the native vegetation impact of the development. The guide emphasises to applicants the need to determine requirements for the clearance of native vegetation and any mitigation strategy that might be required before submitting a DA.

While the guidance for applicants provides an overview of the process, native vegetation information pertinent to the development referral is prepared for the applicant by an accredited consultant. DEW codified consistent material, developed by consultants, to support improved assessment and decision making. This reform was initiated in 2016 to address the variability and adequacy of material provided to support native vegetation clearance applications.

DEW has also produced guidance material not in the public domain for use exclusively by accredited consultants in preparing development applications. That material:

- provides a decision tree and associated process maps for native vegetation clearance and the types of clearance relating to vegetation overlays;
- describes the steps to be followed for preparing a data report; and
- provides links to relevant public information supporting the data report.

The Policy for a Significant Environmental Benefit under the *NV Act* and *NV Regulations* is publicly available and provides information about the calculation of the SEB.⁸³ While the guidance material outlines the calculation and achievement of the significant environmental benefit, the Commission has been told by major project proponents they have had to engage in negotiations leading to revision of SEB payments. The Commission considers that this an area that requires more certainty for proponents.

Commissioner of Highways

CoH will provide guidance to applicants regarding materials relevant to their assessments. CoH does not have an online presence aimed at supporting applicants in relation to DA referrals.

As discussed in section 2.3.2, CoH has not developed any published guidance material that would help applicants to understand and prepare for a referral to CoH. However, CoH will refer applicants to materials relevant to the assessment criteria used by CoH, including Austroads Guides, RAVnet and Metropolitan Adelaide Road Widening Plan requirements among others. It is arguable that the absence of publicly available material for applicants combined with the existing relationships between CoH staff and commonly used traffic consultant favour the current incumbents from a market access perspective. The absence of published assessment requirements may act as a barrier to entry for other traffic consultants into the South Australian market.

CoH acknowledged there is scope to develop publicly available materials to guide applicants through the CoH referrals process. The EPA and NVC guidance materials show that technical assessment requirements and process guidance materials can be developed to assist both applicants and consultants in relation to procedural and assessment requirements.

⁸³ Native Vegetation Council, *Guide for calculating a Significant Environmental Benefit under the Native Vegetation Act 1991 and Native Vegetation Regulations 2017* (July 2020) (NVC SEB Guide).

Information request 2.3: Commissioner of Highways guidance materials

What benefits to applicants and/or consultants would come from Commissioner of Highways publishing information about their referral procedures and assessment requirements? To what extent do the current arrangements act as a barrier to entry for traffic consultants seeking to enter the South Australian market?

Conclusions

The referral bodies have adopted significantly different approaches to their publicly available guidance for applicants. EPA publish significant detailed material about process, information requirements and references to other resources, including planning legislation. NVC also have substantial material available, for both applicants and accredited consultants, but not all of it is in the public domain. They have also invested substantially in material to guide accredited consultants to support consistency and transparency in assessments. CoH does not have an online presence aimed at supporting applicants with referrals.

Publicly available material that is easy to access and use by both lay applicants and accredited and professional consultants supports an efficient and transparent referral process, will support pre-lodgement arrangements and may mitigate the need for RFIs during the referrals process. The absence of publicly available assessment requirements, together with long-standing relationships between consultants and regulators can act as a barrier to entry for those seeking to enter the South Australian market. Better public material would also support an improved understanding by relevant authorities, particularly councils (assessment panels), augmenting their initial assessment of DAs during the 5-day validation period.

Information request 2.4: Publishing 'on request' referral body guidance materials

What benefits to applicants and consultants would come from publishing referral body guidance material that is currently only available on request? Would this additional transparency support a customer focus approach and reduce ambiguity about the requirement for, and content of, accredited or professional consultant's reports?

2.3.4 Information requirements, proportionality and risk

The Commission received some feedback in relation to what applicants consider to be delays and unforeseen costs in the development assessment process arising from referral body RFIs. The Commission observes that most if not all of the experience that was shared with the Commission relates to DAs assessed under the *Development Act*. Under the *PDI Act* a relevant authority will only have one opportunity to request the applicant provide additional documents or information in relation to the application.⁸⁴

While all of the in-scope referral bodies agreed that relevant authorities are confined by statute to a single RFI, they all noted that the *PDI Act* enables them to make more than one RFI if necessary.⁸⁵ In this context the Commission's focus is on the extent to which relevant authorities and referral bodies processes enable adequate initial assessment of DAs at the

⁸⁴ *PDI Act* s 119(3).

⁸⁵ *Ibid* 122(3).

beginning of the process to meet the relevant authorities single RFI within the statutory timeframe, and enable the referral bodies to minimise any further RFIs.

Environment Protection Authority

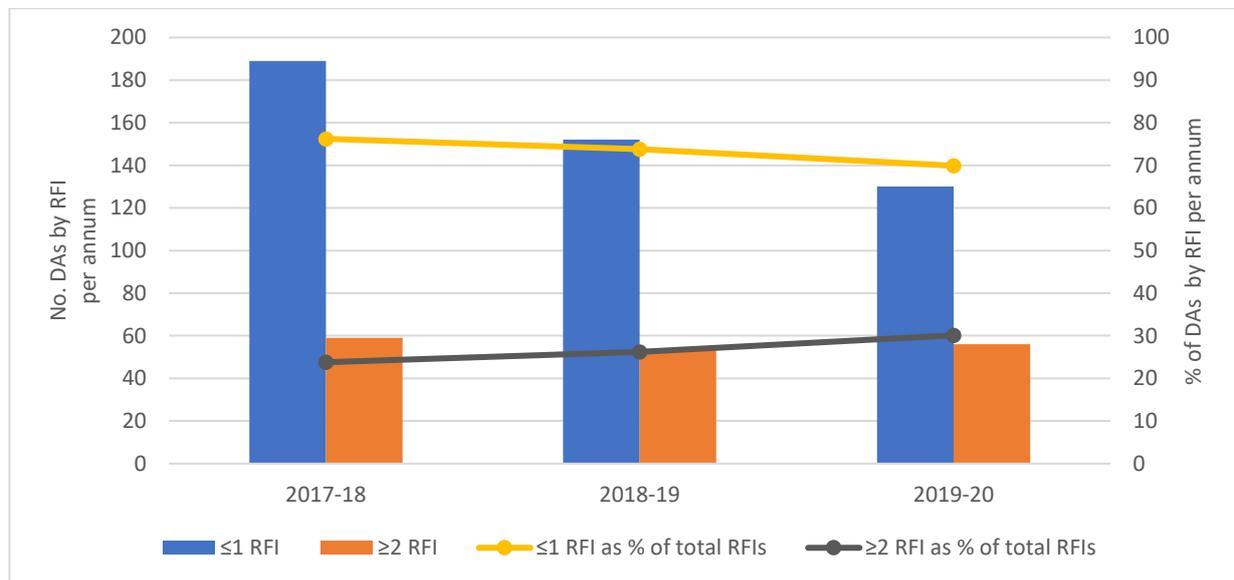
EPA’s supporting materials and pre-lodgement arrangements are intended to mitigate the need for RFIs by clarifying information requirements as early as practicable. Nearly 74 per cent of EPA’s referrals were completed with 1 RFI or less, with approximately one-third of all referrals not requiring any RFIs.

EPA’s wide regulatory remit has resulted in DAs being incorrectly referred to EPA or referred without enough information to enable effective assessment against its mandate. EPA has checks built into its internal referral response process to address these issues.

The Commission could not validate the views expressed by some applicants and their agents about the proportionality of EPA’s RFIs.

During the period 2017-18 to 2019-20 approximately 33.4 per cent of EPA assessments were completed with no RFI, 40.2 per cent of assessments were completed with one RFI during the assessment process and 18.4 per cent with two requests while 5.6 per cent, 1.7 per cent, 0.2 per cent and 0.5 per cent were completed with three, four, five and six requests respectively. The data indicated that under the *Development Act* slightly more than one in four DAs (26.4 per cent) required 2 or more RFIs. Figure 2.6 summarises EPA’s RFI data.

Figure 2.6: Number of development applications per RFI, 2017-18 to 2019-20



Source: Environment Protection Authority data provided to the Commission on 17 May 2021.

The Commission heard from planning consultants that RFIs from EPA can cause delays to the referral assessment process and be costly. Concerns raised included difficulty accessing EPA’s specialist advisers who could clarify aspects of the information requested, and costs incurred to generate the required reports from technical experts. The UDIA was concerned that:

... the EPA will seek a level of information with the development application that is more appropriately provided as part of the EPA licencing process. Advice from the EPA as to what is required for the EPA licence is useful at the Development Approval stage but should be without delaying the issuing of Development Approval.⁸⁶

The new site contamination referral will be the subject of further consultation with EPA.

During the assessment stage if the DA coordinator, in consultation with specialist advisers, determines that the information provided as part of the initial review is insufficient to effectively assess the DA further information may be requested via the SA Planning Portal with a copy to the nominated contact at the relevant authority (refer figure 2.3).

It is a common practice that EPA liaises directly with the applicant and/or representative to clarify aspects of the DA or explain why specific information is requested. These engagements are formally recorded as part of the DA assessment process, and the relevant authority is updated.

EPA advised the onus is on the applicant to provide any necessary plans, details, reports or modelling that may be considered necessary and relevant to undertake the assessment against section 57 of the *EP Act*. The *PDI Act* provides the referral body with the opportunity to request from the applicant any additional documents or information (including calculations and technical details) that the prescribed body may reasonably require to assess the application.⁸⁷

Some applications are complex and require more detail than first provided or questions arise as the assessment process progresses. The *PDI Act* clarifies that requests must be reasonable, which is open to argument by both parties. Open and transparent communication between the parties at this early stage is important to ensure this provision is construed from a best practice regulatory governance perspective.

EPA advised the Commission it is not uncommon for DAs to be referred without adequate information (e.g. key information or documents missing and/or not to the level of detail needed) required to determine the appropriate triggers and undertake a proper assessment. This situation occurs despite EPA's efforts to provide all the relevant information on its website providing staff to clarify queries, and results in RFIs being needed.

Insufficient information may also result in referral by the relevant authority to the wrong referral body. Sometimes, this means that the referral process will have to cease and be re-commenced by the relevant authority.

Some applicants will choose to have a planning consultant prepare and submit their DA which can be beneficial for complex DAs. The planning consultant will act as the applicant's agent, including for RFIs, and for coordinating the preparation and provision of any technical reports that may be required. EPA will specify if reports from specific specialists (e.g. an acoustic engineer) are required.

⁸⁶ UDIA submission (n 49) 3.

⁸⁷ *PDI Act* (n 1) s 122(3)(a).

Native Vegetation Council

Allowing for the recency of the planning reforms, introducing native vegetation clearance as a statutory referral has seen improvements in process transparency, information requirement proportionality and applicant management. The requirement to use trained accredited consultants, and DEW's improvements to the materials they are required to use supports consistent assessments and mitigates the need for additional information.

NVB assesses the accredited consultant's report using a risk-based approach to determine whether clearance follows the requirements of the *NV Regulations* and whether it is seriously at variance with the principles of clearance under the *NV Act*.

The quality of the accredited consultant report determines whether there is a need for an RFI. DEW advised that since the introduction of statutory native vegetation referrals there have been nine referrals to NVC. Of these, there have been no instances of stopping the clock for an RFI. The only exception was where no accredited consultant report was provided. Data on the number of times and the duration for each 'stop the clock' instance because of a request for information was not recorded by the NVC before the introduction of the *PDI Act* as the NVC did not have an active statutory referral.

DEW advised that given the level of training accredited consultants need to understand NVC's assessment requirements it is expected that the number of RFIs for code assessed development will be low.

The Commission has not heard of any onerous or disproportionate requirements in terms of data reports or RFIs supporting clearance consent approvals. As data reports are written in accordance with a DEW-supplied template this, along with the requirement to use accredited consultants, may help to mitigate the need for RFIs.

The accredited consultant report prepared for lodgement with the DA and the NVC referral response is the same report used for the subsequent native vegetation clearance assessment under the *NV Act*. Applicants need not provide any additional report for a native vegetation approval or pay an additional lodgement fee.

DEW advised that the information provided during the referrals process by the applicant is in most cases sufficient to support the subsequent approvals process undertaken by the NVC for clearance consent. Matters approved during the referrals process are not reconsidered during the *NV Act* assessment process, meaning that in practice an approved DA referral response will not be changed during the subsequent clearance consent assessment.

Commissioner of Highways

CoH works closely with applicants and their consultants to ensure the required information is provided early in the process and is proportionate to assessment requirements. Traffic consultants are an essential part of the applicant's capability to produce an effective application for assessment. Taken together these factors mitigate the requirement for additional information.

CoH adopts a risk-based approach to determine if an RFI is required from an applicant. This involves consideration of three key risk criteria: the undesirable outcome of the state inheriting

the risk of public road safety, increased infrastructure upgrade costs or an increase in operational costs.

CoH advised it uses RFIs when:

- the matter requiring clarification is fundamental to the development and its assessment;
- essential information required for an effective assessment is not provided – either partial information is received or none at all e.g. applications for moderate to complex land divisions or developments which have not included traffic assessments, which will have a material impact on access to the road network; and
- amended plans do not address specific departmental requirements.

TAS staff consider information requirements against the applicable transport overlays in the Code and consult with internal CoH specialist advisers on the relevance of state traffic engineering and transport planning guidelines and standards.⁸⁸

There is no statutory scheme for accredited professionals to support information for assessment by CoH. The current industry and professional requirements for these practitioners are considered satisfactory across the wider transport sector. CoH advised that by using consultants that understand the CoH assessment expectations applicants are likely to experience a more efficient and effective referral response process. The Commission considered the implications of the absence of publicly available assessment information and using consultants in section 2.3.3.

CoH advised that minor clarifications or corrections are addressed by contacting the applicant directly to resolve the matter quickly. Sometimes issues are addressed by conditioning the referral response, indicating to an applicant they need to meet design requirements in accordance with department standards. On-road works are addressed in the project management phase and TAS staff pass the relevant information to the project management team at DIT, off road designs will come back to TAS for further input. This approach enables CoH to provide planning consent through the referral response subject to further minor work being addressed post-DA, giving the applicant certainty earlier in the process and improving the speed of the application.

The number of RFIs that were made by the CoH increased from 90 to 121 from 2017-18 to 2019-20.⁸⁹

The Commission has not heard of any onerous or disproportionate requirements in terms of data reports or other materials CoH requires for assessment. CoH advised they often work closely with the applicants to ensure the required information can be provided in a timely and reasonable manner. This was validated by the LGA who indicated:

*The Commissioner of Highways' information requirements have historically been generally reasonable, and response times and access to staff with relevant expertise appropriate. Longer timeframes are generally related to issues of significant traffic engineering complexity, which can have flow on effects to require reworking of other aspects of a development proposal.*⁹⁰

⁸⁸ For example see Australian Standard AS1742 series; Manual of Uniform Traffic Control Devices, Australian Standard AS/NZS2890 series; Parking Facilities, Austroads Guides and Contract Master Specifications, among others.

⁸⁹ PLUS data provided to the Commission on 3 May 2021.

⁹⁰ Local Government Association submission (n 34) 7.

The Commission would like to hear more from proponents on CoH information requirements.

Conclusions

Overall, the referral bodies indicated they have a process to determine whether requesting additional information from applicants is necessary to undertake their assessment of the DA. Each regulator undertakes an assessment of information provided against information required to determine if a referral response can be prepared against the relevant regulatory mandate. Available data did not indicate a pattern of several RFIs being required by any of the referral bodies. Only EPA were able to provide the Commission with data in relation to RFI's on a DA basis enabling effective analysis.

It is too early to form a view about whether the statutory limit of one RFI for the relevant authority in the first 10 days of the referral will minimise subsequent RFIs made by referral bodies.

The combination of the use of consultants aware of referral body information requirements and publicly available information about same may act to minimise the requirement for RFIs during the assessment phase. The new 5-day verification period by the relevant authority for Code assessed development may also contribute to ensuring appropriate information is submitted with the DA before it is referred.

The Commission did not identify any specific examples of disproportionate requests for information by referral bodies for Code assessed DAs.

2.3.5 Capability and resources

Environment Protection Authority

All staff involved in referrals possess relevant planning, scientific or other qualifications. Staff have substantial experience in assessments against EPA mandates and preparing responses. PIAB staff call on internal specialist advisers as required to support referral responses.

EPA advised that their staff have significant experience, some more than ten years, working with development referrals, and have extensive knowledge of what is legally required to undertake an effective referral assessment. Technical specialists are involved in referrals on a needs basis. Staff attend training provided by professional organisations, such as the Planning Institute of Australia, regularly to maintain and improve their capabilities. EPA aims to be an effective and trusted regulator, striving for excellence in its capability and performance.⁹¹

PIAB staff who coordinate and finalise referral responses have planning qualifications and are classified at Professional Officer level 2 (PO2) or above. Specialist advisers are usually classified at the PO2 and above classifications and hold science, natural resource management and/or engineering qualifications. Approximately seven of EPA's specialist advisers hold a Ph.D. in science. Specialist advisers generally provide referral-related advice on an irregular basis because their primary roles relate to industry regulation or environmental monitoring and investigations.

⁹¹ EPA Strategic Directions (n 80).

Referral response workload is managed by the DA coordinator who allocates DAs to staff, who are the primary contact point for applicants.

Native Vegetation Council

The NVB possesses capability and qualifications in-house commensurate with business requirements under the NV Act and DA referrals. Staff outputs and progress are monitored and reported on. Capability improvements resulted from reforms implemented in 2016. The work undertaken by accredited consultants on behalf of applicants is an important part of the overall capability required to complete effective referral responses.

NVB assessment officers are involved in referral responses under the *PDI Act* and assessments for native vegetation clearance under the *NV Act*. Assessment officers are also involved in site visits, client management and liaison with external bodies such as landscape boards. Assessment officers also provide training to local councils, accredited consultants and other public and private organisations such as SA Water, SA Power Networks and the Department for Infrastructure and Transport. Assessment officers are public-facing staff that manage phone enquiries to the NVB.

For the 2020-21 financial year there are eight positions (equivalent to 7.2 FTEs) within the NVB who are responsible for the preparation of referral responses and assessment of *NV Act* clearance applications. To date, referral responses constitute a small proportion of the work conducted by these assessment officers.

NVB staff retain expertise to undertake the functions of accredited consultants e.g. site visits, data report writing and managing DA applications with proponents. These skills are still required occasionally, subject to the scale of the work being undertaken and what resources are available.

The professional standards and experience of accredited consultants is an important part of the overall capability relevant to preparing NVC referral responses. Accredited consultants are trained in relation to introducing statutory native vegetation referrals in June 2020. Training has been conducted for existing accredited NV consultants regarding the changes with implementing the Code. Consultants are trained in the native vegetation assessment process for DA referrals and in relevant reporting requirements.

Commissioner of Highways

The Transport Assessment Section is a small division of qualified staff that draw on DIT specialist advisers to support referral responses as required. The use of industry accredited traffic consultants is a key part of the overall capability required to support effective referral responses.

CoH's assessors who coordinate and finalise referral responses have planning and/or engineering qualifications, and are supported through internal engagement from a wide range of specialist areas and functions in DIT, including strategic transport planning, traffic network management and design. For that group contributing to referral responses is an ancillary part of their role.

Similar to the accredited consultant regime applicable to native vegetation referrals, traffic consultants are an essential part of the capability required to produce an efficient and effective referral response for CoH. Traffic consultants are generally also members of the departments re-qualification process for contractors undertaking planning and construction work on DIT managed projects. The Commission discussed traffic consultant qualifications in section 2.3.5.

Conclusions

The hub and spoke model used by all three referral bodies draws on two distinct skill-sets and capabilities to support referral responses: planning-related skills and experience to coordinate the assessment, supported by in-house specialised expertise in specific scientific and engineering disciplines where required.

Using professional or accredited consultants is also an important part of the overall capability contributing to an effective referral response. This is most prominent in NVC and CoH referrals where statutory mandated and professionally credentialed consultants are used respectively. Applicants also often use specialised industry consultants to support the provision of information to meet requirements in relation to EPA referrals.

The Commission did not identify any specific workload or resourcing issues adversely affecting the efficiency of the referrals response process.

2.3.6 Post-development assessment licensing and approvals

Environment Protection Authority

EPA provides continuity for applicants between its referral response and licensing activities. This is achieved through involvement of licensing staff in the referral response, in records management connecting both processes, and in collaboration with relevant authorities where required. The EP Act and the PDI Act work in conjunction to support continuity between prescribed development activity and activity requiring environmental authorisation.

Consideration of operating approvals and licensing is an integral part of EPA's referral assessment process. Although there is a clear separation between the DA referral process and environmental licence, continuity between the two processes is achieved through internal consultation, pre-lodgement records, use of the Aspect and Impact Register, and involvement of Compliance Branch during preparation of the referral response.

Development activity subject to a referral to the EPA may also require an environmental (operating) authorisation under the *EP Act*. A person can only undertake a prescribed activity of environmental significance if authorised by an environmental authorisation in the form of a licence.⁹² This legal requirement allows for EPA to authorise activities of environmental significance through a system aimed at the control and minimisation of pollution and waste.⁹³

An environmental authorisation can be granted in certain circumstances where a person has been granted development authorisation under the *PDI Act* and has complied with the conditions imposed by or directed by EPA.⁹⁴ If an application for an environmental

⁹² *EP Act* (n 46) s 36(1).

⁹³ *Ibid* s 13.

⁹⁴ *Ibid* s 47(2).

authorisation under the *EP Act* involves an activity that requires a related approval under the *PDI Act*, EPA must defer its determination of the application until it receives notification that the applicant has obtained the relevant development authorisation. However, EPA may refuse environmental authorisation if not satisfied that the applicant is a suitable person to be granted the authorisation.⁹⁵

EPA advised that when it receives a licence application for an activity that required a DA response EPA's Compliance Branch check for compliance with DA-related conditions (from the referral response). This normally includes a request for the applicant to evidence compliance and a site visit. Licences are not issued until the applicant demonstrates compliance with the conditions. The relevant authority under the *PDI Act* is responsible for ensuring compliance with conditions; however EPA will consult with the relevant authority in relation to non-compliance.⁹⁶

Native Vegetation Council

While the referral response and subsequent clearance consent under the NV Act are separate processes, they rely on the same applicant information. The Commission received no feedback about the potential for delay in achieving both approvals. Compliance and monitoring arrangements generally rely on reporting by the general public to identify non-compliance.

Before the introduction of the new statutory native vegetation referrals, advice regarding native vegetation clearance was provided on an ad hoc basis to applicants at the discretion of the relevant authority. Historically, approved DAs only included a note reminding applicants to seek clearance approval under the *NV Act* once planning consent had been approved.

Clearance consent under the *NV Act* is typically issued with a range of conditions including discharge of SEB obligations prior to clearance. The Commission has not yet heard of any significant issues regarding post-planning consent conditions or compliance matters being imposed following development approval for performance assessed development.

DEW advised the assessment process under the *NV Act* to approve native vegetation clearance does not reconsider the DA outcome from the referrals process. Rather, the subsequent *NV Act* application to clear native vegetation will consider matters separate to those addressed through the DA including:

- micro-siting of elements of the development;
- ongoing management of retained or rehabilitated vegetation post clearance approval; and
- the achievement of the SEB.

Table 2.4 summarises the differences in information requirements to satisfy the application for development approval under the *PDI Act* and the information to requirements for clearance consent approval under the *NV Act*. The only difference in the content of the accredited consultant report for the two approvals is the achievement of the SEB.

⁹⁵ Ibid s 47.

⁹⁶ *PDI Act* (n 1) s 213.

Table 2.4: Requirements addressed by applicant for referral direction (PDI Act) and for clearance consent approval

Requirement in application	PDI Act Referral	NV Act Clearance Consent
Overlay and mapping	x	x
Vegetation assessment	x	x
Threatened species assessment	x	x
Mitigation hierarchy	x	x
Principles of clearance	x	x
Risk assessment	x	x
Achievement of significant environmental benefits		x

Source: Native Vegetation Council, *Guide for Applications to Clear Native Vegetation under the Native Vegetation Act 1991 or the Native Vegetation Regulations 2017 and the Native Vegetation Assessment Process, A Guide for Applicants*.

DEW advised that any further streamlining of the referrals and NV Act clearance approvals processes would need legislative change. The Commission will consider and consult further on the costs and benefits of legislative change required to streamline the two processes.

Sometimes compliance with clearance consent under the *NV Act* will be checked by the NVB as a result of a member of the public reporting native vegetation clearance. The coordinator compliance within the NVB investigates these reports and this may include assessing compliance with clearance consent conditions.

Commissioner of Highways

CoH's post-referral approvals take the form of conditions or notes in the referral response that require an applicant to meet specified on-road design requirements in accordance with relevant standards. This approach provides certainty for the applicant in relation to build/construct requirements during the planning consent phase of a development.

CoH advised that post-development assessment matters form part of the departmental project management process for the delivery of road works. That process includes formal monitoring to ensure that a project meets departmental standards and requirements. This process relies on several different approaches including the use of deeds, permits, related compliance/assurance methodologies and appropriate financial security to ensure the works are undertaken in accordance with approvals and conditions.

These arrangements are recorded as a condition or a note in the referral response to the relevant authority. Examples of permits referenced in DA conditions include requirements for a traffic permit from DIT to undertake works on, near or adjacent to arterial roads.

CoH advised it does not undertake or resource compliance with planning-related approvals or conditions. Where issues are raised in relation to a specific development DIT liaises directly with the relevant authority to assist them to undertake any necessary planning-related compliance actions.

Conclusions

EPA and CoH consider post-planning consent licensing and approvals in their referrals' response process. This is achieved by consulting with relevant specialist advisers and compliance staff during the referrals assessment and conditioning that approval, or through other record keeping mechanisms. This provides the applicant with certainty on expected operating approvals that are required to be obtained subsequently.

The native vegetation clearance approval required under the *NV Act* uses effectively the same information that accompanies the DA. This subsequent approval does not revisit the planning consent provided for in the referral response but is used to determine the SEB and considers additional site and vegetation management matters pertaining to the proposed clearance.

2.3.7 Performance monitoring and continuous improvement

Environment Protection Authority

EPA demonstrated a culture of continuous improvement through review of referral processes and structural changes. IT solutions manage and monitor work performance. EPA publishes its commitments to improving performance. Internal and external training opportunities are available to staff to maintain industry knowledge. EPA used the state planning reforms as an opportunity to remove low-risk activities from referrals to enable a focus on higher risk activities.

EPA's performance and continuous improvement arrangements are set out in several corporate documents including its Planning Framework, Corporate Plan and annual report.⁹⁷ EPA's Strategic Directions sets EPA's direction for a four-year period and includes commitments to enable innovative and sustainable industry practices, and to be an effective and trusted regulator, striving for excellence in its capability and performance⁹⁸.

EPA acknowledges that established industries are modernising, and new industries are emerging that require the use of innovative technologies. EPA works with research bodies and industry to learn and gain new knowledge as a way of ensuring ongoing improvement of its regulatory role.⁹⁹

EPA advised that as part of the state planning reforms it removed 13 lower-risk activities that required referral and that non-complying referrals in the Mt Lofty Ranges and River Murray Water Protection Areas, were replaced with a specific list of referrals for activities with a high risk of polluting water.¹⁰⁰ This is an important step supporting a risk-based approach, and will enable EPA to focus its resources on higher risk development activity.

Staff working in PIAB are encouraged to attend training offered by the Planning Institute of Australia, and specialist training provided by industry to maintain knowledge currency across industry sectors. Internally, staff are given the opportunity to work with a range of DA

⁹⁷ Environment Protection Authority, *Corporate Plan (2020-21)* <https://www.epa.sa.gov.au/files/14642_corporate_plan_2021.pdf>.

⁹⁸ EPA Strategic Directions (n 80).

⁹⁹ Ibid

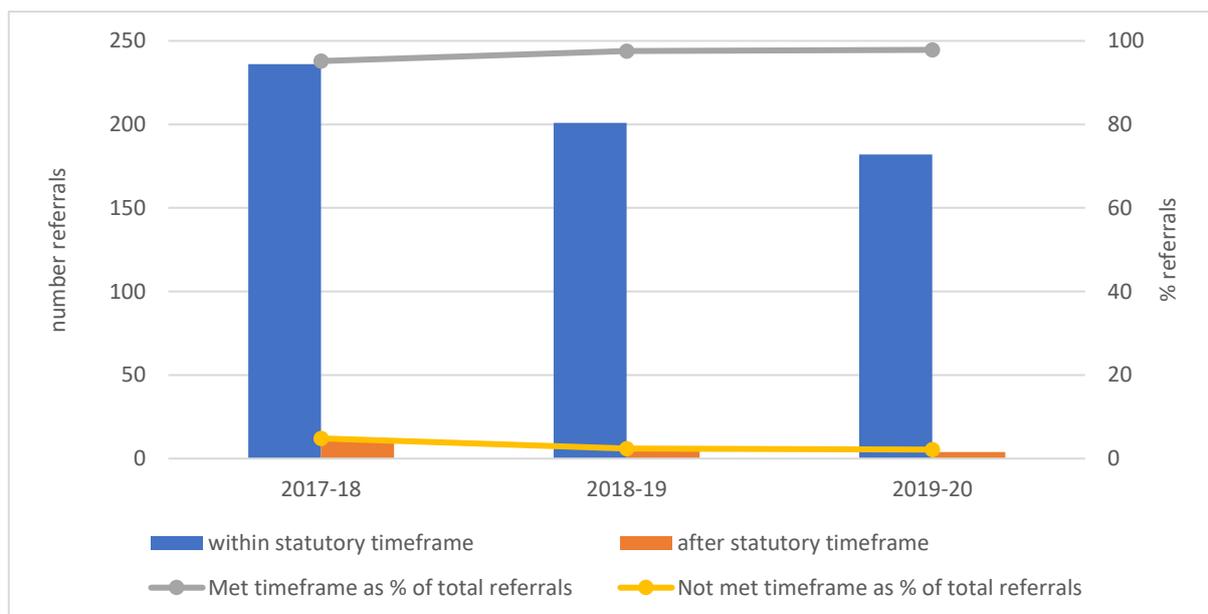
¹⁰⁰ Specific types of land division, function centre and restaurants, dwelling, tourist and worker's accommodation and any development that generates human wastewater from a peak loading capacity of more than 40 persons (or more than 6,000 litres/day) that are not connected to a community wastewater management system or sewerage infrastructure.

applications, including Crown and impacted assessed development, to build their knowledge and experience in relation to developments of varying complexity and risk.

EPA advised the PIAB was established as a function in the mid-90s to centralise planning-related functions. In 2005 concerns were expressed by the EPA Board about EPA finalising 60 per cent of its DA responses within statutory timeframes. In response, EPA reviewed its development referrals processes and restructured to bring environmental planners together to achieve a higher rate of DA responses being finalised within statutory timeframe.

EPA reports on its referral response performance in its annual reports, which include the total number of referral responses prepared, the number of advice or directed refusals, and a summary of significant referral activity, including major projects. Since 2006 EPA has adopted a performance target of 100 per cent for referral responses to be completed within statutory timeframes. This is reported on quarterly and annual completion rates have been 95.16 per cent in 2017-2018, 97.57 per cent in 2018-2019 and 97.85 per cent in 2019-2020. EPA advise reasons for not completing referrals within the statutory timeframe include the complexity of the issues to be considered in the 30 day timeframe. Figure 2.7 shows referral response timeframe performance for the last three reported financial years.

Figure 2.7: Number and percentage of EPA referrals that met the statutory timeframe, 2017-18 to 2019-20



Source: Environment Protection Authority data provided to the Commission on 17 May 2021.

The PIAB advised it has not recorded any formal complaints about the services it has provided in recent years. Occasionally enquiries are made about the time it is taking for a referral to be considered and a response to be provided. EPA has a system dedicated to managing complaints about its services. Complaints are managed on an ad hoc basis by senior EPA staff. During that last 15 years, there have been no appeals against EPA directed or advice refusals of DAs, or EPA directed or advice conditions of planning consent for DAs referred under the *Development Act*.

Native Vegetation Council

DEW demonstrated a commitment to continuous improvement in the form of organisational change, a review of its effectiveness as a regulator and consequential changes to guidelines and other governance arrangements. Operational performance regarding referral response activity is monitored, but not published, and there have been deliberate changes to develop an outcome focused culture.

A major review of the *NV Regulations* was undertaken in 2016, with remade regulations coming into effect on 1 July 2017. The revised regulations consolidated several existing exemptions into activity-based regulations and mandated a risk-based approach to assessment while clearly identifying NVC assessment criteria.

As part of the same regulatory reform process NVC undertook a substantial review of the SEB Policy. The policy was updated to reflect best practice in offsetting vegetation clearance, specifically incorporating relevant principles of the Business and Biodiversity Offset Program (the program operates internationally across 75 organisations, companies, financial institutions and government agencies).¹⁰¹ The revised SEB Policy includes substantial change to the metrics used to determine the SEB or offset obligations of individual clearances.

Those metrics aim at consistency by measuring biodiversity value based on a range of quantitative factors including rainfall and extent of clearance (i.e. partial clearance or permanent clearance). The object of these changes is improved transparency and equity in determining SEB requirements and was accompanied by amendment to the metrics and calculation methods for SEB introduced in 2019. Under the previous policy, offset requirements were determined using a method based on land value and condition of vegetation which led to inconsistent outcomes.

Other significant policy reforms include:

- remaking of the Fuel Hazard Clearance Guidelines, which relate to clearance that is permitted in relation to fire protection and safety, both with or without CFS approval;
- remaking the Roadside Vegetation Guidelines, which included a 12-month trial period for local government. The new guidelines provide councils with more flexibility in managing roadside vegetation to better reflect their operational activities; and
- introduction of Tree Hazard Guidelines to provide local government with the capacity to approve removing trees that potentially present a safety risk, avoiding delays in obtaining arborist reports and NVC approval.

DEW advised cultural changes and structural reforms resulting from a functional review undertaken in 2015 have contributed to improvements in timeliness, the reduction in applicant complaints and the efficiency of the native vegetation function. Before the reforms, the clearance approval times for some applications could be up to five months. An approval time of ten weeks is now specified by the NVC with a commitment to handling 80 per cent of approvals within this time frame.¹⁰² Completion rates on statutory timeframes are not available for NVC as it has only been a referral body since September 2020.

¹⁰¹ Business and Biodiversity Offsets Programme, *Biodiversity Offset Design Handbook* (2009) <<https://www.forest-trends.org/wp-content/uploads/imported/biodiversity-offset-design-handbook-pdf.pdf>>

¹⁰² Native Vegetation Council, *Native Vegetation Council Service Standards* (11 March 2020).

While policy reviews and regulatory reform constitute a large part of continuous improvement at DEW/NVC there has also been an internal focus on culture, leadership, training, role clarity and improving publicly available information with a customer-centred focus. Reforms include the establishment of client response timeframes, development of applicant engagement checklists, codification of assessment criteria for approvals and use of templates for improved consistency.

The NVC undertakes continuous improvement initiatives under its governance program. This has included modification of reporting templates and development of a governance framework to foster better decision making. The NVC Charter and governance procedures to support delivery of the Council's work program are reviewed when new appointments are made to the Council.

The reporting generated by the NVC on achievement of timeframes, operational risks and status of applications is provided to the Executive Director of the Environment, Heritage and Sustainability Unit monthly. The reporting shows performance of individual assessment officers and the complexity of the assessments they are undertaking.

The Commission considers that public reporting of key performance indicators in relation to NVC's referral response function would add transparency to the referral response function and provide additional accountability. This approach aligns with better-practice regulatory governance principles for accountability structures.¹⁰³ This would also augment anticipated reporting improvements expected from ePlanning for Code assessed developments.

Commissioner of Highways

CoH has undertaken internal reviews of business processes leading to process improvements and improved engagement of relevant authorities, additional transparency of RFIs and a substantial reduction in referral response timeframes. CoH will rely on the ePlanning system for data and analytics instead of their in-house workflow system.

CoH advised the TAS regularly reviews management and reporting arrangements to improve its processes and performance and has undertaken several internal administrative reviews including:

- a review of 'informal' referrals from local government in 2018-19 that revealed CoH was receiving incorrectly classified referrals in relation to land division applications and referral based on incorrect triggers. This triggered guidance and advice to relevant authorities to ensure the correct categorisation and triggers were applied to DAs; and
- a review of RFI practice in 2020 which led to an increase in the number of formally registered RFIs and improved transparency with relevant authorities and applicants, and better response timeframes. Data provided by PLUS supports this improvement indicating the total number of referrals responded to within the statutory timeframe by CoH has increased in 2020 compared to the previous financial years.

As part of the state planning reforms CoH undertook a comprehensive review of its referral processes, resulting in the introduction of a complete suite of transport overlays in the Code.

¹⁰³ OECD Best Practice Principles (n 44) ch 4.

Prior to this, CoH referral triggers were made to CoH through the *Development Regulations* under the *Development Act 1993*.

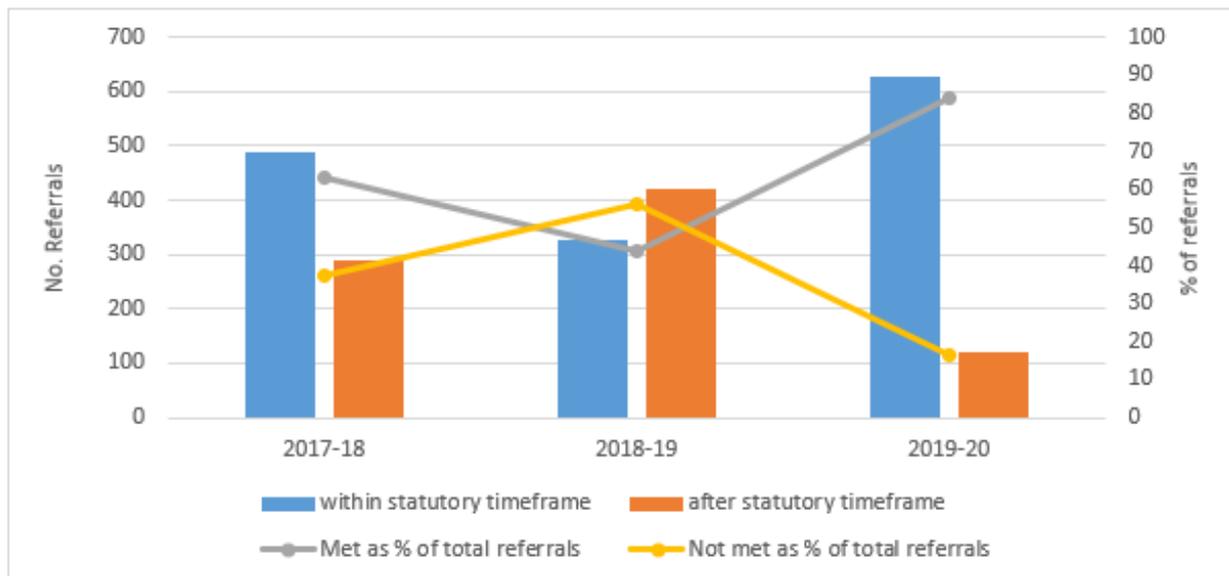
Data provided by CoH indicated it has had only one appeal of referral responses for direction in the last ten years and matters most likely to be appealed are other development issues as a result of a change to the original proposal.

CoH advised it uses a monitoring and management spreadsheet and workflow software, LUDREM, which reports on:

- number of DAs for referral response received;
- number of DAs for referral response responded within statutory time frames; and
- number of RFIs.

Figure 2.8 shows the total number of referrals responded to by CoH within the statutory timeframe against the total number of referrals for which a response was provided after the statutory timeframe during the period 2017 – 2020. From 2018-19 to 2019-20 the total number of referrals responded to by CoH within the statutory timeframe increased by almost 40 per cent.

Figure 2.8: Number and percentage of CoH referrals that met the statutory timeframe, 2017-18 to 2019-20.



Source: PLUS data provided to the Commission on 6 April 2021.

The Commission received quarterly indicator data from CoH in response to its information and data request which was in a different format to that provided by other referral bodies. The information provided did not enable detailed analysis. The inconsistent response to the Commission's information requests has limited the analysis of data in some circumstances. To reduce the risk of irregularities the Commission has used the centralised data provided by PLUS. This may be evidence of data shortcomings in an area where data-based oversight is important.

CoH advised that elements of the LUDREM system will still be used in the short term for administrative features but it will rely on the ePlanning system to provide improved reporting for fields the current arrangements do not capture e.g. number of referrals to other authorities

or agencies, timeframes for comment and direction given (including pre-lodgement engagements with referral bodies). The CoH annual reporting is incorporated into the annual report for DIT.

Conclusion

All three referral bodies demonstrated notable organisational and process improvements over time. These took the form of a combination of internally motivated reviews and reforms and using externally triggered regulatory reviews to give effect to changes within the organisation, including the state planning reforms.

EPA and DEW indicated they use existing governance arrangements and select data indicators to inform continuous improvement activity. That said, the Commission did not observe a dedicated, proactive continuous improvement cycle to identify and report on improvement. Reforms generally arose from responses to issues-based triggers and external reviews.

To varying extents, all three referral bodies have data systems in place that could be leveraged to inform a structured continuous improvement cycle.

3. Referrals and major projects

3.1 Projects of state significance

Several classifications of development under the *PDI Act* can be characterised as being of state significance. They include impact assessed development (major projects declared by the Minister or prescribed by regulation), Crown development (undertaken on behalf of a state agency), and restricted development (prescribed by the Code). The Commission has focused its consideration of referral arrangements applicable to state-significant projects on impact assessed development as declared by the Minister, previously known as major projects under the *Development Act*. In this section impact assessed development (declared by the Minister) and major projects are used interchangeably.

This chapter considers the importance of major projects to the state, the effect of the state planning reforms on major project assessment, the role of referral bodies in assessing major project applications, and feedback received so far from interested parties. Further areas for engagement and analysis in relation to impact assessed development to include in the Commission's final report are also flagged.

3.1.1 The importance of major projects to the state

Major projects are conceived and driven by the private sector. They can have a significant impact on the economy and jobs as they are generally funded through private investment, contributing to gross domestic product. The private sector stands to benefit financially and otherwise from a successful development; proponents and their investment partners also bear the risk. They seek development approvals as quickly and as effectively as possible.

Significant infrastructure and other strategic developments¹⁰⁴ are also important to state growth and productivity and have:

*...a fundamental role in supporting growth through direct investment and improved productivity and access to the markets and jobs...[and]...a role to facilitate and catalyse growth where there is evidence that it will improve productivity, open new markets and grow the economy.*¹⁰⁵

The Commission received considerable feedback about major projects, including infrastructure projects and other strategic development, much from the private sector regarding the impact of the referrals process on achieving an efficient and effective development approval, including:

- concerns around timeliness in progressing applications;
- a lack of understanding by the state of the impacts on business (e.g. holding costs, redirected investment) of the time taken to undertake assessments;
- unclear and irregular communication between the relevant authority and the proponent (particularly about expected approval timeframes); and

¹⁰⁴ Infrastructure developments are usually classified as either Crown developments or impact assessed development as defined under the *PDI Act*.

¹⁰⁵ Infrastructure SA, *20-year State Infrastructure Strategy* (Report, May 2020) 10

<<https://www.infrastructure.sa.gov.au/__data/assets/pdf_file/0006/197511/20-Year-State-Infrastructure-Strategy-Full.pdf>

- misalignment of government policy objectives and approvals for innovative and strategic major projects in the state, among other things.

Information request 3.1: Major project assessment and the state's interest

Does the current major project assessment process reasonably enable the state to make a development decision that effectively balances regulators' input and the economic interests of the state?

3.1.2 Major projects and the state planning reforms

The Commission was advised that 'There is not considered to be any material changes arising from the reforms in relation to referrals for impact assessed developments'.¹⁰⁶ The Commission's assessment is that this is so because the assessment process for impact assessed development is, subject to some declaratory changes under legislation and changes to governance arrangements, very similar in a practical sense to the process for assessing major projects under the *Development Act*. PLUS advised the Commission that as at 25 May 2021 no impact assessed development applications have been received under the *PDI Act*.

The unchanged referral arrangements for major projects contrasts with the substantial changes to referral processes introduced for Code assessed development explored in chapter 2. The referrals process for Code assessed development is heavily prescribed by the *PDI Act*, *PDI Regulations*, the Code, referral body legislation and planning and referral body policy guides. One of the most significant changes is the power of direction referrals bodies have for most development activity types.

The role of referral bodies for an impact assessed development proposal is more akin to consultation sought by the Minister as one of several inputs to support the state's assessment of a proposal. The next section summarises the feedback received from interested parties. This provides a context for the Commission's preliminary views of the state as the relevant authority.

3.2 What the Commission heard: industry and proponent perspectives

This section sets out the feedback received from industry, business and other interested parties regarding major projects assessment processes. As discussed in section 1.5, few stakeholders were prepared to be cited or provide the Commission with a formal submission. The commonly expressed reason requesting confidentiality was a concern that comments made could be construed as being critical of state regulators and risked prejudicing or disadvantaging their business. The Commission has not considered any evidence in this context that indicates actual prejudice to any proponent or their agent arising from feedback provided.

The perception that there may be adverse consequences for providing feedback to state regulators is a cause for concern. Among other explanations it may reflect an absence of transparency and checks and balances in the assessment process and perhaps the absence of a pathway available for proponents and their agents to provide feedback safely.

¹⁰⁶ Planning and Land Use Services, *Response to South Australian Productivity Commission Information Request – Major/Impact Assessed Development* (25 May 2021) (PLUS response).

Information request 3.2: Improving major project assessments through proponent feedback

How do proponents and their agents currently provide feedback on the major project assessment process? How is that feedback considered? To what extent does it influence regulator practice in assessing developments? What arrangements are in place in other jurisdictions that provide an effective feedback loop to help in improving regulator practice regarding major project assessment?

The remainder of this section summarises feedback received under common themes and invites further feedback, validation of these views by way of evidence or views, and evidence of counter views for consideration. Some of the feedback received was expressed as relating to regulator practice generally.

Pre-lodgement and early engagement

Case managed pre-lodgement services are available for eligible developments. This option helps prepare the development application with all key information provided and is intended to reduce the assessment time of development proposals. It can provide certainty by resolving issues upfront, and importantly may negate the need for referrals during assessment of the development application where a pre-lodgement agreement is reached.¹⁰⁷

Feedback the Commission received in relation to the value of pre-lodgement arrangements included:

It is our experience that direct engagement, particularly early engagement, is very helpful for applicants in avoiding or mitigating impacts to native vegetation. Early engagement can reduce costs and waiting times for applicants later on in the development approval process. It also means that development approval includes native vegetation consideration, rather than leaving it aside to be resolved after development approval.¹⁰⁸

Referral bodies can differ in their approach to pre-lodgement as they are not mandatory, and whether to undertake formal or informal discussions is at the discretion of the relevant referral agency.

All three referral bodies use pre-lodgement and support early engagement for applicants, and with native vegetation and CoH referrals, accredited consultants handling the DA. CoH advised that they have informal discussions with developers and, while not all manifest as DAs, they are useful in providing the proponent with early advice about a regulator's assessment requirements which can inform feasibility and cost implications for the proponent.

Feedback from consultants indicated that while early engagement is good practice, it is not always productive and can be a waste of time for a proponent's agent, adding costs and delays for the proponent. This can be because of staff changes at the referral body requiring the proponent to bring new assessors up to speed, different advice being provided by different representatives of the same referral body, and some referral bodies being reluctant to engage in pre-lodgement arrangements, among other things.

¹⁰⁷ PlanSA, *Pre-lodgement service* (Web page, 9 December 2020).

<https://plan.sa.gov.au/development_applications/case_management_services/pre-lodgement_service>

¹⁰⁸ Murraylands submission (n 33) 6.

Matters of inconsistent advice from the same referral body and unnecessary duplication of effort by the proponent can indicate poor regulatory practice. Simple strategies to avoid these issues can be put in place by referral bodies, for example, hand over arrangements if planned absences occur and corporatisation of engagement records including advice regarding the current status of information requirements.

Requests for Information

Major project proponents have indicated that referral bodies can be unclear about the level of detail required in the proponent's information to enable the referral body to effectively assess development applications against their mandate. This can lead to subsequent RFIs and the requirement for a proponent to engage additional specialised consultants to produce additional reports. Being clear about what information is required to assess a proposed major project earlier in the process may minimise re-work and reduce the risks of additional holding costs to the applicant.

While the information and data requirements may ultimately have been the same, delays can arise where consultants are not available for several months to undertake follow up work. Briefing a consultant to undertake all necessary work upfront can also provide cost and time advantages by undertaking all relevant sampling and testing in one tranche, as opposed to having to return to the site several times.

Referral bodies advised the Commission that RFI's can be identified following the provision of the first tranche of information. For example, CoH indicated that the requirement for RFI's can be a consequence of insufficient or insufficiently detailed information being provided by the proponent in the first instance. Once sufficient information is provided for the referral body to make an assessment an RFI may be required in relation to specific aspects of assessment. This can be perceived as a delay by the proponent.

Where delays are associated with poor engagement this is a frustration for proponents, adding to the time taken to obtain an approval and contributing to investment uncertainty.¹⁰⁹ The Commission heard from proponents that referral bodies are said to have requested disproportionate information from applicants that is not commensurate with the risks and mandates the agency is assessing against, creating unnecessary delays and adding to the proponent's costs. For Code assessed development the *PDI Act* provides that referral bodies must only deal with matters referred to it and only with matters coming within its regulatory mandate.¹¹⁰ No similar legislative test applies to referral bodies in relation to major project assessments.¹¹¹

Linear (sequential) assessment

Best practice literature indicates that approval decisions may be taking longer than necessary due to applying a sequential assessment process by agencies rather than parallel (concurrent) assessments, when '...employing concurrent assessment would speed up approvals by enabling multiple steps in the planning, building and referral process to be undertaken at the same time'.¹¹²

¹⁰⁹ Australian Productivity Commission, *Plan to identify planning and zoning reforms* (Information Paper, March 2021)

<<https://www.pc.gov.au/research/completed/planning-zoning-reforms/planning-zoning-reforms.pdf>> (Productivity Commission Information Paper 2021).

¹¹⁰ *PDI Act* (n 1) s 122(9).

¹¹¹ *Ibid* ss 111 – 115.

¹¹² Productivity Commission Information Paper 2021 (n 109).

The Commission has heard major project proponent feedback about sequential processes causing avoidable delays. Specifically, why is there not a single point of coordinated assessment for all RFIs rather than successive information requests from individual referral bodies. This is believed to reduce the risks of additional delays and costs to the applicant.

The Queensland State Assessment and Referral Agency (SARA) model for referral and assessment of applications has been well received by industry and applies a centralised approach to managing referral body input. Before the establishment of SARA, applicants needed to obtain separate approvals from individual agencies. The streamlined approach of centrally managed state referrals is reported to have contributed to reduced delays in development assessment timeframes.¹¹³

In reviewing recent reforms in other jurisdictions, the Commission notes that as part of Planning Reform Action Plan, the New South Wales government objective is to reduce the number of applications that require concurrences and referrals. While a single referral agency may not necessarily be adequate for all jurisdictions 'a more coordinated referral system can increase efficiencies and reduce delays significantly.'¹¹⁴

Appendix 3 sets out the Commission's consideration of leading and emerging practice in other jurisdictions.

Additional and unforeseen costs

Costs are a significant consideration for proponents especially where the time to obtain an approval can materially affect costs and the proposal's risk profile, the financial viability of a proposal and whether it proceeds. These include direct costs such as requirements to prepare, submit and provide supporting information for referrals, and holding costs associated with delays in obtaining planning approval.

The financial impacts for proponents may also create indirect costs such as uncertain timeframes and disproportionate information requirements not commensurate with the risks and mandates against which a DA is being assessed.¹¹⁵

Major development proponents provided examples of uncertainty in the process leading to delays in commencing projects. The Commission heard from one proponent about significant delays to obtaining project approvals which substantially increased holding costs and reduced the projects overall financial viability.

Consultants

The Commission heard from planning consultants about costs associated with the use of accredited consultants. As discussed in section 2.3.4 referral bodies can require proponents to use agency-accredited consultants to prepare reports to support referral body assessments. A proponent expressed frustration that the cost of NVC-required consultant reports when resolving vegetation clearance issues affected project profitability. In the Commission's view this is not a matter that goes to regulatory practice – other than perhaps the need for the reports – but may be an outcome from a referral body assessment.

¹¹³ Department of Treasury and Finance Victoria (Better Regulation Victoria), *Planning and Building Approvals Process Review* (Discussion Paper, 2019) <<https://www.vic.gov.au/planning-and-building-approvals-process-review>> (Better Regulation Victoria Review).

¹¹⁴ Productivity Commission Information Paper 2021 (n 109).

¹¹⁵ Productivity Commission 2011, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment* (Research Report) 273 <<https://www.pc.gov.au/projects/study/regulation-benchmarking/planning/report?a=108835>>.

The Commission invites further feedback in relation to using subject experts in preparing major project EIS' and in response to referral body feedback on an EIS for major projects.

Uncertainty, proportionality and scope

The nature of larger projects, complexity of objectives, financing and engineering requirements lends itself to more issues to assess for referral bodies and more substantial assessments. This can create uncertainty about outcomes. The Commission observed referral bodies addressing a larger portfolio of risks and proponents using consultants and lobbyists to minimise the risk of project refusal.

Major development proponents provided examples of uncertainty in the process leading to delays in the project commencing, compliance that was considered disproportionate to the matter being regulated, and amendments to EIS or conditions that changed project design. Generally, proponents weigh up the delays and costs of agreeing to conditions of approval and choose to wear the costs to get the project across the line.

The examples of proportionality for major development proponents include environmental considerations for a proposed site in a regional area being required to meet the same standards as a site in metropolitan Adelaide. While there may be legitimate environmental standards that apply in both contexts, it may also be a product of existing assessable criteria that do not take account of project location.

Proponents highlighted the sequential rather than concurrent raising of issues by referral bodies, with one issue being addressed only to be followed by another. This linear approach can delay approvals and be expensive for proponents. This situation may be a product of an insufficient pre-lodgement process, or lack of investment by referral bodies and proponent in identifying all issues early in the assessment process. Proponents have asked for a more coordinated approach for all information requests.

The Commission heard examples from proponents and public sector agencies of potential differences in standards applied to major development proponents compared to a government (Crown declared) project. The differences included for items to be addressed by proponents, and the expert reports published as part of public consultation requirements, and for monitoring, reporting and compliance obligations. The Commission heard conflicting perspectives on these matters, making this an area for further investigation.

A major development proponent considered that project risks are not managed proportionately. The major project assessment guidelines categorise risk as high, medium and low. While this appears a risk-based assessment process, it is not managed in this way. For example, issues of visual amenity are categorised at the same risk level as transport issues.

The Commission engaged with PLUS and referral bodies on their pre-lodgement and case management approaches to provide examples that have brought certainty and efficiency in the assessment process. No case studies have yet been provided to the Commission.

Time taken

Major project proponents described to the Commission several lengthy assessment processes and the impact delays have had on project viability and cost. The case studies highlight an absence of structure in process, uncertainty of assessable requirements and outputs, and delays at every step of the process.

One major development proponent highlighted the EIS process as requiring hundreds of individual matters to be addressed and multiple rounds of consultation on specified matters.

All these matters require engagement of consultants and writing of reports which are time consuming and entail further costs. The proponents accepted that referral bodies have a role, but the process is perceived as inefficient. Approvals can take two to three years. Uncertainty about the length of the process and the state's preparedness to make a decision is a serious concern.

Major development proponents were concerned by the number of touch points where public sector agencies are involved in the process which increases the time taken to obtain approvals. At each of these touch points referral bodies can impose an unspecified number of requirements. Proponents have raised concerns about the time taken for this.

The legitimacy and usefulness of some of the individual touch points have been questioned by proponents, such as the time it takes to conduct an adequacy check in relation to a draft EIS. PLUS distributes the documents for referral bodies to comment on and to ensure that what proponents have submitted is of sufficient quality. Proponents consider this process is largely procedural, adding to timeframes rather than adding value early in the process e.g. by documenting a list of issues to be addressed throughout the entire process.

Complexity and alignment with government objectives

Major development proponents have described the planning system and assessment processes as inherently adversarial. There is perceived to be a reluctance by public sector agencies involved in the major projects assessment process to adopt a problem-solving perspective. Proponents indicated regulators cited their role as an assessor as precluding them taking a problem-solving approach.

From the Commission's perspective, optimal planning outcomes result from land going to the best use. The best use can relate to state and national economic priorities. Proponents have consistently suggested to the Commission that an assessment of major developments needs should be based on whether the state's economic interests are being well served under the current process for approving projects of significant economic value. From a broader economic perspective growth in the regional areas of the state depends largely on these projects proceeding and being viable in the long-term.

The Commission heard examples of major projects that were established to support specific national economic and industry growth commitments where the assessment process did not appear to consider those priorities in terms of the time taken and the approach by the state as a relevant authority.

Post-approval requirements

Stakeholders reflected that development authorisations are a once off regulatory decision, whereas licensing, approvals and compliance may require ongoing attention to meet regulatory requirements. Separating licensing requirements from obtaining planning consent has positive benefits as it provides applicants with an early indication of project viability through the planning process and confidence in preparing detailed information necessary for licence, approvals and compliance later.

A potential risk raised is that referral bodies, notably the EPA, may seek information as part of a development application that is more appropriately provided later as part of the licencing process. This could result in delays and expense while the proponent prepares the information, with no certainty of the projects viability (i.e. the need to provide further information without planning consent being granted). The Commission has been told by major

development proponents that DA conditions can be a constructive way to defer expenditure earlier in the process without compromising referral body mandates.

The next section considers the role of the state as the relevant authority and the importance of ensuring a transparent and best practice approach in the assessment of projects that have a marked impact on the state's economy and its prospects

3.3 The state as relevant authority

The significance of major projects is established by their ability to positively impact on the state's economy and growth, and support or achieve government objectives. Such proposals are declared by the Minister under the *PDI Act* as a major project because they are sufficiently complex to require the highest level of environmental, social and economic assessment i.e. an EIS is required. The state assessment process can be characterised as:

*...a whole of Government response...necessary to ensure that all 'state interests' are carefully assessed and resolved, and to ensure the right weight is given to the range of social, environmental and economic issues that arise through the assessment process.*¹¹⁶

Once declared as a major project, the Minister becomes the relevant authority for the purposes of impact assessment development.¹¹⁷ The Minister is supported by the SPC in relation to procedural matters including the application of Practice Direction 4 regarding the production of an EIS,¹¹⁸ the preparation of and consultation associated with the Assessment Report required under the *PDI Act*,¹¹⁹ and advice to support decision-making in relation to a major project under the *PDI Act*. The State Commission Assessment Panel (SCAP) is appointed by SPC to undertake assessment functions on its behalf.

The state has significantly more direct control and can exercise more discretion over the major projects assessment process than it does over Code assessed development. The codification of planning consent through the Code and the structured ePlanning assessment process is significantly more regulated and limits assessment discretion to performance assessed development. Performance assessed development is also subject to statutory timeframes in relation to referrals processes. Notwithstanding the requirements of the *PDI Act* in relation to impact assessed development and EIS requirements, the state has more control over the input of referral bodies and the extent of engagement of proponents in major project assessments.

The importance of major projects to the state, and the way they are managed centrally by the SPC and PLUS staff, warrants the application of best-practice regulatory governance principles. In the remainder of this chapter the Commission considers the performance of the major project assessment process, with emphasis on the input of referral bodies and how that influences the time it takes to obtain an assessment outcome. The Commission also considers how major projects are declared, how the state assessed process is managed and monitored, and feedback from interested parties.

3.3.1 Declaration of major projects

The Commission has so far been unable to determine how a major project is declared by the Minister. While this does not relate directly to the referrals process that follows, it is important to understand how a project is declared because the state assessed process involves

¹¹⁶ PLUS response (n 106).

¹¹⁷ *PDI Act* (n 1) ss 95 and 108.

¹¹⁸ *Ibid* ss 111(d)(2), 112(a) and 113(3).

¹¹⁹ *Ibid* ss 113(9) – (12).

significant public sector resources, including state-controlled input from referral bodies. Transparency in relation to how a major project is declared sets the tone for an efficient and effective assessment process, and the standard of regulatory practice that follows.

Information request 3.3: Declaration of major projects

What has been the experience of proponents going through the process to be declared a major project? What guidance, procedures or other process-related material were provided to support them through the process to declaration?

3.3.2 Major projects, referrals and performance

The Commission heard from both referral bodies and proponents about what it means procedurally to be involved in a state-assessed process. Proponent feedback indicated there is a misconception that being declared a major project means a smoother pathway to an assessment outcome. It was suggested that this is often not the case and that declared major projects can be subject to a protracted and unnecessarily complex process that does not consider the business impacts on proponents and the implications for investment in the state.

In this section the Commission makes several observations about how the major projects assessment process is regulated, the role of referral bodies in that process, and identifies areas where additional feedback will assist the Commission to further its views and support recommendations.

Governance

Working groups established to manage major project assessments must be staffed by agency representatives with authority to commit their agency to decisions and progress timely assessments. New legislative provisions requiring consultation with proponents on EIS detail may, in part, address proportionality issues raised by proponents regarding referral body information requirements.

Summary procedural information is available on the PlanSA website illustrating the steps in the major project assessment process.¹²⁰ PLUS also advise that a detailed internal procedures manual is available to PLUS staff involved in major project assessment, which is being updated to reflect the impact assessed development process.

PLUS advise that an officer-level working group is often established involving referral bodies and other public sector agencies who usually assign a single contact point to act as an internal coordinator managing information arrangements applicable to the assessment process. These agency coordinators work with the assigned PLUS staff member. The assigned PLUS staff member may also liaise with Australian Government agencies in relation to matters applicable to the *Environment Protection and Biodiversity Conservation Act 1999*. Ensuring the representatives of these working groups is an important factor in terms of the level of commitment and authority able to be exercised by participating agencies.

PLUS advised that Practice Direction 4 sets the requirements for information in the EIS, and that once established those requirements must be adhered to by the proponent. PLUS

¹²⁰ PlanSA, *How major projects are assessed* (Web page, 10 June 2021) <https://plan.sa.gov.au/state_snapshot/development_activity/major_projects/how_major_projects_are_assessed>.

engages with referral bodies to establish those requirements. PLUS also noted they respond to proponent enquiries during the preparation of the EIS.

The Commission must provide written invitation for the proponent to express a view on the proposed level of detail required in the EIS and give them 20 days to do so.¹²¹ These consultative provisions, which appear to be new in the *PDI Act* and *PDI Regulations*, may be relevant to the feedback received by the Commission in relation to proportionality issues raised by industry and business interests regarding referral body information requirements under *Development Act* major projects assessment processes.

Accountability, performance and continuous improvement

Given the impact of major projects on the state, the applicable assessment processes warrant a high level of scrutiny and accountability to support the most efficient and effective assessment, and outcomes that consider the state's economic interest. Accepting the flexibility required in a complex state-assessed process, the Commission sees no barrier to introducing timeframes, milestones and commensurate reporting to improve accountability and drive efficiency in major project assessments. An effective data strategy and key performance indicators (KPIs) are critical components of performance improvement.

While the Minister is the relevant authority and the SPC is responsible for major project assessment, the Executive Director of PLUS, and other executive and senior staff in PLUS are accountable for the day-to-day management of the major project assessments.

In terms of performance monitoring of major projects assessments PLUS advised quarterly reports are prepared for the SPC and SCAP for all development assessments, including major developments. Weekly reports are prepared to track major projects. The Commission has not considered examples of these reports.

PLUS indicated that the duration of a major project assessment process is taken up predominantly by the proponent preparing the EIS and responding to consultation matters, and that their efficiency in fulfilling these requirements can be linked to the complexity of the project and the resources at the proponents' disposal.

PLUS noted that there are no statutory timeframes in relation to the time for the SPC to prepare an Assessment Report, nor for the Minister to decide. The Commission notes there is also no timeframe for preparing assessment guidelines. PLUS follow up with agencies who have not responded to the EIS within the 30-business day notification period; however extensions of time may be granted to referral bodies by the Executive Director of PLUS where the grounds for the extension are considered sufficiently important to ensure an effective assessment of the proposal.

While accepting the need for flexibility in a state-assessed process the Commission sees no reason why timeframe guidance cannot apply to major project assessment. Accompanied with milestones and pre-determined reporting requirements, this will drive efficiency and reflects the importance to the state of major projects. Timeframes applicable to major project assessments could include a maximum timeframe to obtain an approval (between 12 and 18 months) and attaching timeframes and/or dates to milestones in the process e.g. publication of assessment guidelines and preparation of the assessment report. Changes to the timeframes

¹²¹ *PDI Act* (n 1) 113(5) and *PDI Regulations* (n 48) r 71.

arising from unforeseen demands on the proponent, referral bodies or other public sector agencies would be reportable by the accountable party.

The Performance Indicators (System) Scheme established under the *PDI Act* does not capture major projects assessments as the Scheme only captures data through the ePlanning system. The Scheme is intended to monitor and evaluate performance and trends based on established indicators.¹²² PLUS indicated that major projects may be built into the Scheme's indicators in the future.

The Commission requested data from PLUS in relation to major projects to form a view about performance of the assessment process and referral body inputs. That request sought data in relation to each phase of a major project assessment aligned with the relevant sections of assessment activity in the *Development Act*, *PDI Act* and *PDI Regulations*. Given the recency of the state planning reforms, the Commission was advised that data would relate to assessment under the *Development Act*. The Commission's data request is at Appendix 4.

PLUS advised that major projects data is held in several repositories which created challenges to respond to the Commission's request. The data was not provided in time for analysis in the draft report and will instead be considered for the final report. The effectiveness of the state's approach to major project assessment data reflects the level of commitment to efficient assessment of projects of state significance, and to achieving the economic, employment and growth benefits that come from those projects. The Commission's preliminary observations about this are addressed from a systems perspective in section 4.4.

The Commission was advised that there is currently no legislatively-mandated continuous improvement process applicable to the state's assessment of major projects. PLUS engage with proponents individually throughout the assessment process, including in relation to lessons learnt at the conclusion of the process. PLUS advised that there is opportunity to establish a formal review process at the conclusion of each major project development assessment process, including participation of referral bodies and other public sector agencies involved in the assessment. The Commission supports this proposal, which would be complemented by a data strategy and developing KPIs supporting a systemic approach to continuous improvement of major project assessments.

Project management, communication and staffing

The Commission needs more clarity in relation to how major project assessments are managed and staffed by the relevant authority. Subject to further consultation with the SPC, PLUS, referral bodies and other interested parties, there may be scope to increase economic and social impact/benefit assessment expertise and better align major project assessments with government macroeconomic and social policy objectives.

PLUS advise it does not dedicate a case manager to each major development assessment process; it endeavours to allocate a staff member or members from the major projects team to have carriage of a major projects assessment process to provide a key contact and consistency to the applicant. The level of engagement between proponent and those staff

¹²² *PDI Act* (n 1) sch 4. See also *South Australia's New Planning System Performance Indicators (System) Scheme - Operational 1 July 2020* (Report July 2020) <https://plan.sa.gov.au/__data/assets/pdf_file/0007/573334/Performance_Indicators_System_Scheme.pdf> (Performance Indicators Scheme).

members can vary significantly. PLUS indicated that case managers in other public sector agencies may take the lead depending on the nature of the project e.g. Defence SA in relation to the Whalers Way Orbital Launch Facility. Those case managers keep a ‘watching brief’ on the statutory assessment process where PLUS is the lead agency.

The major development team at PLUS are experienced urban planners and there is also environmental expertise. The Commission is considering recommending stronger involvement of economic and social policy expertise, and possibly other disciplines, in the major projects assessment process to support decision-making that reflects the state’s economic interests and consideration of government’s current and future objectives. This input could be sourced from other public sector agencies e.g. Department of the Premier and Cabinet, akin to the way referral bodies participate in major project assessment currently, or reside permanently in the SPC/PLUS. In any case this perspective is relevant from the earliest stages of a proposed major project (i.e. pre-declaration) through the operational phase (licensing and other operating approvals), and involves post-construction evaluation of the economic and other benefits to the state.

While the legislatively mandated EIS assessment requirements cover ‘the expected environmental, social and economic effects of the development’, the feedback to the Commission indicates a heavy skew to environmental considerations. This may reflect the explicit reference to the EPA in the EIS process under the *PDI Act*,¹²³ and the involvement of other several environmental protection referral bodies. The impact major projects have on the state warrant a level of involvement by the state extending to a strong evaluation of economic and social benefits and impacts, and how the project aligns with government’s macroeconomic policies and growth objectives.

PLUS advise that project management tools such as Gantt charts are developed by its major projects staff in consultation with proponents to identify key steps, ‘dependencies’ and to support an efficient assessment process. Any reconsideration of the management of major projects assessment would include an evaluation of whether current management tools are fit for purpose, and any potential benefits from incorporating best practice project management techniques and tools.

The Commission will consult further with PLUS and SPC in relation to how major projects are staffed and managed, and the extent to which government’s economic objectives are incorporated into the major project assessment process.

Information request 3.4: Where case managers are not the relevant authority

What has been the experience of proponents in relation to major projects where the appointed government case manager is not the relevant authority? What impact did this arrangement have on the proponent’s understanding of who is managing the process and who is accountable?

To what extent did the appointment of a case manager from a regulator with a specific mandate impact on the extent to which the assessment process considered the state’s overall interests when assessing a major project?

¹²³ *PDI Act* (n 1) s 113(4)(d) and 113(5).

3.4 Referral bodies and impact assessed development

PLUS indicated in relation to the effect of the state planning reforms on major project referrals processes that:

In addition to the legislated referrals associated with the Major Development process, there is a coordinated whole of government agency assessment process overseen by PLUS. Agencies are included on a case-by-case basis dependant on the nature of the application under assessment. On occasions third party peer review expertise is engaged should it not be available within agencies.¹²⁴

From the state's perspective, the role of referral bodies in assessing major projects can be characterised as the legislated opportunity for regulators to exercise their mandates in relation to state-significant land use proposals. Those opportunities include participation in the preparation of assessment guidelines by the State Planning Commission,¹²⁵ determining the level of detail required in the mandatory EIS,¹²⁶ and by commenting on the EIS following its production¹²⁷ to support the SPC's Assessment Report.¹²⁸ Referral bodies also have a role in relation to assessing amended EIS',¹²⁹ and may participate in bilateral or multilateral pre-lodgement discussions with proponents and other referral bodies and public sector agencies.

The input from referral bodies into these regulated phases of a major project assessment include several practical touch points including:

- engaging with proponents on issues relevant to the mandate of referral bodies before the project to being declared an impact assessed development by the Minister;
- providing technical expertise on matters to determine and inform the nature and extent of issues to be addressed by applicants contained in the project assessment guideline and EIS;
- undertaking a formal 'adequacy check' process to ensure that the draft documentation prepared by the applicant properly respond to the assessment guideline and EIS and is in a form suitable for public consultation;
- responding to an updated or amended an EIS when a proposal responds to a change in circumstances, scope or direction; and
- requesting additional information from an applicant to respond to variations in the development proposal, or that are required for the referral body to undertake an assessment against their relevant regulatory mandate.

For the final report the Commission will develop and consult on a stylised process map identifying where referral bodies feed into the assessment process for impact assessed development. In the next part of this section the Commission briefly considers the perspectives and roles of the in-scope referral bodies in relation to major project assessments.

¹²⁴ PLUS response (n 106).

¹²⁵ Practice Direction 4 (n 24).

¹²⁶ *PDI Act* (n 1) s 112(b).

¹²⁷ *Ibid* s 113(5).

¹²⁸ *Ibid* s 113(9).

¹²⁹ *Ibid* s 114.

Environment Protection Authority

The EPA advised that while major projects are a substantially different assessment process compared to Code assessed DAs, the EPA adopts the same perspective and approach in terms of applying their regulatory mandate to the proposal as a referral body. This is because the EPA is mandated by statute to further the objects of the *EP Act*, have regard to the general environmental duty and relevant environment protection policies in relation to any development authorisation referred to it under the *PDI Act*.¹³⁰

EPA are prescribed in the *PDI Act* as a body to which the Minister must refer an impact assessed development EIS for comment and report if that development involves a prescribed activity of environmental significance as defined by the *EP Act*. This mandatory referral to EPA indicates the state's acknowledgment of the importance of assessing environmental impact in relation to major projects.

EPA acknowledged that major projects can require up to six separate touch points with a proposed development and even more steps as it is often necessary for the EPA to provide guidance in relation to preparing an EIS.

The assessment of large-scale impact assessed developments that involves activities of major environmental significance (such as desalination plants, mining, resource processing and infrastructure projects) require a large team of staff from several technical areas across EPA (e.g. air, noise, water quality, site contamination etc). The extent of their participation may vary dependent on the nature of the development but usually include detailed assessments and attending regular meetings with proponents. For example, with the proposed Olympic Dam expansion EPA had two staff dedicated full-time to the project for 6 and 9 months respectively.

During 2017, EPA provided 12 major project referral contributions, which EPA advised is comparable to other years. While none required a full EIS assessment, the overall workload regarding major developments was made more typical of the annual workload regarding these types of developments because of the ongoing assessment for various steps of the proposed port development on Kangaroo Island for shipping of plantation timber. The ongoing assessment of this project during 2017 is typical of the fact that major developments and projects often require input from EPA over a period of two to three years.

Native Vegetation Council

The *NV Regulations* provide vegetation incidental to a major project approved under the *Development Act* may be cleared subject to preparation of the relevant environmental assessment report and the Ministerial Assessment Report having been prepared and provided to the relevant council for comment.¹³¹ Approval to clear also requires an NVC approved SEB. The NVC will comment on the assessment report within 8 weeks in relation to avoidance and minimisation of clearance, alternatives to clearance and determine the SEB.¹³²

This process, set out in the *NV Regulations*, calls up the major projects provisions of the now ceased *Development Act*.¹³³ It is unclear to the Commission whether the same referrals process in relation to impact assessed development declared by the Minister under the *PDI Act* applies. The Commission will consult further with DEW and NVC about this legislative anomaly.

¹³⁰ *EP Act* (n 46) s 57.

¹³¹ *NV Regulations* (n 55) r 27.

¹³² Department for Environment and Water, *Major projects* (Web page, 9 June 2021)

<<https://www.environment.sa.gov.au/topics/native-vegetation/clearing/major-projects>> (DEW major projects).

¹³³ *Development Act* (n 52) s 48.

DEW engages with major development proponents on issues relevant to its mandate before the project is declared an impact assessed development by the Minister. DEW also issue technical advice on matters to be addressed by applicants contained in the project assessment guideline and EIS. Developing guidelines for major developments involves ensuring the applicant addresses their obligation to provide an SEB.

The function of the NVC in the major development process is to assess the suitability of the proposed SEB. The NVC will comment within eight weeks on the proposed development:

- whether it avoids and minimises clearance as far as practicable;
- whether there are alternatives that involve no clearance, less clearance or clearance of vegetation that is less significant (or has been degraded to a greater extent) than the vegetation proposed to be cleared; and
- to determine the SEB required to offset the impact of the clearance.¹³⁴

Clearance can occur if development consent is granted under the *Development Act* and the provision of an on-ground SEB or SEB payment is approved by the NVC. For an on-ground SEB. A management plan approved by the NVC is also required.

The conceptual nature of some major developments can create difficulty in the assessment process, specifically, the development that is initially approved is subject to an extensive range of development consent conditions that result in ongoing amendments to the SEB.

The Policy for a Significant Environmental Benefit under the *NV Act* and *NV Regulations* contains publicly available information about the calculation of the SEB.¹³⁵ While the guidance material outlines the calculation and achievement of the significant environmental benefit, the Commission has been told by major project proponents they have engaged in negotiations throughout the approval process leading to several revisions of the proposed SEB payment. The Commission considers this area requires more certainty for proponents. It is unclear how a quantum that is determined through a formulaic method can be the subject of several rounds of negotiation if the variables remain constant.

DEW have advised the Commission that the level of detail provided in relation to the SEB differs considerably across major development documentation. Some proponents provided details of their proposed SEB offset as part of the major development process and other proponents deferred consideration of the SEB until after planning approval is received. The latter results in issues from a transparency perspective, as assessment of the SEB is excluded from the public consultation.

DEW and the NVC have not considered any impact assessed applications since the Code has been implemented. DEW have indicated a level of uncertainty on how the process is going to be centrally administered in the future.

Commissioner of Highways

CoH indicated that the same Australian standards, applicable engineering requirements and risk management perspectives apply equally in their assessment of proposed major projects. As discussed in section 2.3.4, the complexity of road network access arrangements in major project proposals may require additional detail from and increased engagement with proponents to enable CoH to undertake an effective assessment. This may necessitate the

¹³⁴ DEW major projects (n 132).

¹³⁵ NVC SEB Guide (n 83).

proponent provide a comprehensive traffic impact assessment undertaken by a professional traffic consultant operating within a relevant discipline.

That assessment provides an overview of the transport and traffic impacts associated with the proposed development, provides necessary modelling outputs and outlines necessary modifications required to meet established standards. Assessed in conjunction with the applicable engineering standards and guidelines, the traffic impact assessment informs the extent of impact on the road network and what road upgrades or modifications may be required to approve the development.

Proposed modifications are then reviewed, including against CoH traffic modelling work to ensure that performance requirements meet transport and engineering practice to reconcile actual and projected road network operation.¹³⁶

The Commission will consult further with CoH for the final report to obtain a better understanding of any differences between Code and impact assessed developments in terms of CoH's regulatory practice.

3.5 Further analysis

The Commission will further develop its analysis of major project assessment and, supported by further engagement from PLUS, business, referral bodies and other public sector agencies, the extent to which referral bodies influence the efficiency and effectiveness of major project assessments. This is expected to include analysis of how major projects are managed by the state as relevant authority.

A summary of the Commission's observations about major projects assessment and proposed further analysis is set out in section 4.4.

¹³⁶ For example, see Australian Standard AS1742 series – Manual of Uniform Traffic Control Devices, Australian Standard AS/NZS2890 series – Parking Facilities, Austroads Guides and Contract Master Specifications.

4. Enhancing performance in the new planning system

4.1 The state's interest

The referrals process for Code assessed development, and the input of referral bodies into major project assessments are both integral to ensuring that the mandates of those regulators are considered at the right time and in the right way having regard to land use in the state. The Commission has considered this from the perspective of the regulatory practice of referral bodies, and the structure and management of the assessment processes. This is particularly important for major projects where the state is the relevant authority because such projects have a disproportionate effect on the state. Improvements in these areas will support the implementation of the new planning system and enhance regulator and system performance. This, in turn, will contribute to the government's ability to achieve its economic and social objectives, lift employment prospects and improve the state's reputation as a place to invest with certainty.

4.2 The costs of delay

The outputs, value and employment benefits of residential and non-residential development is substantial. The Reserve Bank of Australia¹³⁷ and the Australian Productivity Commission,¹³⁸ among others, have identified that unnecessarily complex development assessment processes lengthen the time it takes to negotiate development approvals and create uncertainty about the likelihood of project success.

The Commission is interested in the extent to which referral bodies, SPC and PLUS understand the impact of cost, unnecessary delay, and uncertainty on business and investment, and how this understanding is applied to improve their practices and assessment process. Regulatory practices can have substantial financial impacts on the payoff for individual proponents and have economic impacts on regions and employment. Just as importantly they have a material impact on attractiveness of South Australia as an investment location.

4.2.1 When and how costs are incurred

The unforeseen financial impacts for proponents involved in development assessment largely relate to the time it takes to secure an approval. Proportionality of information requirements, regulator capability and the extent to which pre-lodgement arrangements have been used can all influence timeliness in the assessment process. Ambiguity or uncertainty in the mind of the applicant regarding the information requirements of a referral body to support an assessment can lead to re-work and give rise to additional cost to the applicant that may have been avoided if expectations were made clearer earlier.

While costs may be mitigated where decisions can be anticipated or businesses can slow down the assessment process for commercial reasons, significant costs arise when

¹³⁷ The Reserve Bank Australia, *Housing Bulletin September Quarter 2012* (Report, September 2012) 13 <<https://www.rba.gov.au/publications/bulletin/2012/sep/>>.

¹³⁸ Australian Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment, Research Report* (Report, April 2011) <<https://www.pc.gov.au/projects/study/regulation-benchmarking/planning/report?a=108835>>.

timeframes are longer than agreed or expected for that process.¹³⁹ The types of costs incurred throughout the DA assessment process encountered by applicants include:

- *Design phase*: costs emanating from project conception and design involving engagement of planning and design consultants, engineers and subject consultants as well as engagement with state government agencies and, in the case of impact assessed developments, preparation of documents for declaration of a major development by the Minister for Planning.
- *Assessment phase*: costs such as preparing an EIS and public notification and response requirements.
- *Compliance phase*: costs of re-designing and/or re-locating a project to operate in accordance with approval conditions; and
- *Construction readiness phase*: costs for the payment of offsets or licence fees, undertaking remediation of site to meet environmental obligations and supporting infrastructure.¹⁴⁰

For Code assessed developments referral costs relate primarily to design, compliance and construction readiness. The relative speed of the regulated Code assessed development assessment process will mean applicants will likely have negligible unforeseen costs while referral bodies assess their proposal. For proponents of major projects there are additional financial and economic impacts that are either not encountered or are not encountered to a significant a degree by Code assessed development applicants.

Major project proponents who spoke to the Commission raised examples of significant periods of time awaiting project approval. Aside from the self-evident impacts on servicing loans and attracting funding, the proponents outlined impacts of lengthy approval times including:

- the opportunity cost of other investment opportunities being foregone while awaiting a decision;
- the cost of physical capital remaining idle exacerbating the cost of time lags between acquiring capital and putting it to use;
- future contract losses resulting from an inability to deliver on contracts, and future contracting difficulties arising from being perceived to be an unreliable supplier; and
- reputational damage for both the company and the industry in the state with increasing costs of operation for interstate and overseas investors increasing costs of operation in the future.

During the assessment phase, particularly in preparing the EIS, major project proponents can incur significant costs in relation to the size of the project. Major projects require an EIS be prepared for the development, usually by the proponent.¹⁴¹ The preparation of an EIS is an extensive exercise that assesses the project's potential effects on physical systems, ecological systems, communities and on land use as well as assessing potential economic effects on regional and national economies and key industry sectors.¹⁴²

¹³⁹ Victorian Competition and Efficiency Commission, *A Sustainable Future for Victoria: Getting Environmental Regulation Right* (Draft Report, March 2009) 79 (VCEC 2009).

¹⁴⁰ Developed by the Commission based on stakeholder feedback.

¹⁴¹ *PDI Act* (n 1) s 111(2)(e).

¹⁴² VCEC 2009 (n 139) 108.

Delay-related costs during this phase may be categorised as standby costs (capital and labour down time) and holding costs (interest on loans, rent, material procurement, builder contract costs, additional consultancies and lost business opportunities). While unnecessary delays can impose a direct cost on affected businesses they can also add to uncertainty for an investment because other businesses may factor the possibility of delays into their investment decisions. Future losses may also be incurred as a result of being unable to deliver on time and being perceived as an unreliable supplier.

4.2.2 Measuring the cost of delay

The identification and measurement of delay costs is a difficult exercise, particularly in cases where there are overlapping approval processes and multiple parties involved in the process (community, local councils, government agencies and business). A further difficulty is that delays reported by business may reflect poorly planned projects or the time taken to legitimately respond to regulators' information requests. Understanding the activities that a business would undertake in the absence of, for example, an environmental approval process would enable more accurate estimates of delay costs to be established. However, these activities are not necessarily known or readily available from affected parties.¹⁴³

The Australian Productivity Commission (APC) found that the costs caused by delays to major projects suggests substantial gains can be made if efficient ways to save time can be found. The Commission estimated that the indicative cost of a one-year delay to a major offshore liquefied natural gas project worth \$11.3 billion is in the order of \$500 million to \$2 billion, depending on the assumptions made. The equivalent cost of a one-year delay for a major project of more average size (with capital expenditure of \$473 million) might be around \$26 million to \$59 million.¹⁴⁴

The APC acknowledged that some costs accrue to the wider community as well as to the project proponent. There are a range of other factors not considered in the analysis that could influence the actual cost of a delay brought about by development assessment processes. For example, an increased difficulty in financing the project or reduced flexibility to respond to market conditions could push costs higher and/or threaten the viability of the project. In contrast, any ability to accommodate the delay within the planned project schedule or use the delay to improve project design could lower costs.¹⁴⁵

Modelling the costs of delay

The Commission will draw on the evidence it gathers during this review to quantify the costs and impacts attributable to meeting regulatory requirements of an impact assessed development application in South Australia. This will involve modelling the costs associated with lengthy timeframes for approval of impact assessed development.

The costing analysis will use information about impact assessed developments assessed under the *Development Act* as well as impact assessed developments currently awaiting approval under the *PDI Act*. The analysis will attempt to define the time scale applied to major projects as context for the referral element of the process and identify the types of costs incurred throughout the application process.

The focus will be on the touch points of referral bodies throughout the approval process acknowledging that there is no statutory referral trigger for impact assessed development. The

¹⁴³ VCEC 2009 (n 139) 80.

¹⁴⁴ Australian Productivity Commission, *Major Project Development Assessment Processes* (Research Report, 2013) 202.

¹⁴⁵ *Ibid* 203.

feasibility of the analysis will depend on the quality of information that can be drawn from PLUS and the ability to engage proponents in relation to projects awaiting approval.

4.3 Process and practice improvements – Code assessed development

In this section the Commission takes a systemic view of the regulatory practice of referral bodies in relation to Code assessed development. Some of the principles discussed are expected to assist referral bodies in relation to their approach to major project assessment because they are matters that relate to organisational efficiency and culture. Boxed synopses are included at the beginning of each subsection to highlight the key issues.

The Commission sets out its preliminary systemic views regarding major project assessments, including referral body inputs in the next section.

While garnering some feedback, the Commission has not focused its consultations with referral bodies on their views about how they contribute to the major project assessment process. The extent to which they consider government objectives and the state's economic interests when preparing their referral responses for major projects will form part of further considerations to inform the final report.

4.3.1 Timeliness

For Code assessed development applications, the Commission found that referral body assessment processes are mostly completed within statutory timeframes. There remain areas for improvement such as formalising pre-lodgement arrangements and better use of performance indicators and associated reporting.

The Commission will consult further in relation to the operation of 'stop the clock' provisions, what causes these pauses of the statutory assessment timeframes, and whether the net time taken to conduct and complete a referral response can be reduced.

The Commission considers several areas for further consultation and consideration to support efficiency and effectiveness improvement in the assessment of major projects in section 4.4.

Timeliness is a key motivator for applicants as the efficiency of the approvals process can materially affect the proposal's risk profile, financial viability and whether the proposal proceeds. Statutory timeframes codify obligations for regulators in preparing referral responses. These obligations must be balanced with ensuring referral bodies have enough of the right information to assess the proposal effectively, and that it can conform with their statutory mandate and the public interests they are bound by statute to protect.

Overall, stakeholder feedback suggests timeliness of referral processes for simpler development proposals has improved. The extent to which the state planning reforms will affect this remains to be seen. Data limitations have confined the Commission's ability to form an empirical view.

The ability of referral bodies to assess innovative proposals is still an issue. In the absence of empirical data referral bodies appear to fall back to the precautionary principle, leading to several information requests to develop a body of knowledge to enable assessment of an activity that does not neatly fit into existing regulatory frameworks. Obtaining information to

undertake an effective assessment against regulator mandates must be balanced with the object of the *PDI Act* to supporting innovation.¹⁴⁶

Planning consultants and proponents indicated that project size and complexity is often not a predictor of the time taken for referral responses, especially for low value projects. Referral bodies are perceived as treating the statutory timelines as upper bounds, taking the full amount of time for simple proposals.

The Commission's ability to evaluate timeliness of referrals responses under the *PDI Act* is limited given the relatively brief period since the reforms were fully implemented. This has resulted in a relatively small sample of referrals from the three in-scope referral bodies.

Data generated by the ePlanning system on the number of statutory referrals since phase one of the planning reforms came into operation in July 2019 has only recently been provided to the Commission by PLUS. The Commission is still analysing that data and working with PLUS to extract value from what the system can currently generate.

The Commission found that for the last three financial years the proportion of Code assessed referrals being processed within the statutory timeframes has increased for the two referral bodies that provided statutory referral data. EPA and CoH data indicates that in 2019-20 97.9 per cent and 83.8 per cent respectively of all referrals met the statutory timeframes. Data has not been reported by the NVC as the statutory native vegetation referral process has only recently come into operation. The causes of referral responses beyond the statutory timeframes will be the subject of further consultation with referral bodies.

There are several administrative and market-based influences on the timeliness of processes and decision-making of Code assessed referrals. The Commission has conducted some analysis of the influences on referral response timeframes based on the information provided. Each of the influencing factors are discussed below.

Frequency of requests for information and stopping the statutory clock

During the period 2017-18 to 2019-20 approximately 33.4 per cent of EPA assessments were completed with no RFI with the total number of requests for information reducing over the period while the total number of RFIs by CoH increased over the last two years from 96 to 121. CoH advised this increase resulted from an internal review leading to formalisation of RFIs to improve accountability and decrease response times.

The Commission considers that the frequency of RFIs and the impact on performing the referrals process has improved over the last three years. Further improvements can be made by ensuring all relevant information is provided when the DA is lodged. Referral body use of pre-lodgement activity and the quality of published guidance material will be important supporting factors.

Referral bodies play an important role in the development assessment process, and generally add value to the assessment process and ultimate development outcome. On the whole, under the previous planning system the proportionality of information required by referral bodies relative to the risk and complexity of the applicant and the referral body's mandates was generally fair and reasonable.¹⁴⁷

¹⁴⁶ *PDI Act* (n 1) s 12(2)(c).

¹⁴⁷ Local Government Association submission (n 34) 7.

Volumes of referrals and resourcing

The three in-scope agencies provided information about how resources are dedicated to the referral functions; no issues of delays related to resourcing due to referral volume were raised with the Commission.

CoH has only 4.5 FTEs dedicated to referral matters yet has historically processed seven to eight hundred referrals annually. The contribution of traffic consultants to the total output of CoH referrals enables a high volume of output. The high number of low-risk referrals they assess is a contributing factor; this is expected to change with introducing the Code. The use of external consultants is a key feature of managing the volume, complexity and quality of work for the in-scope referral bodies, representing a shift over time to increasing the private sector contribution to the assessment process.

Complexity of referrals

Aside from CoH, the in-scope referral bodies have not presented the numbers of referrals by complexity level to the Commission. Of the total number of referrals received, CoH advised that approximately 60 per cent were for low complexity, smaller subdivisions and land uses.

An outcome of the planning reforms has been to codify a large proportion of lower risk development activity as deemed-to-satisfy development that does not require a referral. The implication for a lower volume of referrals is that the risk profile of referral bodies can skew towards the more complex. This may result in higher productivity/greater efficiency in using the resources of regulators. Conversely, it risks increasing the time taken to process referrals than was previously the case, even with a lower volume.

The Commission considers that tracking of referrals by complexity and risk would be a useful reform for monitoring of timeframes and outcomes, and to inform future resourcing requirements. Compliance with statutory timeframes under the *PDI Regulations* may be a relevant indicator. This will be subject to consultation with PLUS.

Efficiency of referral body internal business processes

Chapter 2 of the report presents process maps of the internal business processes and approvals for each of the in-scope referral bodies. The process maps were constructed using information provided by the agencies as well as through internal documentation. In line with the relatively short statutory timeframes for processing Code assessed development applications, the internal business processes are to a large degree streamlined. This assessment is based on the number of approvals achieved, the relative contribution at each level of the organisation, using hub and spoke models to incorporate in-house technical and specialist advice, and coordination roles and delegation mechanisms with appropriately designed responsibilities.

An important aspect of internal process efficiency affecting timeliness raised by stakeholders was the potential for duplicating requirements placed on applicants in relation to referral processes and subsequent operating approvals for which the referral body is also responsible for as a regulator e.g. EPA licensing and native vegetation clearance consent. This is an issue the Commission will seek more clarity on for the final report.

Use of early engagement and pre-lodgement arrangements

Using informal pre-lodgement arrangements is common across the three in-scope referral bodies. The arrangements are used to clarify information requirements for anticipated DAs expected to be referred, and sometimes to determine if a referral will be required and which

referral body is relevant. The level of publicly available information to support applicants varies across the referral bodies as does the preparedness to offer pre-lodgement information. These factors will affect timeliness as often an early resolution of issues can facilitate a faster referral, or if a pre-lodgement agreement can be made negate the need for referral as part of the assessment process. There is a nexus between the amount and type of information an applicant can provide and the value of the pre-lodgement process.

Pre-lodgement and early engagement approaches of referral bodies are viewed positively by councils, subject consultants and industry. Given the extent of the role of consultants in facilitating information supporting DAs and associated referrals, the Commission has concluded that the informal arrangements for pre-lodgement and early engagement can be better used. More formal arrangements are to be codified in training and guidance as well as formalising the channels of communication and process between consultants and referral bodies. Capture of relevant data will validate the value of pre-lodgement in terms of the relative efficiency (time taken and RFIs required) of the associated referrals process.

Draft recommendation 4.1: Formalising pre-lodgement arrangements

For Code assessed developments, the Commission recommends referral bodies formalise their pre-lodgement arrangements to facilitate more frequent and earlier engagement by:

- producing and publishing guidance material to make clear to applicants and their consultants or agents what can be expected from the pre-lodgement process with that referral body;
- ensuring suitably experienced staff are involved in pre-lodgement engagements with applicants that can identify key issues, information requirements and show-stoppers; and that remaining staff are trained and mentored in these skills;
- where pre-lodgement agreements are not used, record and share the outcomes of the pre-lodgement process with the applicant to support a clear and mutual understanding between the parties, including the extent to which pre-lodgement advice can be relied upon in relation to any subsequent development application and assessment process;
- supporting an evidence-based approach to calculating the value of pre-lodgement activity in the referrals process by capturing the following metrics:
 - applicant name/company, type of proposed development activity etc;
 - the duration of the pre-lodgement process;
 - the number of instances of interaction between the referral body and applicant during the pre-lodgement period;
 - the number of requests for information (RFIs) required by a referral authority for a development application that was subject to a pre-lodgement process; and
 - the referral response time of a development application that was subject to a pre-lodgement process with the referral body.

4.3.2 Continuous improvement and system performance

Continuous improvement and performance monitoring are an important part of the Commission's diagnostic principles for this review. The Commission identified sound commitments and demonstrated examples of both continuous improvements and improved performance in all three referral bodies. These covered responses to external reviews e.g. the state planning reforms and other regulatory reviews, and internally driven business performance initiatives.

Better practice regulator continuous improvement is built on an internal focus on culture, leadership, training and a customer-centred focus. The most effective performance improvements link efficiencies and process improvements to regulatory objectives and outcomes.

There is scope to institutionalise best practice for referral bodies through a structured cycle of continuous improvement informed by performance monitoring arrangements and safe stakeholder feedback loops. This approach will support the transition to the new planning system and deliver material improvements in accountability, efficiency in business process and achieve other best-practice regulator outcomes.

Providing access to high-quality data across government agencies enabling rapid and reliable delivery of connected services to the public has emerged as a key issue for the performance of planning systems.¹⁴⁸ The academic and industry literature¹⁴⁹ reviewed by the Commission suggest that this is partly driven by concerns about 'housing supply and affordability, and in part by a wider regulatory reform agenda.'¹⁵⁰

Performance frameworks commonly allow for regulators to self-assess their performance because a primary objective is to embed practices of review and continuous improvement within regulatory agencies. The Commission's focus is on the alignment of referral bodies' internal businesses processes and the new DAP system, and the extent to which referral bodies will benefit from and contribute to system-wide performance improvements.

Referral body continuous improvement

The new ePlanning system will systematise transactions, marking a shift away from relationship-based/advocacy models of engagement between referral bodies, relevant authorities and applicants. Applications will be lodged, assessed and determined through this electronic framework.

All referrals are undertaken electronically via the PlanSA ePlanning solution. Development Application documents are not sent back and forth between councils and agencies, but rather digitally communicated online via the system functions.¹⁵¹

¹⁴⁸ KPMG, *Modernising Government: Global trends* (Report, May 2021)

<<https://kpmg/au/en/home/insights/2021/04/modernising-government-global-trends>>

¹⁴⁹ Property Council of Australia, *Cutting the costs – streamlining state agency approvals* (Report, November 2017) <https://files.propertycouncil.com.au/hubfs/_RDC/WebFiles/RDC_CuttingTheCosts.pdf> (Property Council Report).

¹⁵⁰ Nicole Gurran, and Peter Phibbs, *Measuring Planning System Performance: The Case of Housing Supply and Affordability* (State of Australian Cities National Conference, 2011)

<http://soac.fbe.unsw.edu.au/2011/papers/SOAC2011_0231_final.pdf>.

¹⁵¹ SPC submission (n 10) 6.

‘Applicants, organisations and practitioners can all use the DAP system to streamline the application process’.¹⁵² The Commission sought information from the three referral bodies on how they capture feedback and data on their performance and their continuous improvement arrangements (see section 2.3.7).

All three referral bodies have undertaken internal continuous improvement reviews to support business process improvements and used the state planning reforms to create efficiencies in the execution of their mandate. Each referral body has adopted significantly different approaches to continuous improvement. EPA and DEW demonstrated continuous improvement in their codified approach to the delivery of business processes and commitment to organisational change over time. The Commission observed that structural reforms have resulted from functional reviews, including the adoption of performance targets which have contributed to process and cultural improvements, including commitments to training and knowledge currency, and reductions in applicant complaints (DEW).

In an effort to reduce referral response timeframes and decrease its volume of referral activity CoH has undertaken internal reviews of business process leading to process improvements and improved engagement of relevant authorities, additional transparency regarding RFIs and a substantial reduction in referral response timeframes.

The referral response statutory timeframes and additional reporting expected to be available through ePlanning may mitigate the risk of delay in relation to RFIs in the future. However, it remains unclear to the Commission how direct interactions between referral body and applicant, which can be critical to timely assessment, will be captured as part of these new data and reporting arrangements.

There is scope for all three referral bodies to institutionalise a culture of continuous improvement to further capitalise on the significant benefits that have come from their respective commitments to improvement. Supporting a cycle of continuous improvement is consistent with best-practice regulatory governance and will assist in the transition to the new planning system.

System performance indicators

Performance in the planning system has mutual benefits for regulators and regulated entities (DA applicants). Industry feedback indicates:

*The referral process must be constantly improved to promote certainty of process and to minimise costs and delays for all stakeholders. Jurisdictions should set benchmarks with minimum improvement measures to minimise costs and delays for all stakeholders.*¹⁵³

The Commission’s consideration of performance monitoring in other planning jurisdictions identified diverse approaches. New South Wales,¹⁵⁴ Victoria¹⁵⁵ and Queensland¹⁵⁶ have various forms of mandatory reporting arrangements. In Western Australia, there are currently

¹⁵² PlanSA, *Development Application Processing system*, (Web page, 10 June 2021)

<https://plan.sa.gov.au/our_planning_system/plan_sa/development_application_processing_system>.

¹⁵³ Property Council Report (n 149) 8.

¹⁵⁴ Government of New South Wales, *Planning Portal, Local Development Performance Monitoring* (Web page, 25 June 2021) <<https://www.planningportal.nsw.gov.au/local-development-performance-monitoring-ldpm>>.

¹⁵⁵ Government of Victoria, *Know your council* (Web page, 25 June 2021) <<https://knowyourcouncil.vic.gov.au/>>.

¹⁵⁶ Government of Queensland, *Manage government performance* (Web page, 25 June 2021)

<<https://www.forgov.qld.gov.au/manage-government-performance>>.

no mandatory performance reporting requirements for relevant authorities but introducing planning reporting is a key recommendation of their current state planning reforms.¹⁵⁷

The Queensland State Assessment and Referral Agency (SARA) is seen as a benchmark for public awareness and accountability in referrals processes. While the structural features of SARA such as governance and decision making are important, SARA also gives priority to cultural and continuous improvement. It established reporting targets with a strong emphasis on monitoring, most notably annual public reporting against a suite of formalised service agreement KPIs and an annual customer satisfaction survey. This performance driven culture is embedded in operational practice and drives organisational change.¹⁵⁸

In South Australia, the *Development Act* required the Minister to publish the Planning System Indicator Data Collection report 'requiring the keeping, collation and provision of information' of several indicators including referrals of applications, development authorisations and appeals and review processes. As part of the new planning system a performance indicators scheme was developed to better monitor, analyse and report on development activities taking place across the state.¹⁵⁹ The scheme aims to capture data directly from the new SA Planning Portal (ePlanning system), said to offer 'new data, new ways of measuring applications lodged, decisions being made and assessment timeframes in the new system making it accessible to all interested parties beyond the development sector.'¹⁶⁰ The new scheme came into effect on 1 July 2020 with the first formal report to the SPC to occur shortly following the end of the 2020-21 financial year, enabling reporting on a full financial year of statewide data.

The Commission was advised by PLUS that while there have been several changes to the governance of impact assessed developments under the *PDI Act*, impact assessed process has not been built into the Performance Indicators (System) Scheme. There is currently no automated process for monitoring the performance of agency referrals for impact assessed developments, including the input of referral bodies. PLUS indicated this may change in the future with subsequent enhancements to the SA Planning Portal to be further considered in the short-term.

The impacts of the state planning reforms are not yet well understood, and it will take some time to properly evaluate the benefits of the new performance monitoring system. The Commission has formed the view that the Performance Indicators (System) Scheme is expected to improve planning system reporting, including referrals, in relation to Code assessed development.¹⁶¹

¹⁵⁷ Government of Western Australia, Department of Planning, Lands and Heritage, *Action Plan for Planning Reform* (Web page, 19 May 2021) <<https://www.dplh.wa.gov.au/action-plan>>.

¹⁵⁸ Government of Queensland, *SARA Key Performance Indicators and Customer Satisfaction Survey Report 2017-2018* (April 2019) <<https://dsdmipprd.blob.core.windows.net/general/sara-key-performance-indicators-2017-18.pdf>>.

¹⁵⁹ *PDI Act* (n 1) sch 4.

¹⁶⁰ Performance Indicators Scheme (n 122).

¹⁶¹ *Ibid.*

4.3.3 Culture and capability

The referral bodies demonstrated variable commitments to high-performance and service-orientated cultures. The extent to which these commitments are published, measured and reported on is an area for further consultation with the referral bodies.

Using consultants is a dominant part of the referral bodies capabilities, and intrinsically linked with the effectiveness of the referral response process. The impact of consultant use on regulatory practice, and the extent to which consultant product may be influenced by the accreditation process and other factors will be explored further in the final report.

Corporate culture

All three in-scope referral bodies display a culture of service demonstrated by early engagement, the provision of information and pre-lodgement services. The referral bodies dedicate effort to understanding their customers and their needs and seek to facilitate an outcome beneficial to all parties. This is promoted in corporate documents, such as EPA's Corporate Plan 2020-21, that encourages a high-level of timely service delivery adopting the South Australian Public Values and Behaviours Framework.¹⁶²

The South Australian Public Values and Behaviours Framework was developed to ensure public sector institutions share a similar culture and vision.¹⁶³ The values take into account the place of government in helping to grow the state's prosperity and wellbeing and all public sector employees are encouraged to embody these values at work. It provides examples of organisational practices and personal behaviours in the workplace.¹⁶⁴

Notwithstanding these sector value commitments, the Commission heard that it is difficult for applicants or their agents to access EPA's specialist advisers. LGA indicated a reluctance by EPA to undertake pre-lodgement discussions or provide informal advice at officer level.¹⁶⁵ The Commission has not validated this feedback – this is an area for further consultation with EPA. LGA suggested:

...given the significance of the EPA in the referral and licencing process they should consider regularising pre-lodgement discussions with the relevant authority and the applicant.¹⁶⁶

Campbelltown City Council commented on the frequency of engagement of applicants with referral bodies:

Very rarely do applicants engage directly with referral bodies. Direct engagement with a referral body through a pre-lodgement agreement would result in a similar outcome, however would be quicker once the application is lodged.¹⁶⁷

¹⁶² Environment Protection Authority, *Corporate Plan 2020-21*.

¹⁶³ Government of South Australia, *South Australian Public Sector Values and Behaviours Framework* <https://www.publicsector.sa.gov.au/__data/assets/pdf_file/0020/218270/Public-Sector-Values-and-Behaviours-Framework.pdf>.

¹⁶⁴ The public sector values are service, professionalism, trust, respect, collaboration & engagement, honesty & integrity, courage & tenacity and sustainability.

¹⁶⁵ Local Government Association submission (n 34) 6.

¹⁶⁶ Ibid.

¹⁶⁷ Campbelltown City Council Submission DR1 to South Australia productivity Commission, *Development referrals review* (19 May 2021) 2.

NVC's culture is reflected in its Charter, Governance Framework and Service Standards which provide NVC members and employees with specific guidance on how the business should operate, and about a culture of encouraging good governance and timely delivery of services.¹⁶⁸ The service standards focus on providing an efficient, fair and transparent service centred on customer needs.

NVC's 2019-20 Annual Report includes a values' focus on providing clarity for community and stakeholders managing native vegetation and indicates NVC undertakes a performance review every two years including an evaluation of its effectiveness.¹⁶⁹ LGA submits that consistency and collaboration between NVC/DEW and CFS referrals have improved and conflicts are generally resolved in a straightforward manner.¹⁷⁰

CoH has a culture of technical and managerial focus strongly aligned with its legal mandate to make further and better provision for the construction and maintenance of roads and works. The Commission heard from legal consultants that there has been a positive two-way engagement with the CoH as part of the development application referral process. Competent and reputable traffic consultants have good relationships with CoH staff and are effective in dealing with traffic and road issues in a proactive way. While the LGA acknowledged longer timeframes can arise because of 'issues of significant traffic engineering complexity' and can 'require reworking of other aspects of a development proposal', the LGA commented on CoH interactions:

*Information requirements have historically been generally reasonable, and response times and access to staff with relevant expertise appropriate...pre-lodgement consideration of whole of site issues, in consultation with all relevant referral bodies, has been beneficial in achieving an efficient assessment process and appropriate development outcome.*¹⁷¹

Culture of accountability

The *PDI Act* provides for ensuring high level of accountability of referral bodies as they will be respondents to appeals where their direction to a relevant authority is to refuse or condition a DA.¹⁷² Businesses are concerned that the intended accountability dividend of the shift to referral for direction will not be realised. There is a perception that referrals for direction makes referral bodies quasi-relevant authorities. Further, that proponents are unlikely to appeal directions given the high costs associated with litigation and the perception that there are low prospects of successfully overturning a referral bodies decision.

These observations from planners and proponents highlight the importance of ensuring that these powers are exercised judicially, in the spirit of the *PDI Act* and in the state's overall interests.¹⁷³

Capability

Capability is a product of the level of training, knowledge, experience and skills necessary for assessment officers to effectively and efficiently assess a DA. Capability and resourcing influence the type and amount of information requested from applicants and responsiveness.

¹⁶⁸ Native Vegetation Council, *Native Vegetation Branch Governance Framework and Native Vegetation Council Service Standards* (11 March 2020).

¹⁶⁹ Native Vegetation Council Annual Report, 2019-20.

¹⁷⁰ Local Government Association submission (n 34) 6.

¹⁷¹ Ibid 7.

¹⁷² *PDI Act* (n 1) s 122.

¹⁷³ Ibid s 12.

Proportionality of RFIs were raised a point of concern by business stakeholders, and legal and planning consultants.

Appropriate resourcing of referral bodies ensures efficient and timely operation of the system. The approach to understanding resource requirements needs to not only consider total referral numbers, but also the assessment complexity of caseloads.... A well-resourced referral body will have the time required to provide a highly skilled and productive assessment service, which in turn supports economic development, growth and sustainable environmental outcomes.¹⁷⁴

The Commission heard from business that experience and maturity are pre-requisites for good customer service and can affect referral body responses and responsiveness. An absence of succession planning, and poor or no handover of work when referral body staff are absent were also flagged as issues. Business suggested that benchmarks and risk-based approaches would mitigate the risks to referral body outputs in these circumstances.

All three in-scope referral bodies have demonstrated they possess capability to perform their referral body role – to provide expert technical assessment on their areas of expertise. A culture of customer service that is subject to performance measures and commensurate public reporting will underpin their published commitments to high-performing cultures and service, and ensure they reflect the South Australian Public Values and Behaviours Framework.

The Commission will consider further the uptake of public sector and agency-culture standards, whether or not these attributes are measured, and if performance is fed into a continuous improvement cycle.

Accredited expert consultants

The engagement of external consultants is part of the working culture in both the CoH and NVC/DEW and a legal requirement in certain circumstances. While there is no legislated accreditation scheme for CoH to use consultants, the technical nature of their mandate means traffic engineers and other consultants need to possess industry accreditation. NVC only engages accredited native vegetation consultants approved by the NVC. Expertise of staff in the NVC has been maintained to undertake the functions of accredited consultants if necessary. EPA has in-house technical expertise involved in the referral process and there is a legal requirement for site contamination auditors to be accredited for site contamination audits.¹⁷⁵

The Commission heard from planning industry businesses there is a perception of a conflict of interest arising where the regulator who accredits consultants is the same regulator that assesses those consultant's reports. In lay terms, the view was that consultants will draft reports to reflect the preferred outcomes of the accrediting regulator. This potential capture of consultants may potentially result in assessments that are more conservative than would otherwise be the case, impacting on obtaining approvals or giving rise to conditions.

The Commission also heard that accredited and professional consultants are inclined to take a conservative approach to their assessments and reports to guard against impacts on their reputation and their professional indemnity insurance. The Commission will consider further the extent to which these issues impact on referral body regulatory practice and the effectiveness of the referrals process.

¹⁷⁴ Local Government Association submission (n 34) 7.

¹⁷⁵ EP Act s 103U.

4.3.4 The relevant authority-referral body relationship

The relationship between relevant authority and referral bodies is a critical part of the efficiency and effectiveness of the referral response process. Any barriers to the interactions between these two parties has the potential to unnecessarily delay the referral response and DA assessment process.

The structure of DA assessment through the SA Planning Portal may be impacting on the ability of applicants, relevant authorities and referral bodies to resolve matters quickly and pragmatically.

There may be scope for the Performance Indicators (System) Scheme to capture data to monitor the process efficiency of the portal.

An important feature of the new planning system is the SA Planning Portal established under the *PDI Act*. This portal is used for the online delivery of planning and assessment services in relation to the lodgement of DAs, among other things. Relevant authorities and referral bodies use this online service as the key mechanism to communicate with each other and the applicant once a DA is lodged and referred.¹⁷⁶

There needs to be a clear line of sight to what the process is for an applicant who has an application to be reviewed by a referral body, including what information is likely to be required, timeframes, impact of referral bodies direction and an applicant's recourse clearly and concisely documented for an applicant and not hidden in legislation.¹⁷⁷

This portal is intended to facilitate the online delivery of services and information to the community and must include information, documents and materials that are required to be published by the SPC and regulations.¹⁷⁸ It is also a mechanism contributing to the transparency of the DA referral process as all formal transactions between parties, including RFIs, are systematised.

Referral bodies have indicated that the portal makes it easier for them to communicate with both applicant and relevant authority simultaneously as the information is centralised and readily available. Joint conversations between parties are seen as important for complex referrals. 'In complex applications it is important that the relevant authority, referral body and applicant have joint conversations to balance the needs of both planning related matters and the matters for referral.'¹⁷⁹

The Commission heard that there is scope to improve the information provided on the portal regarding referral process.

The role that the referral body plays in the process and the direction that they may make in relation to an application is not made clear at the beginning of the process. The process for an applicant engaging with a referral body prior to lodging an application is not clearly understood by a number of applicants.¹⁸⁰

¹⁷⁶ *PDI Act* (n 1) s 53.

¹⁷⁷ City of West Torrens submission DR3 to South Australian productivity Commission, Development referrals review (May 2021) 7 (City of West Torrens submission).

¹⁷⁸ *PDI Act* s 48.

¹⁷⁹ City of West Torrens submission (n 177) 4.

¹⁸⁰ Campbelltown City Council Submission DR1 to South Australia productivity Commission, *Development referrals review* (19 May 2021) 2.

The Commission also heard that the portal may have a detrimental impact on the ability for applicant and referral bodies to resolve matters pragmatically.

It has been noted that more recently there is more rigidity and formality in the referral process between relevant authority and the referral agency which has been a missed opportunity for collaboration and improved service to applicant.¹⁸¹

Some newly established relevant authorities have found the system to be rigid – for example not allowing applicants or referral bodies to provide information in parts and precluding referral bodies from adding file notes to applications, an issue of concern not only for transparency, but also efficiency where system “workarounds” may be required to effectively communicate information and accommodate changes¹⁸².

Referral bodies advised the Commission that they inform the relevant authority about any communication they have directly with applicants or their representatives in relation to RFIs and other matters. Any formal requests are captured in the SA Planning Portal with easy access for all parties. However, some relevant authorities have a different perception of the portal’s current impact on the referral body-relevant authority relationship.

Councils have indicated that some referral bodies will not provide information or informal advice (officer to officer) outside of a formal application process. This indicates some referral bodies are encouraging a siloed approach between relevant authorities and referral bodies. Historically, communication and collaboration amongst planning authorities, referral bodies and applicants prior to and during the assessment process has achieved efficient, high quality, and customer focused outcomes for applicants¹⁸³.

The Commission acknowledges that the SA Planning Portal is still in its operational infancy. Structural barriers to effective communication between applicant, relevant authority and referral bodies may impact on the efficiency and effectiveness of the referral response process, and adversely affect timeframes to obtain a DA outcome. The impact of the portal on regulatory practice and referral response timeframes is an area to watch. The Performance Indicators (System) Scheme includes an indicator in relation to ‘the number of referrals to each other authority or agency, timeframes to comment and direction given (including pre-lodgement referrals).¹⁸⁴ There may be a role for the Scheme to add additional indicators to monitor how relationships between the relevant authority, referral body and applicants in the new planning system impact the efficiency of the development referral process.

4.4 Process and practice observations – impact assessed development

The Commission is considering a sample of major projects assessed under both the *Development Act* and the *PDI Act*. This analysis is intended to quantify the typical timeframe for approval of large-scale projects in the state. This will be related to the costing analysis detailed in section 4.2.2. Defining the timeframes and milestones is a difficult exercise; no two projects have the same objects or impacts on the community. The timeframes of projects vary with management of finance and construction and raise different issues for assessment and approval. The Commission is interested in commonly occurring and structural approaches to milestones applicable to the management of major projects by the state. This approach will be the most instructive and enable rigorous analysis and the development of recommendations.

The Commission has requested data from PLUS on milestones and timeframes on a sample of projects declared as major project. The sample will include all projects approved, refused or

¹⁸¹ City of West Torrens submission (n 177) 5.

¹⁸² Local Government Association submission (n 34) 4.

¹⁸³ Ibid.

¹⁸⁴ Performance Indicators Scheme (n 122).

under consideration. The Commission will consider the major milestones from application to be declared as major or impact assessed by the Minister, declaration as such by the Minister, publication of EIS and associated public notification periods, and approval date either for the entire project or a first phase of construction.

The retrieval and presentation of the data requested by the Commission has proved challenging. The parameters of the Commission's full data request are at Appendix 4. PLUS has indicated that the information is held in two separate systems and traverses two planning regulatory frameworks. The Commission will continue to work with PLUS to extract information capable of supporting constructive analysis.

The difficulty in retrieving this data has implications for tracking projects and reporting on progress of high value to the state. This is an important conclusion which the Commission will build on in the final report.

The Commission has made the following observations based on information provided by PLUS, proponents, industry representatives and consultants, and the referral bodies. The Commission invites feedback on these observations which will be the subject of further consultation with PLUS, the referral bodies and other interested parties to inform recommendations relevant to the terms of reference in the final report:

- Centralised case management of major projects can be strengthened by focusing on facilitating timely approval for developments of state significance.
- There is a lack of strategic focus on major projects linking their timely facilitation and assessment to economic growth and other government priorities and objectives.
- Tracking of major projects is undertaken on a project-by-project basis with no system-wide reporting.
- There is scope to improve using milestones for major project assessments and transparency of timeframes, including in relation to referral body input at several stages in the assessment process.
- There are no service standards to govern the state's management of major project assessments.
- Performance data of major project assessments requires significant improvement; major project assessment data is not currently captured by the ePlanning system.

It is the Commission's view that, in the absence of action to address them, these issues are likely to be continue through the transition from the *Development Act* to the *PDI Act*. This is so because the *PDI Act* reforms were focused primarily on reforming less complex, lower risk developments through introducing the Code. Impact assessed provisions in the *PDI Act* are similar to those in the *Development Act*, accepting some modification (e.g. only one level of assessment now an EIS, and some governance changes e.g. Practice Direction 4).

While the Commission's mandate does not extend to legislative reform the Commission intends to have a stronger focus on accountability, transparency and better regulatory governance of state significant developments, with a particular emphasis on referral body input in the final report.

4.5 Conclusion

This review is confined to the referral role of three regulators (of a total state regulator population of around 30 entities). Consequently, the evidence-base this review considers is

inevitably narrow from a jurisdictional perspective. Within the scope of the review, further consultation and analysis is also necessary. That work will enrich the evidence and improve the understanding of the regulatory practice of the three referral bodies. The Commission will also obtain more, broader evidence in the other related activities of the Modern Regulation Project.

In doing the work of examining regulatory practice, the Commission has applied a framework for examining good regulatory practice based on OECD research and principles. The Commission's task requires it to be focused on regulators doing, within their mandate, purpose and obligations, their role to strengthen SA's economic interests of employment, investment and productivity.

The boundaries and the focus of a regulator's role are set by its mandate, which in turn is determined by legislation. No regulator may act in contravention of its legislation, for to do so would be unlawful. First and foremost, its role is to protect the public interest for which it was created.

That said, a regulator may, within those boundaries, have regard to additional areas of the public interest in addition to those specified by regulation. To be clear, the Commission considers that, for the regulator, those additional areas may be incorporated only to the extent that doing so would not compromise the regulator's role especially where strong regulatory action is needed.

Most regulators, including referral bodies, accept this view and attempt, to varying extents, to regulate accordingly. In doing so they achieve a synthesis in how they understand and practice their role – that is, the role is not singular strict compliance with the regulations but rather compliance with the regulations and business growth and development.

Observed regulatory behaviours that are consistent with this view include assisting proponents not only to understand what the approval process requires but also how the regulatory requirements may be met. In practice this may be experienced as when a regulator says no, it also indicates how approval may be achieved – unless of course the proposal contains inherently show-stopping problems. The use of pre-lodgement arrangements to determine either an 'early no' or a conditional pathway forward is a practical example of enabling regulatory practice.

A second behavioural example is a regulator applying the understanding of the business drivers and incentives of the regulated entities to better understand and mitigate regulatory risks so that regulatory action is effective, efficient and minimally intrusive.

Industry regulators may naturally fall into this pattern where, for example, there is a shared interest between businesses and regulator in protecting and sustaining the environment, and where a pattern of individual failures may prejudice the reputation of the industry.

Employment, investment, productivity and living standards are dimensions of a broad public interest that is extremely important to the interests and future of South Australians. This public interest is relevant to every area of business regulation, including development assessment and referral body input. The Commission will summarise this broad public interest as an "Economic Objective", which it regards as a key element of the role of every regulator in conjunction with their primary role.

Strengthening such an objective in regulatory work would, in the Commission's view, raise the contribution of the state's regulatory framework to increasing employment, investment and living standards.

Clearly, such an objective needs testing and refinement to be of practical value to regulators in their practice. Such an objective would be supported by demonstrated best practice elements including:

- Internal policies incorporating the Economic Objective.
- Appropriate performance indicators to measure progress on implementing the Objective.
- Publishing measures of the overall effectiveness and efficiency of these indicators.
- Leadership and management accountability for performance against these measures.

The Commission intends to develop these elements further as part of the consultation following the release of this report with a view to making recommendations in this area in the final report.

Appendices

Appendix 1: Terms of reference

SOUTH AUSTRALIAN PRODUCTIVITY COMMISSION REVIEW INTO MODERN REGULATION – REVIEW OF REGULATORY REFERRALS WITHIN THE DEVELOPMENT APPROVALS PROCESS

I, Steven Marshall, Premier, hereby request that the South Australian Productivity Commission (the Commission) undertake a review into regulation and practice governing referrals processes that form part of obtaining a development approval.

Background

Encouraging investment in developments and significant projects that create or expand private sector investment is essential to lifting South Australia's economic growth, employment and productivity. The total value of building approvals in 2019/20 in South Australia was more than \$6.8 billion.¹

The government is aware of industry concerns about costs, time delays and uncertain outcomes arising from referrals processes that are often an important part of development assessments. Duplicated and disproportionate information requirements placed on proponents, use of 'stop the clock' provisions by agencies during assessment processes, and an absence of case management and pre-lodgement arrangements can all contribute to these concerns and influence investment outcomes.

Referrals occur when an application for development approval is referred by the approving authority to another body for specialised advice which may be advisory or binding. In recent years there have been several efforts to improve the speed at which a project of economic importance to the state can be assessed, along with improvements intended to speed up assessment of development applications generally. The most important of these is the state planning reforms. The government recognises the importance of building on these reforms to ensure that South Australia's regulatory systems contribute to a competitive business environment which is attractive for business growth.

Terms of Reference

The government seeks advice from the Commission on how the referrals processes, that form an integral part of the state's development approvals system, can be improved to lift the competitiveness of South Australia as an investment destination. The Commission is to focus on short to medium term benefits to the state that can be realised through changes in regulator practices, regulator structure and systems, business processes, technology and capability as well as culture and relationships between proponents and regulators.

The Commission is to make recommendations aimed at an improved understanding by state authorities of the impacts of the referrals process on a proponent's preparedness to undertake a development having regard to application and holding costs, timeframes and certainty of decision-making. This includes the value of a transparent and efficient assessment process in achieving a conditional approval or an 'early no'. Whilst this review is to focus predominantly on regulator practice and policies, the Commission may make recommendations on amendments to regulations and legislation if relevant to these terms of reference.

To contain the scope of the review it will be confined to three referral processes which together account for a significant volume and complexity of referral activity in the areas of:

- environmental significance;
- native vegetation; and
- transport routes and corridors.

¹ Australian Bureau of Statistics, Building Approvals, Australia, catalogue number 8731.0.

Heritage-related referrals will not form part of this review.

The Commission is asked to make recommendations to:

1. improve the efficiency of the operations and the performance of the relevant referral agencies:
 - a. in ways that cut the costs of referrals and development assessment to regulated parties and make it easier to do business in the state; and
 - b. having regard to the relevant referral agencies' mandates and the public interests with which they are charged.
2. institutionalise continuous improvement and better practice in the referral agencies.
3. improve the adaptability and resilience of the referrals process to achieve timely and effective outcomes including in relation to unusual or innovative development proposals of economic value to the state.

The Commission is to make estimates of the value of proposed administrative efficiencies and time reductions in obtaining referral outcomes that will contribute to South Australia's competitiveness and certainty of investment in the state.

Scope

Given the recency of the state planning reforms, the Commission will accept the *Planning Development and Infrastructure Act 2016*, the Planning and Design Code and complementary reforms as given. This review is to be confined to referrals processes, and specifically to the interdependencies, processes and practices of the referral agencies, planning authorities, and relevant interactions with proponents.

The Commission is to focus on developments where the efficiency of the referrals process can have a material influence on attracting and securing investment, jobs and economic growth. This may include development declared to be a major project or Crown development, other large commercial developments, and smaller scale developments of a high frequency or complexity.

The Commission is asked to have regard to better practice in other jurisdictions and the government's Growth State Plan.

Inquiry Process

The Commission is to consult with key industry organisations, business operators, Planning and Land Use Services (Attorney-General's Department), the referral agencies, other relevant public sector agencies and regulators, and other key stakeholders.

The Commission is to publish an issues paper at the beginning of the review process and a draft report containing recommendations for consultative purposes. A final report is to be provided to me no later than 6 months from the date of receipt by the Commission of these terms of reference.



Hon Steven Marshall MP

PREMIER OF SOUTH AUSTRALIA

01 / 03 / 2021

Appendix 2: Submissions in response to the Development Referrals Review issues paper to support the draft report

Organisation name	Submission number
<u>Campbelltown City Council</u>	DR1
<u>City of Adelaide</u>	DR2
<u>City of West Torrens</u>	DR3
<u>Hickinbotham Group</u>	DR4
<u>Local Government Association of South Australia</u>	DR5
<u>Murraylands and Riverland Landscape Board</u>	DR6
<u>State Planning Commission</u>	DR7
<u>Urban Development Institute of Australia (South Australia) Inc.</u>	DR8

Appendix 3: Leading practice and other jurisdictions

The Commission's review of the reforms in other jurisdictions suggests that comprehensive initiatives aimed at improving development processes and approvals have been completed or have been undertaken, including those considering best practice approaches, in Western Australia, Victoria, New South Wales, Tasmania and Queensland.

In response to the COVID-19 pandemic each Australian state and territory has emergency and disaster response legislation which authorises officials to declare emergencies in a variety of circumstances and make orders to deal with an emergency. All jurisdictions have passed omnibus Acts of a temporary nature to address the impacts of the pandemic and introduce measures to ensure the continuation of business operations. This extends to reforms across all jurisdictions with an aim to reduce approval timeframes in their planning sectors. As part of an agreement between the Australian Government Minister for Cities, the State and Territory Planning Ministers, and President of the Australia Local Government Association, reform efforts have also been brought forward in all jurisdictions to 'make sure planning systems and the development approvals pipeline in Australia continue to function during the COVID-19 crisis'.¹⁸⁵

The commonality of the reforms between jurisdictions is they ultimately seek to achieve a more coordinated, streamlined and efficient referral process. The Commission notes that several reforms concentrate on the improvement of assessment of major development proposals, these and other reforms are further discussed below.

The Tasmanian government is currently undertaking planning reform to improve their planning system and intends to introduce legislation to deliver on reforms for the assessment of major development proposals to make the process more efficient.¹⁸⁶ The Commission notes that the Tasmanian government is also proposing reforms to provide greater certainty to proponents earlier in the assessment process and improve transparency and public involvement.¹⁸⁷

The centralised approach of the Queensland State Assessment and Referral body (SARA) model for referral of DAs is a government body assessing impact applications. SARA is the single point of contact for most referral responses on State matters. SARA was established in 2013 to coordinate the state's assessment and decision-making role in the development process and replaced seven different referral authorities, with 56 different triggers. SARA uses advice from state government agencies referred to as technical authorities, to inform and guide its decision about how a proposal meets the state's agreed policy objectives which are outlined in the State Development Assessment Provisions.¹⁸⁸

SARA most closely reflects the key practice principles identified by the Development Assessment Forum and is held in very high regard by the property industry. Prior to the

¹⁸⁵ Communique from Planning Ministers, Land Use Planning and the COVID-19 Pandemic (Web page, 10 June 2021) <<https://minister.infrastructure.gov.au/sites/default/files/documents/land-use-planning-communique-20200420.pdf>>.

¹⁸⁶ Government of Tasmania, *Tasmanian Planning Reform* (web page, 19 May 2021) <<https://planningreform.tas.gov.au/home>>

¹⁸⁷ For further details, see <<https://planningreform.tas.gov.au/home>>.

¹⁸⁸ Department of State Development, Manufacturing, Infrastructure and Planning, *What is the State Assessment and Referral Agency* (Web page, 20 June 2021) <<https://dsdmipprd.blob.core.windows.net/general/sara-fact-sheet.pdf>>.

establishment of SARA, permit applicants needed an approval from individual authorities, for example, a roads and planning approval.¹⁸⁹

The New South Wales Government has introduced a suite of reforms designed to support improved planning outcomes in response to the COVID-19 pandemic. The Planning Reform Action Plan (PRAP) is being implemented to improve assessment time frames, reduce red tape, eliminate double-handling and fast-track projects that deliver public benefits to the social economy. The PRAP outlines long-term structural reform of the planning system and consists of a series of initiatives, including introducing the Planning Delivery Unit (PDU)¹⁹⁰ As part of PRAP the New South Wales government objective is to reduce the number of applications that require concurrences and referrals. The unit has a target of reducing concurrence and referral requests by 25 per cent by 2023.¹⁹¹

In 2019 the Victorian Department of Treasury and Finance undertook a review which primarily looked at the causes of complexity, delay and lack of effectiveness in planning and building approvals. The review identified multiple opportunities for short and medium-term improvement in the approvals chain and made several recommendations aimed at reducing response times for referrals.¹⁹²

The Western Australian Government has brought forward several measures for planning reform as part of COVID-19 economic recovery plans, together with a proposal to establish a new development application process for significant projects. As part of a broader strategy, improving referral processes is a key initiative of the Government's Action Plan for Planning Reform which provides the roadmap for planning reform in WA through the identification of three goals, 19 initiatives and associated actions.¹⁹³

The Western Australian initiative considers the referral processes, including the timely provision of consistent and pragmatic advice from agencies which is an essential component of an efficient planning system and good decision-making and improving the availability of pre-lodgement advice so that referral agencies are engaged more productively and proactively. Initiative C5 - *Referral processes* are intended to address these issues and create a new framework for the referral of planning applications to provide greater certainty regarding the timing, process and scope of referral agency input.

To date several initiatives have been undertaken as part of this wide-ranging review including the establishment of an agency referral group which is currently considering a dedicated group to coordinate agency referral processes. This approach would be similar to the Queensland SARA referral model where the state's overall interests can be considered deciding about a development.

In reviewing planning reforms undertaken in other jurisdictions, the Commission notes that several state governments have or are moving away from the SA approach of mandatory direction power given to many referral agencies referrals, which raises concerns that each of those agencies may become a quasi-planning authority. Interstate governments are looking to increase efficiencies by using a single point of contact to coordinate referrals through various agencies.

¹⁸⁹ Better Regulation Victoria Review (n 113).

¹⁹⁰ New South Wales Department of Planning, Industry and Environment, *Planning Reforms* (Web page, 17 May 2021) <<https://www.planning.nsw.gov.au/Policy-and-Legislation/Planning-reforms>>.

¹⁹¹ Ibid.

¹⁹² Better Regulation Victoria Review (n 113).

¹⁹³ Government of Western Australia, Department of Planning, Lands and Heritage, *Action Plan for Planning Reform* (Web page, 19 May 2021) <<https://www.dplh.wa.gov.au/action-plan>>.

Appendix 4: Commission data request – major projects

Data request

Section 1 seeks data in relation to all development applications lodged in the e-planning system (phases 1, 2 and 3 of the state planning reforms) since July 2019 that have been subject to a referral to a prescribed body under the Planning, Development and Infrastructure Act 2016 (PDI Act) and the Planning and Design Code.

Section 1: Performance assessed developments

- 1.1 Applicant.
- 1.2 Date of lodgement with the relevant authority.
- 1.3 Date applicant advised of DA decision.
- 1.4 The relevant authority.
- 1.5 Applicable Planning and Design Code overlays.
- 1.6 Class of development (e.g. agricultural building)
- 1.7 The number of referrals made in relation to the DA (please identify all).
- 1.8 The total time each referral body took to respond to the relevant authority (i.e. the date the referral was received by the referral body and the date the response was provided to the referring relevant authority). (PDI Act s 122(1)(b) and sch 9(3))
- 1.9 The number of requests for information made by each referral body of the applicant. (PDI Regs r 41(3))
- 1.10 The time it took for the applicant to respond to each request for information. (PDI Act s 122(4))
- 1.11 The duration for each 'stop the clock' instance. (PDI Act s 119(6)(a))
- 1.12 The referral body response (i.e. conditions applied, approved as submitted or refused).
- 1.13 Whether the referral was the subject of an appeal, and if appealed what the outcome was (referral body response upheld, response overturned or returned to referral body for further assessment).

Section 2: Major projects/impact assessed development

Section 2 seeks data for the last 10 years of major projects administered under the Development Act 1993 (Development Act) and impact assessed development under the PDI Act. A reference to an EIS under the Development Act also includes a reference to a Public Environmental Report or a Development Report where applicable.

Phase 1: Declaration and assessment guidelines

- 2.1 Applicant.
- 2.2 The date the project proposal was submitted by applicant for consideration by the Minister as a major project.

- 2.3 The date the Minister declared the major project. (s 46 Development Act 1993 and s 108 PDI Act)
- 2.4 Class of development (e.g. port). (PDI Regs Sch 9, 3 – Table)
- 2.5 Date of lodgement of the major project development application with the relevant authority. (s 46(6) Development Act and s 111(d) PDI Act)
- 2.6 The date the guidelines for the preparation of an Environment Impact Statement (EIS) were published and provided to the proponent (s 46(13) Development Act and s 113(2) PDI Act).

Phase 2: Proponent preparation of application and EIS and consultation and referral

- 2.7 The date the applicant submitted the EIS to the relevant authority (ss 46B(1)-(4) Development Act and s 113(4) PDI Act)
- 2.8 The date the EIS was referred to each of the prescribed bodies and authorities for comment. (s 46B(5) Development Act and s 113(5)(a) PDI Act)
- 2.9 The date the EIS was published for public comment. (s 46B(5)(b) Development Act and s 113(5)(b) PDI Act)
- 2.10 The date the comments from the prescribed bodies and authorities were provided to the relevant authority following public consultation and the referral process. (s 46B(5)(a) Development Act and r 63C *Development Regulations 2008* PDI Act s 113(5), PDI Regs r 71).
- 2.11 The date the comments from public consultation and prescribed bodies and authorities were provided to the applicant. (Development Act and s 113(7) PDI Act).
- 2.12 The date the applicant provided the written response to the Minister in relation to matters raised during public consultation and by the prescribed bodies and authorities in relation to the application. (s 46B(8) Development Act and s 113(8) PDI Act)

Phase 3: Assessment response and decision

- 2.13 The date on which the Minister published and provided to the applicant the assessment report (s 46B(9) Development Act and s 113(9) PDI Act).
- 2.14 The dates of any amendments made to the EIS or assessment report. (s 47 Development Act and s 114 PDI Act)
- 2.15 The date a decision was made and communicated to the applicant in relation to the major project development application. (s 48 Development Act and s 115 PDI Act).
- 2.16 The nature of the decision e.g. approved with conditions or refused. (s 48(2)(b) Development Act and s 115(2)(b) PDI Act)

Supplementary information

- 2.17 Financial value of the major project/impact assessed development.
- 2.18 Geographical location of the major project/impact assessed development.
- 2.19 Where possible please identify industry of the proponent for each project e.g. tourism-related development such as hotels.

For more information

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