



## Final Report

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# Development referrals review

11 October 2021



Government of  
South Australia

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# About the South Australian Productivity Commission

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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 which is an attached office of the Department of the Premier and Cabinet.

## 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 review stakeholders.

## Confidentiality

Transparency is an important part of the Commission's independent process for gathering evidence and other elements of the review 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 review'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 review.

## 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](http://www.sapc.sa.gov.au), email to [sapc@sa.gov.au](mailto:sapc@sa.gov.au) or call 08 8226 7828.

# Transmittal letter

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The Hon Steven Marshall MP  
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Dear Premier

## Development Referrals Review

In accordance with the terms of reference received by the Commission on 9 March 2021 we are pleased to submit the South Australian Productivity Commission's Final Report on the review of regulation and practice governing referrals processes of the state's development assessment system.

This final report has been prepared after consultation with industry, government agencies and other stakeholders as well as careful deliberation of the submissions they made.

We acknowledge and thank them for their support, together with the Office of the South Australian Productivity Commission staff for their contributions in preparing this Final Report.

We respectfully note that in accordance with the *Premier and Cabinet Circular PC046* "The Commission must ensure that the report is available on its website within ninety days of delivering the report...", unless you specify a shorter period.

Yours sincerely

Adrian Tembel  
**CHAIR**

11 / 10 / 2021

Dr Matthew Butlin  
**COMMISSIONER**

11 / 10 / 2021

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## Key messages

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South Australia's planning framework includes independent regulators, referral bodies, who have mandates applicable to development activity to enable an integrated approach to development assessment. The referrals process enlivens those mandates, aimed at protecting broader public interests, and ensures those interests are applied to the development assessment process.

The terms of reference focused the Commission's work on recommendations aimed at improving the operations and the performance of three referral bodies in relation to development application processes: the Environment Protection Authority South Australia, the Native Vegetation Council and the Commissioner of Highways. The overarching perspective was to improve the understanding of those regulators in terms of the impacts on business of the referrals process. The Commission thanks the referral bodies for supporting the Commission's work through their timely sharing of important information and data, and their candid interactions in the spirit of the review's terms of reference. Overall, the Commission found structured and effective regulatory practices across the referral bodies.

The Commission found all three referral bodies use and are supportive of pre-application and early engagement arrangements. Better practice would see referral bodies make clearer the level of guidance applicants can expect early in the development cycle. There is a nexus between the certainty of the applicant's information and the proportionality of response.

Publicly available material that is easy to access and use by lay and professional applicants supports an efficient and transparent referral process and mitigates the need for additional information and rework. Acknowledging the differences in referral body mandates and assessable requirements, lifting the publication of guidance materials to a consistent level across the board will institutionalise a culture of transparency, reflect best practice and minimise inefficiencies. A consistent format and structure to these materials and making them available centrally through the state's planning portal would support a 'single planning system'.

Continuous improvement and improved performance were evident at all of the referral bodies, albeit mostly in response to external reviews. There is scope to institutionalise best practice through a structured cycle of continuous improvement in relation to regulators' referral functions.

The significant impact major projects can have on the state's economy, productivity and employment, and the level of discretion the relevant authority has over the assessment process, including the incorporation of referral body input, warrants the highest levels of transparency and accountability. While accepting the need for flexibility in a state-assessed process that accommodates variations in risk and complexity, there is opportunity to better align assessment processes of importance to the state with best practice regulatory governance principles. Strengthening the state's capacity to assess information about the economic effects of major projects, the provision of which is mandated by statute, would better reflect proportional regulatory practice and better support the Minister's decision-making.

There are opportunities to embed better regulatory practice in the referral bodies by leveraging existing performance functions available in the new planning system, and through regulator communities of practice. The substantial feedback the Commission received from proponents and planning professionals regarding major project assessments provides an early guide to a potential broader review of the major project assessment system.

## Executive summary

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### Land use, the public interest and the referrals process

The *Planning, Development and Infrastructure Act 2016* (the *PDI Act*) is South Australia's principal planning and development legislation. It includes independent regulators who have mandates applicable to development activity—referral bodies—to enable an integrated approach to development assessment. The referrals process enlivens the regulatory mandates of these regulators in relation to land use proposals. It is intended to ensure that broader public interests, like protecting the natural environment, are considered at the right time in the development process, avoiding potential costly delays and avoidable rework later to ensure compliance with regulatory requirements.

The way in which referral bodies apply their mandates through the planning system depends on the development pathway. The Commission has considered Code assessed development and impact assessed development declared by the Minister, otherwise known as major projects. The Commission's focus has been on the regulatory practice of the referral bodies and the way they contribute to the assessment of major projects. The latter has necessarily required consideration of major project assessment processes.

Reviewing the regulatory practice of referral bodies is intended to ensure that the design improvements achieved through the recent state planning reforms are given their intended effect. Ultimately, the extent to which the interests of the applicant and the regulator can be aligned and mutually understood, the more efficient and effective the referrals process will be, and the higher the prospect of achieving the state's overall public interests.

### Referral body process, practice and performance

Specific diagnostic indicators, derived from the Organisation for Economic Cooperation and Development (OECD) regulatory best practice and governance principles, were designed and applied by the Commission to evaluate the efficiency and effectiveness of the in-scope referral bodies' assessment processes. The bespoke indicators enabled an evaluation corresponding to the review's terms of reference by considering internal and external regulator practices and processes, without assessing regulator mandates or regulatory design. Those indicators are accountability and efficiency in business process, early engagement and pre-lodgement, customer centred guidance, information requirements, proportionality and risk, capability and resources, post-assessment arrangements, and continuous improvement.

Overall, the Commission found structured and effective regulatory practice across the referral bodies. Unsurprisingly, they varied in their practices against the diagnostic principles, in part because of their different roles, organisational cultures, and the diversity of industries regulated. In this final report the Commission has summarised its findings; its detailed analysis can be found in chapter 2 of its draft report. The Commission has made recommendations aimed at improving regulatory practice, the impact of which will differ depending on each regulator's current practice.

The Commission found all three referral bodies use and are supportive of early engagement arrangements. There was consensus between referral bodies and applicants that the value of early engagement is that it is a non-binding, flexible and iterative process driven by applicants that provides a mutually beneficial opportunity to identify barriers to a proposal, reduce risk and clarify information requirements for assessment. There were contrasting perspectives regarding timely access to experienced referral body staff, and applicant expectations about

the level of guidance referral bodies can offer based on the information provided to them. Best practice would see these issues clarified through guidance materials, preferably with a consistent format and structure and made available centrally through the state's planning portal.

Best practice regulatory principles encourage regulators to understand the business impacts of their process on applicants. 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 and may mitigate the need for additional information and rework during the referrals process. Whilst the three in-scope referral bodies have adopted different approaches to their publicly available guidance for applicants, there was consensus that guidance materials are of value to proponents, their agents and relevant authorities. The use of accredited consultants in some aspects of referral body practice may reasonably explain limitations on the availability of some materials by some referral bodies. Acknowledging the differences in referral body mandates and assessable requirements, lifting the publication of guidance materials to a consistent level across the board will institutionalise a culture of transparency, reflect best practice and minimise inefficiencies in the referrals process.

All referral bodies demonstrated continuous improvement and improved performance, mostly in response to externally triggered reviews (and some internally triggered reviews), but the Commission did not observe a regular continuous improvement cycle for referral functions. Existing arrangements are based on high-level commitments e.g. national fora on better practice, and opt-in arrangements e.g. complaints feedback. Continuous improvement activities will be an important indicator to show success in the transition to the new planning system. It is also fundamental to improving accountability and efficiency in business process by capturing regulated entities' experience of the practice of regulators through 'safe' feedback loops. There is scope to institutionalise best practice through a structured cycle of continuous improvement in relation to regulators' referral functions. Consideration may be given to the extent to which these arrangements could form part of the Performance Indicators (System) Scheme and should in any case be incorporated into any existing regulator-wide corporate continuous improvement arrangements.

The Commission concluded that generally economic matters neither form part of the assessable mandate of referral bodies, nor best practice regulatory practice principles; with the latter tending to focus on systems and practices that support role clarity, transparency and accountability, consistency in decision-making proportionality and continuous improvement. However, the Commission identified legal questions about the extent to which referral bodies should give regard to the *PDI Act* good planning principles and the economic objectives contained therein. Resolving those questions may create an obligation on referral bodies to consider state economic objectives.

The Commission received feedback regarding the use and accreditation of consultants in referrals process during the review but was not able to find evidence of the in-principle concerns raised regarding partial consultant practices and reports, or conflicts of interest relevant to the accreditation schemes. The use of accredited consultants by the in-scope referral bodies supports efficiency in the referrals processes and effective assessment, by synthesising technical and scientific issues in reports that meet referral body assessment requirements.

## Major projects and referrals

The Commission considered major projects as part of this review given the reliance on referral body input into their assessment, and the significant impact such projects can have on the state's economy, productivity and employment. Substantial feedback was also received in relation to major project assessment processes.

The feedback received by the Commission from major project proponents and their agents spoke commonly to a lack of trust in the process and a lack of understanding by the relevant authority and referral bodies of the economic impacts of the assessment process on proponents. In relation to matters of trust the Commission found there is scope to improve regulatory practices that support major project assessment. Whilst the *PDI Act* and the State Planning Commission's Practice Direction govern the assessment process, there is considerable discretion over how the process is managed, including the incorporation of referral body input. The Commission has made proportionate recommendations to better align major project assessment practices with best practice regulatory governance principles through administrative actions capable of being achieved quickly.

The *PDI Act* mandates the provision of information by proponents of the economic effects of a major project. To better support the assessment of information, and to reflect proportionate regulatory practice in relation to the state's significant projects, the Commission has recommended strengthening capacity to undertake economic analysis and modelling of such proposals. The Commission has identified a pathway but leaves it to interested parties to prescribe a solution. To add depth, the Commission has also recommended that economic modelling is undertaken of approved South Australian major projects to quantify the costs and impacts on proponents, attributable to the assessment process. The aim is to improve regulators' understanding of the impact the assessment process has on proponents, and in turn to encourage a more efficient and effective assessment process.

## Enhancing the new planning system

The referrals process for Code assessed development, and the input of referral bodies into major project assessments are both integral to ensuring that broader public interests are considered at the right time and in the right way having regard to land use in the state. The state planning reforms have introduced fundamental changes to development assessment through codification of most types of development assessment, statutory timeframes for referral responses, and moving to powers of direction for referral bodies, among other things. The Performance Indicators (System) Scheme is expected to provide more transparency through measuring the volume and outcomes of development applications.

Given the extent of the recent planning reforms the Commission's terms of reference necessarily confined its work to the regulatory practice of referral bodies, and the management of their input into major project assessment processes. The recommendations made in this final report are intended to lift specific regulatory practices in the referrals process to a common better practice standard across referral bodies. In addition, the report explores opportunities to embed better regulatory practice in the referral bodies and concludes with the Commission's preliminary analysis of broader feedback as an early guide to a potential review of the major project assessment system.

## Summary of recommendations

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### Recommendation 2.1 – Pre-application activity and early engagement

In order to support referral bodies to adopt best practice in early engagement, the Commission recommends that the three referral bodies review and revise relevant guidance materials:

- to include the level of service applicants can expect during early engagement with the referral body reflecting the proportionality of the information provided by an applicant;
- to ensure content is useful to both inexperienced developers and planning professionals alike; and
- are easily accessible on the referral body's website.

### Recommendation 2.2 – Guidance material

In order to support efficiencies in the referrals process, avoid requests for additional information and minimise rework, the Commission recommends that the three referral bodies review and revise their suite of guidance material following the coming into operation of the *Planning, Development and Infrastructure Act 2016* to ensure it:

- clearly identifies assessment and information requirements and standards;
- is equally useful to inexperienced applicants and planning professionals alike, which may take the form of technical materials accompanied by user-friendly notes or equivalent; and
- includes advice about the level of service and indicative timeframes an applicant can expect in relation to the referrals process.

All materials supporting referral activity are to be published, including materials used by accredited or specialist consultants which can be identified as requiring technical skills to understand and apply.

To support the implementation of the state planning reforms, and in the spirit of a single planning system, the Commission recommends that by the end of 2022 the three referral bodies, in collaboration with the State Planning Commission:

- adopt a consistent format and structure to referral process guidance material; and
- make all such material available centrally through the SA Planning Portal.

### Recommendation 2.3 – Regular continuous improvement cycle for referral functions

In order to build on referral body past performance improvements, and to embed and institutionalise continuous improvement practices, the Commission recommends that:

- all three referral bodies implement a regular and structured continuous improvement cycle in relation to their referral body functions that captures the applicant experience of the regulator's practices through feedback loops; and
- the cycle is integrated into the regulator's existing continuous improvement or performance evaluation processes with regular monitoring and reporting on progress.

### **Recommendation 3.1 – Modelling the cost of delay in major project assessments**

In order to capture the full benefit of the planning reforms, the Commission recommends that Planning and Land Use Service's proposed enhancements to its benefits realisation model to quantify the expected savings from the planning reforms be given effect, including by:

- publishing results generated by the model incorporating both the value of realised and forecast future benefits.
- continuing to review the model's outputs and methodology to ensure relevance and to inform ongoing assessment of the planning reforms.
- continuing to work with relevant authorities and industry to identify additional system wide benefits of the model; and
- ensure this ongoing work is adequately resourced.

The Commission also recommends that this capability to measure and value time savings and other costs to business be extended to monitoring major projects, addressing among other aspects:

- from the proponent's perspective, the overall process to obtain a major project approval, including ongoing operational licensing and condition impacts;
- estimates of the timeframes of the requirements of the referrals process to obtain a major project approval; and
- estimates of proponents' costs and loss of income due to a lapse of time for referrals beyond industry standards or determined benchmarks.

### **Recommendation 3.2 – Consistency and transparency in major project assessment regulatory practice**

Given the potential impact of major projects on the state economy, and in order to better align relevant assessment practices with best practice regulatory governance principles, the Commission recommends the State Planning Commission (SPC) and Planning and Land Use Services (PLUS) take administrative actions to establish:

- standard operating procedures to provide PLUS staff who are supporting the relevant authority/SPC with consistent practices, structured communication arrangements and service standards;
- a continuous improvement cycle to capture the experience of all entities involved in a major project assessment, including the role of referral bodies, to distil improvements in assessment practices and regularly apply those improvements back into the assessment process; and
- a strategy to capture key performance data, including time elapsed indicators for each stage of the statutory assessment process, to complement a systemic approach to continuous improvement of major project assessments.

### **Recommendation 3.3 – Strengthening the state’s capacity to assess major project proposals for economic effects**

In order to strengthen the capacity to analyse information regarding the economic effects of a major project, the provision of which is mandated by the *Planning, Development and Infrastructure Act 2016*, the Commission recommends that:

- existing gaps in this capability be identified through consultation with the State Planning Commission, Planning and Land Use Services, Infrastructure SA and the Department of Treasury and Finance;
- the required economic analytical and modelling capability is scoped and defined; and
- the optimal business model is determined to source this required capability for the relevant authority as required.

## Definitions

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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 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> .
The Code	The Planning and Design Code established under section 65(1) of the <i>Planning, Development and Infrastructure Act 2016</i> .

## Acronyms

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APC	Australian Productivity Commission
CoH	Commissioner of Highways
DA	Development application
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>
ESD	Ecologically sustainable development
IT	Information technology
KPIs	Key performance indicators
LGA	Local Government Association of South Australia
<i>NV Act</i>	<i>Native Vegetation Act 1991</i>
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
SCRG	Site Contamination Reference Group
SEB	Significant environmental benefit
SOP	Standard operating procedure
SPC	State Planning Commission
TAS	Transport Assessment Section (Commissioner of Highways)
UDIA	Urban Development Institute of Australia
VCEC	Victorian Competition and Efficiency Commission

# 1. Land use, the public interest and the referrals process

## 1.1 Referrals and the development assessment process

The *Planning, Development and Infrastructure Act 2016* (the *PDI Act*) is South Australia's principal planning and development legislation. 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. The *PDI Act* operates in conjunction with other laws,<sup>1</sup> including linkages to independent regulators who have mandates applicable to development activity. In this review the Commission will refer to those regulators as referral bodies. The participation of referral bodies in development assessment is referred to as the referrals process.

The referrals process enables an integrated approach to development assessment, enabling the application of the regulatory mandates of applicable regulators early in the process to ensure proposed development is not only consistent with land use as intended by the state, but also consistent with the state's broader environmental, social and economic interests. The way in which referral body mandates are incorporated into development assessment differs depending on the applicable development pathway.

### 1.1.1 Code assessed development

The *PDI Act* provides for referral of a development application (DA) to a referral body where it includes development of a prescribed class.<sup>2</sup> The *Planning, Development and Infrastructure (General) Regulations 2017* (*PDI Regulations*) list 22 prescribed classes of development requiring referral and specifies which referral body is responsible, and the nature of their functional response i.e. direction or advice.<sup>3</sup>

The Planning and Design Code (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. Referral bodies are required to include their policies in the Code.<sup>4</sup> The policies generally reflect the statutory mandates of referral bodies taken from their establishing legislation and are expressed in the Code's overlays and state-wide referrals.<sup>5</sup> Referral bodies can direct 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.<sup>6</sup>

Codifying development activity that requires a referral was a key outcome of the recent state planning reforms. This is intended to minimise the time it takes to obtain a DA decision by confining referral body responses to their prescribed mandate. The reform to provide referral bodies almost exclusively with powers of direction is intended to make referral bodies more accountable and to limit burdening a relevant authority with unnecessary and non-binding advice.<sup>7</sup> This measure is complemented by judicial accountability where referral bodies are respondent to applicant appeals where the referral body imposes a condition on approval or

<sup>1</sup> *Planning, Development and Infrastructure Act 2016* s 12(1) (*PDI Act*).

<sup>2</sup> *Ibid.* s 122.

<sup>3</sup> *Planning, Development and Infrastructure (General) Regulations 2017* sch 9 (*PDI Regulations*).

<sup>4</sup> *PDI Act* (n 1) s 122(2)(a).

<sup>5</sup> Planning and Design Code pt 9 (the Code).

<sup>6</sup> *PDI Regulations* (n 3) sch 9 1(1).

<sup>7</sup> Attorney-General's Department, *Guide to Development Assessment – PDI Act* (Guide, 21 January 2021), 26 <[https://plan.sa.gov.au/\\_\\_data/assets/pdf\\_file/0008/699353/Guide\\_to\\_Development\\_Assessment\\_-\\_PDI\\_Act.pdf](https://plan.sa.gov.au/__data/assets/pdf_file/0008/699353/Guide_to_Development_Assessment_-_PDI_Act.pdf)> (*PDI Act Guide*).

directs a relevant authority to refuse a DA.<sup>8</sup> The prescription and accountability applicable to code assessed development contrasts with the level of discretion and flexibility that applies to referral body contributions to major project assessments through the State Planning Commission (SPC).

### 1.1.2 Impact assessed development

#### **Major projects**

Several classifications of development under the *PDI Act* can be characterised as being of state significance including impact assessed development (major projects declared by the Minister or prescribed by regulation), restricted development (prescribed by the Code), and Crown development (undertaken on behalf of a state agency).<sup>9</sup> The Commission's focus in this review is on impact assessed development as declared by the Minister, previously known as major projects under the now ceased *Development Act 1993 (Development Act)*. This focus acknowledges the significant effect major projects have on the state's economy, employment and future prosperity. It also reflects the substantial feedback received from interested parties in relation to major projects, and consultation with PLUS about meeting the Commission's analytical and information requirements.

While there have been several changes to the statutory governance of major projects under the *PDI Act*, the assessment process is largely the same as it was under the *Development Act*. Planning and Land Use Services (PLUS) advised the Commission that the main changes to major projects arrangements under the *PDI Act* are:

- The Minister for Planning is now the final decision maker (relevant authority) instead of the Governor.
- The SPC Practice Direction 4 supplements the legislated processes and sets out the requirements for preparing the Environmental Impact Statement (EIS), the requirements for assessing the level of impact, and information that must be provided by the proponent.
- Certain classes of development such as windfarms in marine areas and new landfills can now be specified by regulation as being impact assessed development.
- The EIS replaces three categories of report required under the *Development Act* (previously 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 statutory Assessment Report instead of the Minister.

#### **Referral bodies and major projects**

The Minister is responsible for declaring impact assessed development under the *PDI Act*,<sup>10</sup> which is published in the Gazette and on the SA Planning Portal. The declaration made by the Minister may be made in relation to a specific development, a kind of development or development generally within a specified part of SA.

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<sup>8</sup> *PDI Act* (n 1) ss 122(7) and (8).

<sup>9</sup> *Ibid* pt 7 div 2 sub-div 4 and pt 9.

<sup>10</sup> *Ibid* s 108(1)(c).

Major projects are declared as such by the Minister under the *PDI Act* because their complexity warrants the highest level of environmental, social and economic assessment. The EIS assessment and associated processes are 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.*<sup>11</sup>

The state has significantly more control and discretion over the major projects assessment process than it does over Code assessed development. Once declared as a major project the Minister becomes the relevant authority,<sup>12</sup> supported by the SPC in the assessment process, including production of the assessment report.<sup>13</sup> The State Commission Assessment Panel (SCAP) is appointed by the SPC to undertake assessment functions on its behalf.<sup>14</sup>

Code assessed development and the structured ePlanning assessment process is significantly more regulated; it limits assessment discretion and is subject to statutory timeframes in relation to referrals processes.<sup>15</sup> The *PDI Act* gives the relevant authority substantially more control over the assessment process, the input of referral bodies, and the extent to which proponents are engaged.

The high level of discretion available to the relevant authority in the major project assessment process, combined with the high impact such projects can have on the state's economy, productivity and employment demand the application of best practice regulatory governance principles. That premise guides the Commission's consideration of the role of referral bodies in major project assessment in this review.

## 1.2 Scope and approach

The scope of this review's terms of reference encompasses the operations and performance of the in-scope referral bodies, continuous improvement practices and approaches to innovative or unusual developments. The Commission has considered these matters in relation to both Code assessed development and referral body participation in major project assessments. A focus is the extent to which the referrals process supports investment, productivity and employment through regulatory best practice. Reviewing the regulatory practice of referral bodies at this time is intended to ensure that the macro and design improvements achieved through the recent state planning reforms are given their intended effect. The independent mandates of the in-scope referral bodies are outside of the Commission's terms of reference.

The Commission has consulted with applicants and their agents, the referral bodies, PLUS, industry and professional associations and other interested parties in two rounds of consultation. In the first round the Commission engaged with 34 different organisations and held a total of 45 separate meetings of which more than half were with regulators and 35 per cent with businesses or associations. The second round was focused on key issues identified in the draft report. Four round tables were held involving industry associations, businesses and regulators. Several additional meetings and briefings were also conducted.

<sup>11</sup> Planning and Land Use Services, *Response to South Australian Productivity Commission Information Request – Major/Impact Assessed Development* (25 May 2021).

<sup>12</sup> *PDI Act* (n 1) ss 95, 108.

<sup>13</sup> *Ibid* ss 111(2)(d)(iii), 112, 113(3), 113(9).

<sup>14</sup> State Commission Assessment Panel, *About SCAP* (Web Page, 22 September 2021)

<[https://www.saplanningcommission.sa.gov.au/scap/about\\_scap](https://www.saplanningcommission.sa.gov.au/scap/about_scap)>.

<sup>15</sup> *PDI Regulations* (n 3) sch 9(3).

Several interested parties were only prepared to share their experiences with the Commission 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. The Commission has considered those contributions and endeavoured to strike a balance between its commitment to a high level of transparency while not losing the value of the feedback received.

The Commission has received feedback that broadening the scope of the review to include more referral bodies would have been beneficial in terms of the broader application of any government supported recommendations. The principles underpinning several recommendations may be relevant to referral bodies and the referrals process more broadly. Whilst the recommendations are also likely to apply to all referral bodies to varying extents, the terms of reference clearly confine the Commission's remit to the specified referral bodies. The application of the recommendations to other referral bodies is a matter for each referral body to consider.

The Commission received eight public submissions in relation to its issues paper and four public submissions in response to its draft report that are available on its website and listed in Appendix 1. The Commission thanks all participating people and organisations for their contribution, which has materially improved the Commission's understanding, the quality and precision of its analysis, and development of final recommendations.

### 1.3 Referral bodies and the public interest

Referral bodies are regulators in their own right established under statute with objects, functions and governance arrangements to achieve prescribed public interests. Those interests include protecting the natural environment, ensuring public safety, and providing for important future infrastructure. Their role as a referral body in the planning system is to ensure that those public interests are considered, at the right time, in relation to land use proposals.

The referral process authorises referral bodies to exercise their mandate as government intended, avoiding potential costly delays and avoidable rework later, to ensure development complies with regulatory requirements. Ideally, the referrals process also supports the economic objectives of employment, investment and growth without compromising the specific public interests to be protected by 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.*<sup>16</sup>

The role of referral bodies 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'.<sup>17</sup> The statutory requirement for referral bodies to include their 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.<sup>18</sup>

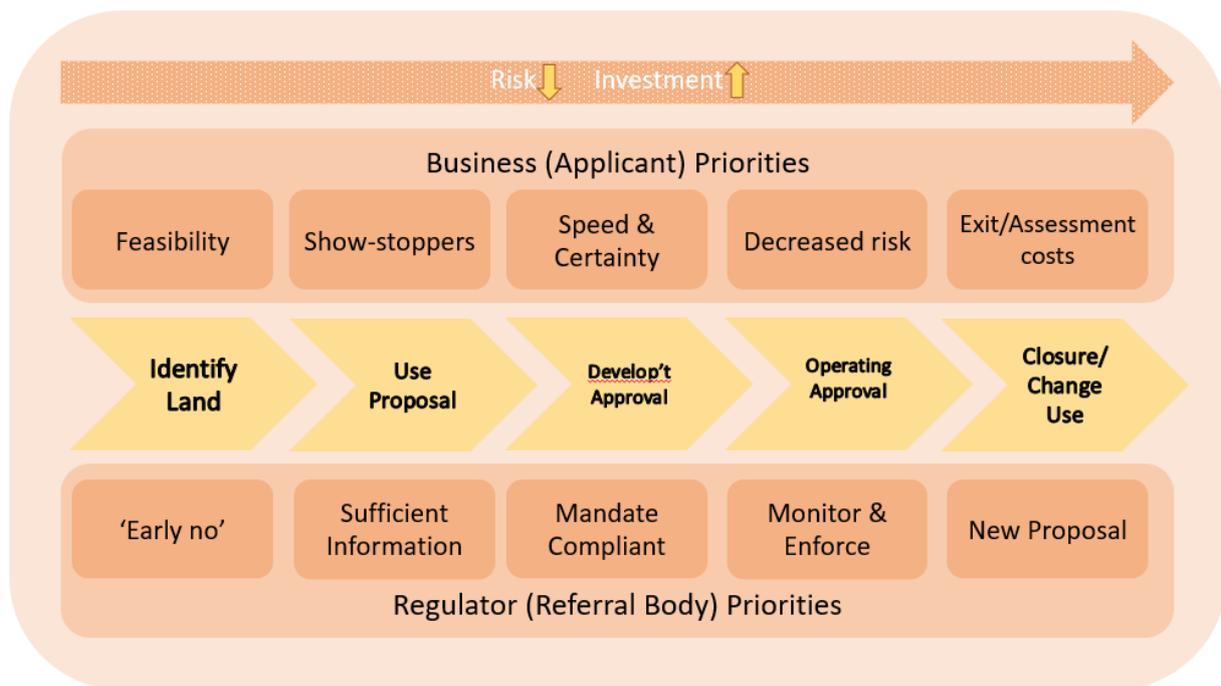
<sup>16</sup> City of Adelaide, Submission DR2 to South Australian Productivity Commission, *Development Referrals Review* (17 May 2021) 2.

<sup>17</sup> South Australia's Expert Panel on Planning Reform, *Our Ideas for Planning Reform* (August 2014) 122 <[https://saplanningportal.sa.gov.au/\\_\\_data/assets/pdf\\_file/0018/360351/Expert\\_Panel\\_-\\_Our\\_Ideas\\_for\\_Reform.pdf](https://saplanningportal.sa.gov.au/__data/assets/pdf_file/0018/360351/Expert_Panel_-_Our_Ideas_for_Reform.pdf)>.

<sup>18</sup> *PDI Act* (n 1) s 122(2).

Generally, private business interests generate the direct economic and productivity benefits arising from development. Regulators, including referral bodies, ensure that development meets the state's social, environmental and broader public interests. Effective land use planning may promote a balance between those interests.<sup>19</sup> The extent to which these interests can be aligned is indicative of the efficiency and effectiveness of the referrals process, and whether the state's overall interests are being met. Figure 1.1 illustrates the different priorities of these binary interests in a simple regulatory value chain.

Figure 1.1: Regulatory value chain – business and regulator priorities



Source: Office of the South Australian Productivity Commission.

### **Business (applicant) priorities**

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, releasing resources that would otherwise be wasted for no return. Once a proposal is 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 for the proposal and any post-approval licensing or other permissions. If this happens, risks are moderated, certainty increases further along the value chain, and the confidence to invest increases commensurately.

### **Regulator (referral body) priorities**

The regulators' 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 enough of the right information to assess the proposal against the regulatory

<sup>19</sup> 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](https://plan.sa.gov.au/_data/assets/pdf_file/0005/513329/Land_Use_Planning_and_the_South_Australian_Economy.pdf)>.

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 regulatory value chain is an important consideration for the applicant as it materially affects financial viability and whether the project proceeds at all. Following development approval, the regulator's priorities turn to operating and licensing arrangements, where a post-approval mandate applies.

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, or additional investment is required to fully fund the development.
- Regulators must ensure a proposal conforms to their statutory mandate and that there is enough information from the applicant to assess the proposal effectively and in a timely way.

The next chapter explores the extent to which the interests of the applicant and referral body are aligned in practice through the application of diagnostic tools derived from best practice regulatory principles, and includes several recommendations aimed at improving regulatory practice.

## 2. Referral body process, practice and performance

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### 2.1 Model regulator principles

The Commission has been asked to make recommendations to streamline the operations of referral bodies, institutionalise better practice, and improve their adaptability to consider innovation without compromising the specific public interests they are mandated to protect. Improvements in regulator performance can often be achieved quickly through changes in regulatory practice without amending legislation or regulation.

Specific diagnostic indicators, derived from global regulatory best practice and governance principles, have been designed and applied by the Commission to evaluate the efficiency and effectiveness of a regulator in an end-to-end assessment process.<sup>20</sup> The indicators enable an evaluation corresponding to the review's terms of reference by considering internal and external regulator practices and processes, without assessing regulator mandates or regulatory design.

Global regulatory best practice and governance principles were also considered in the draft report of the Commission's inquiry into reform of South Australia's regulatory framework. The inquiry considered key principles underpinning good regulator practice domestically and internationally, finding that there is a high-level of consistency in the literature about what constitutes good regulator practice.<sup>21</sup>

The Commission's diagnostic indicators for this review are:

- **Accountability and efficiency in business process:** to what extent are the priorities of the applicant and regulator aligned and transparent in each stage of the referral process regulatory value chain? Do regulators understand the business impacts of their process on applicants?
- **Early engagement and pre-lodgement:** do regulators have opportunities for applicants to seek advice on assessment processes, information requirements and to identify show-stopper barriers to a proposed development?
- **Customer-centred guidance:** are materials publicly available to inform and guide applicants and their agents about and through the referrals process?
- **Information requirements, proportionality and risk:** 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?
- **Capability and resources:** do regulators have adequate resources to fulfil their referral body role? Are available resources managed and used as effectively as possible?

<sup>20</sup> Organisation for Economic Co-operation and Development, *OECD Best Practice Principles for Regulatory Policy - the Governance of Regulators* (2014) <<https://www.oecd.org/gov/regulatory-policy/governance-regulators.htm>> (OECD Best Practice Principles).

<sup>21</sup> South Australian Productivity Commission, *Inquiry into the reform of South Australia's Regulatory Framework* (Draft Report, 5 August 2021) [3.1.2] <<https://www.sapc.sa.gov.au/inquiries/inquiries/south-australias-regulatory-framework/documents/South-Australias-Regulatory-Framework-Inquiry-Draft-Report.pdf>> (SAPC Regulatory Framework Draft Report).

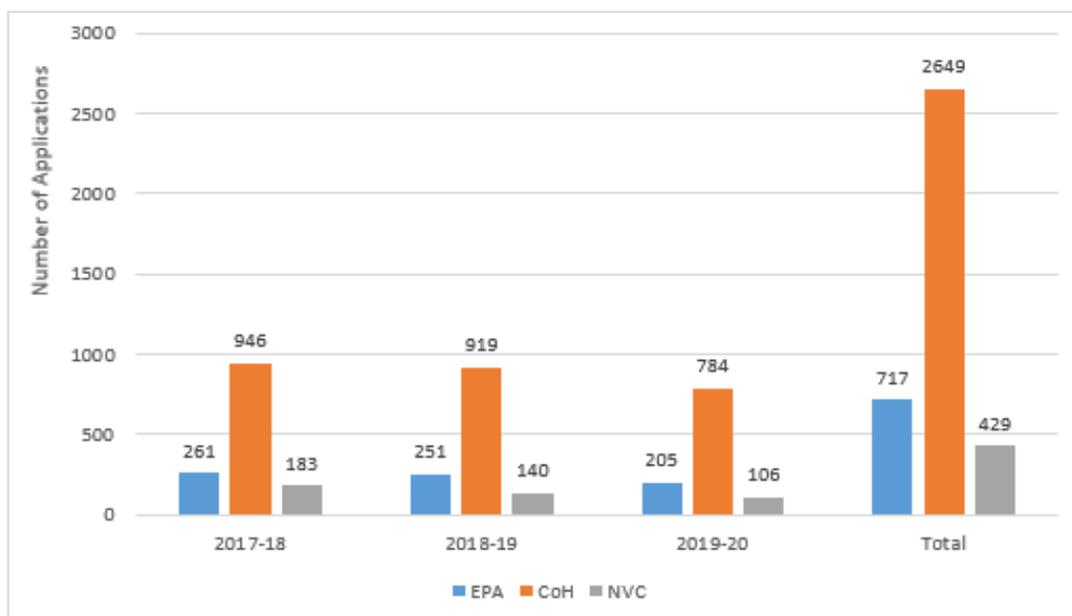
- **Post-development assessment arrangements:** to what extent does each referral body consider the operating approvals and licensing it will be responsible for later as part of the referrals process?
- **Performance monitoring and continuous improvement:** how does each referral body capture feedback and data on its performance to continuously improve its performance, and ultimately provide for a more efficient and effective experience for applicants?

This chapter sets out the Commission’s findings in relation to the three in-scope referral bodies, followed by the Commission’s thematic findings and regulatory practice recommendations aimed at improving the efficiency and effectiveness of the referrals process. The Commission’s detailed analysis of the evaluations was published in this review’s draft report.<sup>22</sup> The chapter concludes with analysis undertaken since the draft report was published regarding organisational culture and behaviours, and the extent to which referral bodies are mandated to assess for economic effects.

## 2.2 Referral bodies in focus

The three in-scope referral bodies, the Environment Protection Authority (EPA), the Native Vegetation Council (NVC) and the Commissioner of Highways (CoH), 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.

Figure 2.1: Number of developments referred to EPA, CoH and NVC per annum, 2017-18 to 2019-2020<sup>^</sup>



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

<sup>^</sup> Referrals to NVC were not statutory. CoH and EPA do not include referral activity in relation to major projects.

<sup>22</sup> South Australian Productivity Commission, *Development referrals review* (Draft Report, 2 July 2021) [2.2]–[2.3] <<https://www.sapc.sa.gov.au/reviews/reviews/development-referrals/documents/Development-Referrals-Review-Draft-Report.pdf>> (SAPC Referrals Review Draft Report).

All of the referral bodies greatly assisted the Commission through their candid interactions, timely responses to requests for substantial information and data, and by being open to supporting the spirit and intent of the review's terms of reference.

### 2.2.1 Environment Protection Authority

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

The *PDI Regulations* prescribe the activities of environmental significance that must be referred to EPA, often called referral triggers. The *EP Act* defines the criteria for EPA decisions when assessing a referral made under the *PDI Act*.<sup>23</sup> The criteria require the EPA to 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.

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.

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 Schedule 49 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
<b>Total</b>	<b>34</b>	<b>140</b>	<b>7</b>	<b>235</b>	<b>368</b>	<b>49</b>	<b>8</b>	<b>841</b>

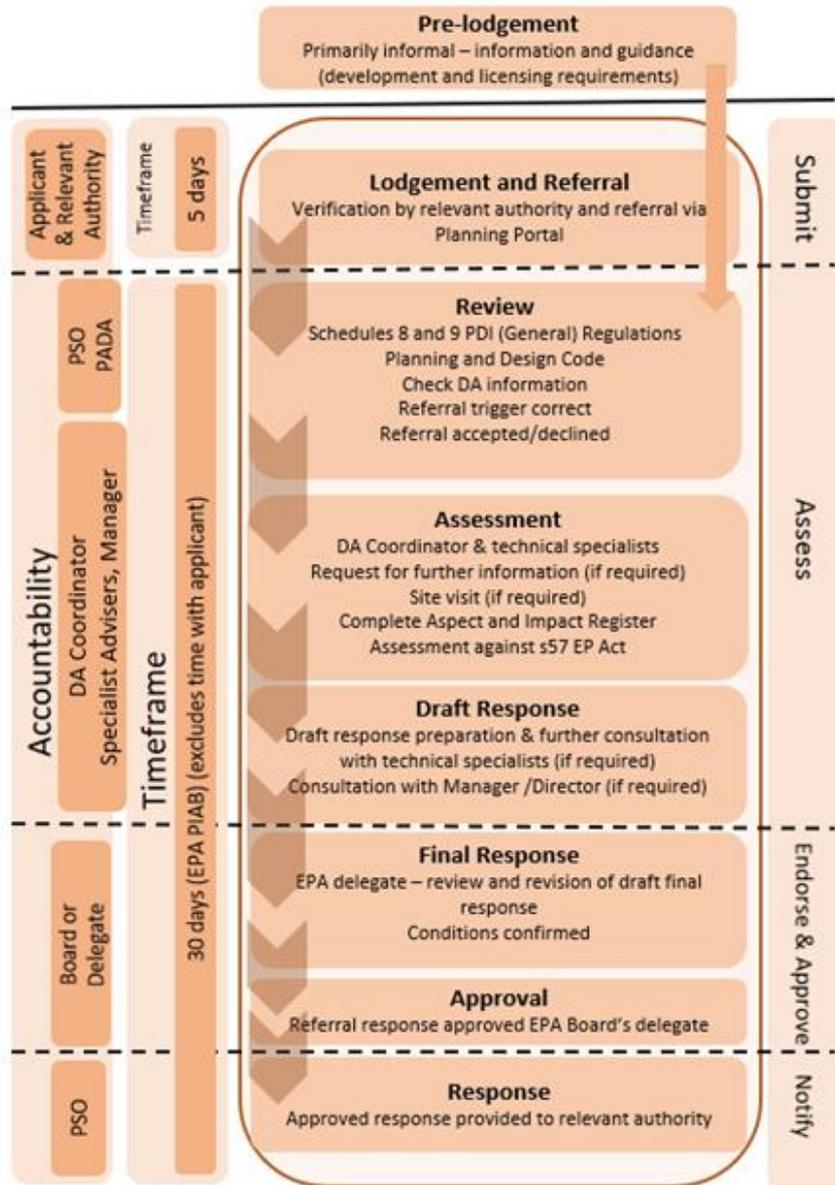
Source: EPA data provided to the Commission on 17 May 2021.

A total of 711 development applications were referred to EPA during the 2017-18 to 2019-20 period, which related to 841 triggers. Most development applications were in relation to activities of major environmental significance listed in Schedule 22 of the *Development Regulations 2008* (Development Regulations) (now ceased) and 6 under the *PDI Regulations*.

EPA's Planning and Impact Assessment Branch (PIAB) coordinates the DA assessment process and engages with applicants and their consultants, relevant authorities and other public sector agencies. PIAB is responsible for finalising the response for consideration by the EPA Board or delegated authority. Figure 2.2 illustrates the EPA development application referral assessment process for Code assessed development.

<sup>23</sup> *Environment Protection Act 1993* s 57 (*EP Act*).

Figure 2.2: EPA’s internal business process for preparation of Code assessed development referrals.



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

The DA Coordinator, a professional planner, is the central point for inquiries and facilitates meetings between applicants and several branches of EPA, including specialist advisers when necessary. Approximately 67 staff can be involved in DA assessment. Environmental licensing functions are incorporated into the referrals process to ensure that the linkages between DA approval and subsequent environmental licensing are established, and to support continuity for applicants through to the operate stage in the regulatory value chain.

**Findings**

Accountability and efficiency in business process – early engagement and pre-lodgement, customer-centred guidance

EPA’s approach to its referral function is characterised by ensuring applicants properly understand its public interest mandate and the administration of the *EP Act*. Substantial

information is publicly available through the EPA website to advise applicants of EPA's assessment requirements before they lodge a DA. EPA uses informal pre-lodgement arrangements to clarify information requirements for applicants prior to DA lodgement, and sometimes to determine if an EPA referral will be required. EPA does not evaluate the impact of pre-lodgement activity on the overall referral response process.

#### Information requirements, proportionality and risk

EPA's supporting materials and pre-lodgement arrangements are intended to mitigate the need for requests for information (RFI)s by clarifying information requirements as early as practicable. Nearly 74 per cent of EPA's referrals were completed with one or no RFIs, with approximately one-third of all referrals not requiring any RFIs. The Commission notes the views expressed by a small number of applicants and their agents about disproportionate EPA information requirements, and that EPA seek information during the referral process that is more appropriately dealt with during licensing processes.<sup>24</sup>

#### Capability and resources

PIAB manages the referrals process centrally, involving other EPA staff and internal specialist advisers to support referral responses when required. Staff involved in the referrals process possess relevant planning, scientific or other qualifications combined with substantial experience in assessments against EPA mandates and in preparing responses. The Commission received one specific piece of feedback that applicants' expectations about accessing EPA's specialist advisers differed from EPA's approach where the DA Coordinator triages requests and may seek a response internally and respond to the applicant's enquiry, rather than facilitating direct access to other EPA staff.

#### Post-development assessment licensing and approvals

EPA endeavours to provide continuity for applicants between the DA approval, including the referral response, and subsequent licensing activities. This is achieved by involving licensing staff in the referral response, ensuring that the DA approval can effectively accommodate environmental authorisation requirements (conditioning and compliance requirements) provided under the *EP Act* during the operation phase. In effect, EPA synthesises the requirements of both the *EP Act* and the *PDI Act* and considers the requirements to obtain environmental authorisation for the subsequent operational phase of the project, during the referrals process.

#### Performance monitoring and continuous improvement

EPA demonstrated a culture of continuous improvement and risk-based regulation through review of referral processes and structural changes. EPA used the state planning reforms as an opportunity to decrease the number of low-risk activities requiring referral, enabling a focus on activities considered to be higher risk in terms of pollution and environmental harm. Information technology (IT) is used to manage and monitor work performance with internal and external training opportunities available to staff to update their knowledge about various regulated industries. EPA captures and reports complaints for continuous improvement purposes and publishes its commitments to improving performance. EPA does not separately maintain a regular continuous improvement cycle aimed specifically at improving regulatory practice in relation to its referral function.

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<sup>24</sup> UDIA, Submission DR8 to South Australian Productivity Commission, *Development Referrals Review* (24 May 2021) 3 (UDIA Submission).

## Site contamination

The Commission has addressed this issue specifically in response to the substantial feedback from stakeholders about the reported impact of this new assessment.

As part of reviewing its referral triggers to streamline and simplify the development assessment process EPA introduced a new site contamination referral. The risk-based referral occurs where there is a change of land use to a more sensitive use where certain classes of potentially contaminating activities previously occurred. The purpose of the referral is to determine whether a site contamination consultant or site contamination auditor are required to provide a statement of site suitability.<sup>25</sup>

The Local Government Association of South Australia (LGA) provided the most detailed feedback received by the Commission noting that the main issues relate to 'significant additional costs to proponents, proportionality issues (seeking a better balance between environment protection measures and efficiency in administration) and the complexity of the new arrangements.'<sup>26</sup> The LGA submission included several recommendations based on specific examples of applying the new arrangements. The Commission did not address specific and technical site contamination issues raised as part of this review.

The Commission understands there is a significant history underpinning the development of the mandate for the site contamination referral and the SPC's Practice Direction 14: Site Contamination Assessment 2021 (PD14). EPA advised consultation occurred in relation to the changes to the Code and the proposed PD14 through 2019 and 2020 to support the site contamination referral, and several of the issues raised with the Commission during this review were also raised in submissions to EPA during those consultations. Ultimately, the State Government has accepted that site contamination is fundamental to the assessment of land to be suitable for the proposed development.

The implementation of the new referral is supported by a Site Contamination Reference Group (SCRG) that was established in 2017 and is comprised of select councils, and industry and professional associations. EPA advised that the SCRG met in April and July 2021 and will continue to review a range of issues associated with implementation of the site contamination assessment reforms introduced through the *PDI Regulations*, the Code and PD14.

The Commission addresses issues specific to site contamination consultants and auditors in section 2.3.3.

### **2.2.2 Native Vegetation Council**

Native vegetation clearance is the statutory responsibility of the NVC under the *Native Vegetation Act 1991 (NV Act)*.<sup>27</sup> The Department for Environment and Water (DEW) provides administrative and technical support to NVC in relation to native vegetation development referrals. 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 NVC. DEW's Coordinator Complex Assessments is also a delegate of the NVC for statutory matters referred to the NVC.

NVC has been a referral body since the commencement of the *PDI Regulations* in September 2020. Prior to the reforms, NVC received no statutory referrals under the *Development*

<sup>25</sup> Environment Protection Authority, *Planning and site contamination* (Web Page, 16 September 2021) <[https://www.epa.sa.gov.au/environmental\\_info/environmental\\_planning/planning-and-site-contamination](https://www.epa.sa.gov.au/environmental_info/environmental_planning/planning-and-site-contamination)>.

<sup>26</sup> Local Government Association of South Australia, Submission FR2 to South Australian Productivity Commission, *Development Referrals Review* (6 August 2021) (LGA FR submission).

<sup>27</sup> *Native Vegetation Act 1991* pt 3 div 1 (*NV Act*).

*Regulations.* DEW advised that the way development was prescribed in the referral trigger meant no statutory referrals were made.<sup>28</sup>

For Code assessed development there is an NVC referral for native vegetation clearances (risk assessment levels 3 and 4) in the Native Vegetation Overlay, and for native vegetation risk assessment levels 2, 3 and 4 in the State Significant Native Vegetation overlay.<sup>29</sup> Under the Code, if development occurs where either 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 NVC. Table 2.2 presents the number of referrals to NVC via all 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
<b>Total</b>	<b>69</b>	<b>299</b>	<b>52</b>	<b>9</b>	<b>429</b>

Source: Native Vegetation Council data provided to the Commission on 3 May 2021.

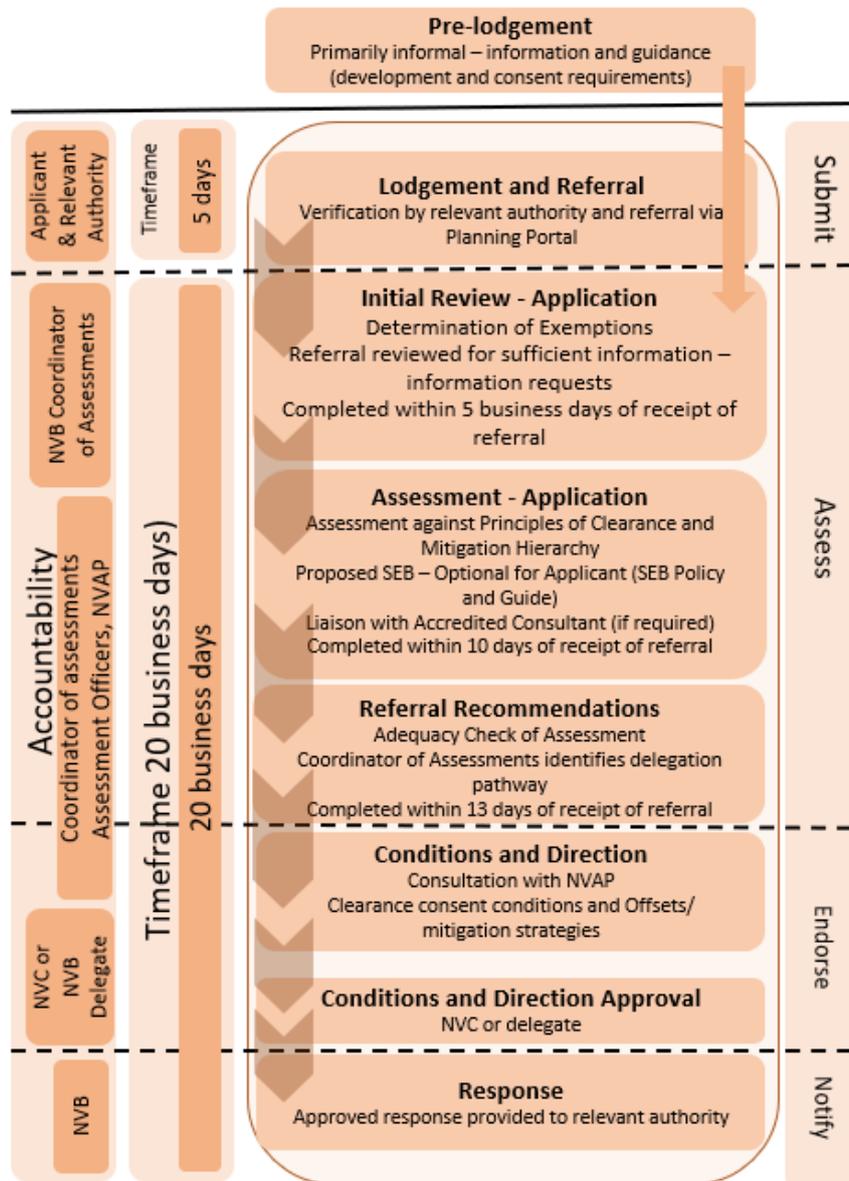
\*Some applications may be referred to the NVC or NVC through multiple channels—there may be some double counting of the total number of non-statutory referrals for development applications.

The business process used by NVC and DEW to assess native vegetation referrals for Code assessed development is set out in Figure 2.3. DEW has developed these stages and internal timeframes as their most efficient method of meeting the 20-day statutory timeframe.

<sup>28</sup> *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.

<sup>29</sup> the Code (n 5) pt 3.

Figure 2.3: 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).

Arguably the most prominent issue raised in relation to NVC’s referral process is the use of accredited native vegetation consultants. The Commission set out the applicable regulations of the scheme in the draft report.<sup>30</sup> The NVC’s submission to the draft report discussed the value of accredited consultants, including provision of quality reports, which generally streamlines the assessment process and potentially delivers higher quality outcomes. The alternative would be to use NVB staff which would have resourcing implications.

Based on discussions with NVC and NVB, the implementation of more formalised arrangements for native vegetation experts to support referrals has provided significant benefits in terms of the efficiency, timeliness and quality of referral processes. These

<sup>30</sup> SAPC Referrals Review Draft Report (n 22) [2.2.2].

arrangements have included formal training in the requirements of the *NV Act*, NVB process familiarisation and development of materials to guide referral reports.

Concerns were also raised in feedback about the perception that consultants are captured by the accrediting regulator, impacting on consultants' assessments. The Commission has not been able to document any patterns of behaviour to support this position. The LGA argued in its submission to the draft report that accredited consultants engaged by applicants to produce reports for referral bodies should have to meet minimum standards of professional practice and ongoing demonstrations of skills and experience like that of the Accredited Professionals Scheme developed under the *PDI Act*.<sup>31</sup> Moreover, the LGA indicated:

*Without a clear auditing and compliance process under the Native Vegetation Act, there is greater opportunity for accredited consultants to provide reports that may benefit their clients' interest rather than ensuring the appropriate protection of native vegetation and recommending appropriate offsets and mitigation.*<sup>32</sup>

The use of consultants by referral bodies and relevant authorities is discussed further in section 2.3.3.

## **Findings**

### Accountability and efficiency in business process

Referral response processes are well documented and understood by assessing staff within the NVB, including the delegation of matters from NVC. Notwithstanding the introduction of Code-based referrals, applicants are still required to obtain a subsequent approval to clear native vegetation under the *NV Act*.

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). The Commission has raised the potential to further streamline this process with DEW, particularly given DEW's advice that the same information is generally used for both assessments.

NVC addressed this issue in its submission to the draft report, raising the possibility of developing technological solutions for applicants to provide information directly to DEW for low-level native vegetation clearances.<sup>33</sup> Whilst this idea is only conceptual at this time, the Commission supports measures to improve the efficiency of native vegetation referrals and remove any existing duplication. The Commission's inquiry into reform of South Australia's regulatory framework has considered the role that regulatory technology has in advancing: regulatory practice; reporting and transaction monitoring; compliance; risk management; and identity verification.<sup>34</sup>

### Early engagement

DEW informally engages early with applicants and accredited consultants involved in referrals. Management of records of engagements with business is perfunctory—DEW advises they do not provide formal advice during pre-application discussions given the likelihood of proposals changing before a DA is submitted. DEW's approach is generally viewed constructively by councils and the practice works in conjunction with the use of accredited consultants.

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<sup>31</sup> *PDI Act* (n 1) s113 (4).

<sup>32</sup> LGA FR submission (n 26) 1.

<sup>33</sup> Native Vegetation Council, Submission FR4 to South Australian Productivity Commission, *Development Referrals Review* (30 July 2021) 1 (NVC submission).

<sup>34</sup> SAPC Regulatory Framework Draft Report (n 21) [5.2].

In their submission to draft recommendation 4.1 NVC indicated support for:

- guidance material that makes clear what can be expected from pre-application engagements – DEW is producing fact sheets and other guidance material to this end;
- early engagement with applicants by experienced staff which reinforces the current informal practice, noting the potential resource implications;
- relevant information being shared with applicants and relevant authorities to support mutual understandings; and
- an evidence-based approach showing the value of pre-lodgement activities by capturing metrics but noted that work is required to define how such metrics are captured, suggesting PLUS lead this as custodians of the Code.<sup>35</sup>

DEW also advised they want to avoid circumstances where proponents expect NVB staff to act as consultants to proponents in relation to specific proposals. All three in-scope referral bodies expressed similar views about some proponents, from time-to-time, seeking technical advice that is appropriately sourced from a specialist consultant.

The Commission notes that DEW does not have a formal client management system or similar. The ability to record, maintain and draw on information connected with applicants and regulated entities is, in the Commission's view, an indicator of better regulatory practice. Good regulators establish mechanisms such as client management tools for engagement with stakeholders as part of achieving their objectives.<sup>36</sup> Pre-application and referral processes are discussed in more detail in section 2.3.1.

#### Customer-centred guidance

NVC and DEW provide guidance to applicants on native vegetation referrals processes. Material to support accredited consultants has been developed over time to support consistent and improved assessments. This material is not made available publicly and must be requested by the applicant.

NVC is developing guidance materials that will assist applicants, consultants and planning authorities to better understand clearance of native vegetation and associated referral processes.<sup>37</sup> Fact sheets are being prepared based on development-related activity e.g. infrastructure or different types of tourism projects. These are positive reforms that will support accountability in the native vegetation referrals process and minimise rework through more informed applications and more transparent decision making.

#### Information requirements

DEW indicated that recent departmental reforms have seen improvements in process transparency, information requirement proportionality and applicant management. 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 under the *NV Act*. Matters approved during the referrals process are not reconsidered during the *NV Act* assessment process—in practice an approved DA referral

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<sup>35</sup> NVC submission (n 33) 2–3.

<sup>36</sup> OECD, *Governance of Regulator's Practices: Accountability, Transparency and Co-ordination, The Governance of Regulators* (OECD Publishing, 2016) 8.

<sup>37</sup> NVC submission (n 33) 2.

response will not be changed during the subsequent clearance consent assessment. This is important in terms of providing certainty to applicants.

The Commission has not heard of any onerous or disproportionate requirements in terms of data reports or other materials required for native vegetation referrals. The Commission has not had any further feedback from stakeholders on information requirements, proportionality and risk following publication of the draft report.

### Capability

NVB indicated their staff possess capability and qualifications commensurate with the business requirements of native vegetation referrals processes. Staff outputs and progress are monitored and reported on to the executive of the department.

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

### Post-development assessment licensing and approvals

While the referral response and subsequent clearance consent under the *NV Act* are separate processes, they rely on the same applicant information. Clearance consent under the *NV Act* is typically issued with conditions including discharge of SEB obligations prior to clearance. The Commission has not been told of any significant issues regarding post-planning consent conditions or compliance matters being imposed following development approval for performance assessed development.

The Commission received one submission that raised concerns regarding native vegetation clearance compliance arrangements and resourcing of the compliance function. That submission also disagreed with the Commission's conclusion that 'The Commission did not identify any specific workload or resourcing issues adversely affecting the efficiency of the referrals response process.'<sup>38</sup> The Commission's earlier conclusion referred to the native vegetation referrals process specifically. Subsequent operating approvals and compliance arrangements are not in scope for this review.

### Continuous improvement

DEW advised it has demonstrated 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. DEW did not indicate it has a regular continuous improvement cycle aimed at improving regulatory practice in relation to its referral body function.

## **2.2.3 Commissioner of Highways**

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 under the *Highways Act 1926* and has the role of carrying that Act into effect.

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<sup>38</sup> Murraylands and Riverland Landscape Board, Submission FR3 to South Australian Productivity Commission, *Development Referrals Review* (28 July 2021) 3 (Murraylands FR submission).

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 (TAS) in the Transport Planning and Program Development Division. This section manages, assesses and responds to DAs, and addresses related planning matters and proposals that interface with the road and transport network.

The CoH receives the highest number of statutory referrals annually, with 747 in 2019-20, down from 835 in 2018-19. 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 the arterial road network and access locations and dimensions. CoH advised that approximately 98 per cent of referrals are approved and local government are the planning authority for approximately 90 per cent of referrals CoH receives. The remainder are from the State Planning Commission.

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*. 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*

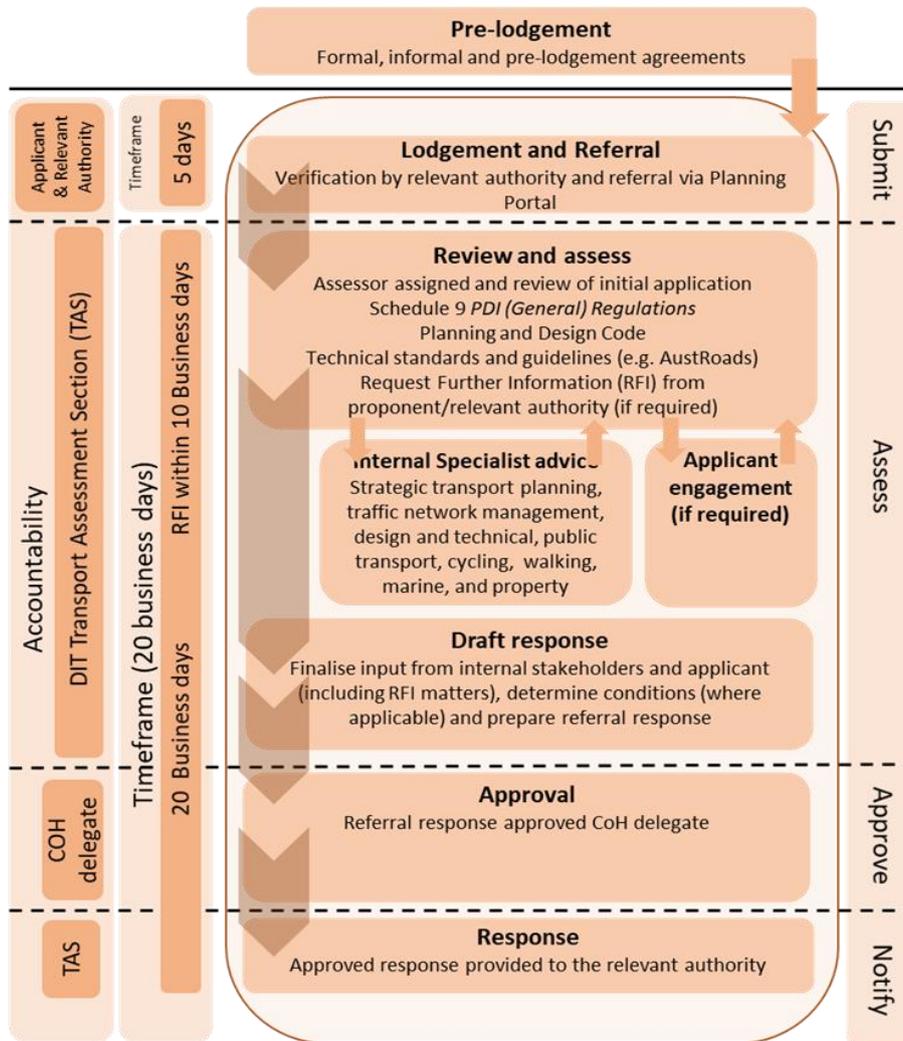
Financial year	Total number of referrals	Crown projects – Minister <sup>^</sup>	Major projects*	Total
2017-18	900	46	N/A	946
2018-19	835	84	N/A	919
2019-20	747	37	N/A	784
<b>Total</b>	<b>2,482</b>	<b>167</b>	<b>N/A</b>	<b>2,649</b>

Source: PLUS data provided to the Commission on 15 March 2021.

\*Major projects data not available at the time of writing. <sup>^</sup>Crown projects data sourced from CoH.

The assessment of DA referrals is a collaborative effort where TAS work with a wide range of specialist areas within DIT. For both major projects and complex Code assessed developments, CoH requires the provision of a comprehensive traffic impact assessment undertaken by a recognised professional traffic consultant as part of the application. Figure 2.4 illustrates CoH DA referral assessment process for Code assessed development.

Figure 2.4 CoH internal business process for preparation of Code assessed development referrals.



Source: Developed by the Office of the South Australian Productivity Commission based on information provided by CoH (DIT).

When TAS receives a referral through the SA Planning Portal the DA is assigned, based on staff availability and the complexity of the application, to an assessor who ensures adequate information has been provided. This initial review is completed within one or two working days.

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 assigned assessor seeks input from specialist sections across DIT as applicable. Internal specialist advisers have up to two weeks to respond within the overall statutory referral response timeframe of 20 business days; however, information adequacy must be resolved in the first 10 days to support an RFI (if required). CoH communicates directly with an applicant using several methods throughout the process, including meetings with developers and/or their traffic consultants.

The referral response is drafted by the TAS assessor, incorporating internal specialist feedback and is approved by the CoH delegate. The approved response is returned to the relevant authority via the SA 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.

## **Findings**

### Accountability and efficiency in business process

CoH referrals often necessarily involve professional traffic consultants who have established relationships with CoH assessing staff and understand CoH requirements. This may explain why CoH assessment information is not currently published. The absence of published assessment requirements may act as a barrier to entry for other traffic consultants into the South Australian market and publishing this information may address this issue.

CoH advised it has effective engagement arrangements that support assessment requirements. Meeting Australian standards and other engineering guidelines including restricted access vehicles network requirements are a feature of the assessments conducted by CoH.

### Early engagement

CoH supports pre-lodgement and early engagement for both applicants and industry accredited consultants that act as their agents. CoH advised they see pre-lodgement more as proponent-driven, non-binding early engagement focusing on ensuring applicants properly understand CoH assessment and information requirements, to support an efficient process once a DA is referred. CoH does not have any published guidance documentation about pre-application arrangements. Stakeholders have indicated an effective and constructive pre-lodgement experience with CoH.

Externalities can affect CoH referral responses which are not always raised by or known to the proponent during pre-application e.g. third-party developments affecting road network access. State road infrastructure works being brought forward can also affect CoH referral responses. CoH can only advise proponents of these works to the extent they are known by DIT at the time of the pre-application engagement.

CoH did not support the Commission's draft recommendation 4.1 in terms of formalising the pre-lodgement processes, arguing this would impact on the flexible and iterative value of pre-application work. Whilst CoH acknowledged there is scope to improve record keeping of pre-application engagements in some circumstances, it considers collecting metrics on pre-application arrangements would add to existing reporting burdens and provide little additional value.

### Customer-centred guidance

CoH provides guidance to applicants on their DAs but has not developed any published guidance material that would help applicants to understand and prepare for a referral. CoH referrals often necessarily involve professional traffic consultants who have established relationships with CoH assessing staff, understand CoH requirements and retain access to applicable assessment standards and materials.

CoH acknowledged there is scope to develop publicly available materials to guide applicants through the CoH referrals process. CoH are considering developing guidelines and accompanying user-friendly explanatory notes that would be available online. CoH indicated they would support making such guidance materials accessible centrally through the SA planning portal.

### Information Requirements

CoH adopts a risk-based approach to determine if an RFI is required from an applicant. This involves consideration of key risk criteria including the potential for the state to inherit

foreseeable road safety and efficiency risks, increased infrastructure upgrade costs or an increase in network operating costs.

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 enable CoH to minimise RFIs. From 2018-19 to 2019-20 CoH responded to approximately 40 per cent more referrals within the statutory timeframe.

The Commission has not heard of any onerous or disproportionate requirements in terms of data reports or other materials CoH requires for assessment. The LGA indicated that CoH information requirements have '...historically been generally reasonable, and response times and access to staff with relevant expertise appropriate'.<sup>39</sup>

### Capability

CoH's referral function of 4.5 full-time equivalent staff possess qualifications in planning and/or engineering and have significant experience working with development referrals. CoH uses a hub and spoke model which draws on assessors and staff who coordinate and finalise referral responses, supported by a wide range of specialist areas in DIT, including strategic transport planning, traffic network management and design, as required.

The use of industry accredited traffic consultants by proponents is a key part of the overall capability required to support effective referral responses. Unlike NVC and EPA, CoH do not accredit these consultants as they are industry accredited professionals. Traffic consultants are generally also members of DIT's re-qualification process for contractors undertaking planning and construction work on DIT managed projects.

### Post-DA licensing and approvals

As part of finalising the referral response, post-development conditions may also be applied requiring an applicant to meet specified on-road design requirements in accordance with relevant standards. Those conditions may take the form of deeds, permits, related compliance/assurance methodologies and appropriate financial security to ensure the works are undertaken in accordance with approvals and conditions. They are recorded as conditions or notes in the referral response, providing certainty for the applicant in relation to the build/construct phase of a development.

### Continuous Improvement

CoH advised that it regularly reviews management and reporting arrangements to improve its processes and performance and has undertaken several internal administrative reviews. Recent reforms addressed business process transparency, information requirement proportionality, and improved engagement of relevant authorities leading to additional RFI transparency and a substantial reduction in referral response timeframes. CoH do not have a regular continuous improvement cycle aimed specifically at improving regulatory practice in relation to its referral function.

CoH relies on the ePlanning system for data and analytics instead of in-house information. The Commission did not observe a dedicated, proactive continuous improvement cycle to

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<sup>39</sup> Local Government Association, Submission DR5 to South Australian Productivity Commission, *Development Referrals Review* (7 May 2021) 7 (LGA DR submission).

identify and report on improvement. Reforms generally arose from responses to issues-based triggers.

## 2.3 Key areas of referral body practice

This section identifies specific areas for improvement and recommendations based on the Commission's findings from its diagnostic evaluation of the referral bodies to improve efficiency and effectiveness of the referrals process. As this section deals with the regulatory practice of referral bodies the Commission's conclusions and recommendations may be relevant to referral bodies more broadly and to several development assessment pathways.

### 2.3.1 Pre-application and early engagement

This section addresses pre-application and early engagement arrangements and practices of the referral bodies. This refers to interactions between proponents and their agents and referral bodies before a DA has been lodged. It does not refer to the formal pre-lodgement services that are available in specified circumstances,<sup>40</sup> or the pre-lodgement agreement process provided for under the *PDI Act*.<sup>41</sup> The Commission has deliberately used the language of pre-application and early engagement to distinguish the parameters of this analysis from those formal pre-lodgement arrangements.

The Commission's focus has been on the regulatory practice of the referral bodies in their early interactions with proponents as part of supporting the subsequent DA assessment process and preparation of the referral response. The intention is to identify where additional and mutual value may be found in these early and formative interactions by establishing the benefits to proponents and the necessary limitations on referral bodies.

#### ***Referral body pre-application arrangements***

All three referral bodies use and are supportive of early engagement with applicants. The type of service offered differs between them, in part given their different regulatory roles and breadth of mandates. The Commission undertook detailed analysis of referral body early engagement arrangements in its draft report.<sup>42</sup>

In brief, EPA's focus is on clarifying information requirements for expected referrals and determining if an EPA referral will be required. EPA's activity at this early stage is guided by the principle of progressive certainty – the guidance provided is commensurate with the amount and detail of information provided by the applicant (see figure 2.5). The substantial information available to relevant authorities and applicants on EPA's website forms part of its early engagement arrangements.<sup>43</sup> DEW engages in early discussions with both applicants and native vegetation consultants. Whilst it publishes a limited amount of information its approach is generally viewed constructively by councils, and the practice works in conjunction with the use of accredited consultants. CoH's approach to early engagement is often explorative given the technical nature of its mandate. It provides early advice to proponents and their traffic consultants about likely applicable assessable standards and criteria.

<sup>40</sup> Plan SA, *Pre-lodgement service* (Web Page, 9 August 2021) <[https://plan.sa.gov.au/development\\_applications/case\\_management\\_services/pre-lodgement\\_service](https://plan.sa.gov.au/development_applications/case_management_services/pre-lodgement_service)>.

<sup>41</sup> *PDI Act* (n 1) s 123.

<sup>42</sup> SAPC Referrals Review Draft Report (n 22) [2.3.2].

<sup>43</sup> Environmental Protection Authority, *Advice and assistance* (Web Page, 16 September 2021) <[https://www.epa.sa.gov.au/environmental\\_info/environmental\\_planning/advice-and-assistance](https://www.epa.sa.gov.au/environmental_info/environmental_planning/advice-and-assistance)>.

There is consensus across the referral bodies of the value of early engagement with applicants to identify ‘show-stoppers’ and clarify information requirements before a DA is lodged. None of the referral bodies provides assessment or formal advice at this early stage.

### **Value and limitations of pre-application activity**

Feedback received by the Commission confirmed the value of early engagement, from regulators:

*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.<sup>44</sup>*

And proponents:

*...opportunities to discuss proposed developments with referral agencies pre-lodgement would enable developers to address significant matters for referral agencies at the pre-lodgement stage of an application. From our experience this can assist in streamlining the formal referral process and subsequently the assessment process.<sup>45</sup>*

Several stakeholders did not support the formalisation of early engagements as characterised by the Commission in its draft recommendation 4.1.<sup>46</sup> That feedback overwhelmingly indicated that the value of early engagements comes from the non-binding, flexible and iterative process driven by applicants that provides a mutually beneficial opportunity to identify barriers to a proposal, reduce risk and clarify information requirements for assessment. The Commission’s proposal to quantify the value of pre-application activity through data capture was also generally not supported.

The submission from the Murraylands and Riverland Landscape Board captured the pragmatic value of early engagements and the potential burden of prescribing the process:

*Many referral agencies have multiple conversations per day, through different contacts within each agency, which could be regarded as pre-lodgement discussions ... Resourcing the monitoring and evaluation of the proposed recommendation would be onerous, and it is not clear what value the metrics suggested would add to the process.<sup>47</sup>*

The Coastal Protection Board also confirmed the value of flexibility in pre-application activity and the potential risks of creating an additional *de facto* assessment process:

*There is a risk that adoption of a formal pre-lodgement may be counterproductive. Pre-lodgement is currently an iterative process which enable a developer to innovatively alter and amend development concepts in consultation with referral bodies to move towards a final proposal and a formal application...Once a formal pre-lodgement process could become a de facto referral process, with a loss of flexibility, and without the statutory limits on timeframes that keep the referral bodies on-task. Recently, the Board has received complaints about the formal referral process duplicating informal pre-lodgement processes, and the additional time incurred.<sup>48</sup>*

<sup>44</sup> Murraylands and Riverland Landscape Board, Submission No DR 6 to South Australian Productivity Commission, *Development Referrals Review* (6 May 2021) 6.

<sup>45</sup> Hickinbotham Group, Submission No DR 4 to South Australian Productivity Commission, *Development Referrals Review* (6 May 2021) 5.

<sup>46</sup> SAPC Referrals Review Draft Report (n 22) [4.1].

<sup>47</sup> Murraylands FR submission (n 38) 2.

<sup>48</sup> Coast Protection Board, Submission FR1 to South Australian Productivity Commission, *Development Referrals Review* (28 July 2021) 2 (Coast Protection Board Submission).

The risk of pre-application activity becoming a pseudo development assessment process was also identified by the Australian Productivity Commission in a recent research paper.<sup>49</sup>

Some feedback supported aspects of the draft recommendation. NVC indicated it is actively reinforcing its current practices by ‘...developing standards that guide the pre-lodgement process ... so applicants understand what is expected of them and what they can expect through the process’.<sup>50</sup> LGA indicated general support for the draft recommendation proposing that reference also be made to ensuring referral bodies are adequately resourced.<sup>51</sup>

The Commission’s review of the early engagement arrangements in other Australian jurisdictions revealed contrasting approaches, and that it is generally not prescribed but recommended to support the DA process. The Queensland State Assessment and Referral Agency recommends that before lodging an application for a “coordinated project” declaration, project proponents schedule a pre-lodgement meeting with the Office of the Coordinator-General.<sup>52</sup> The New South Wales Planning and Environment’s Development Assessment Best Practice Guide recommends that pre-lodgement meetings should be mandatory for more complex DAs.<sup>53</sup> The Western Australian Government’s proposed reforms aim to use pre-lodgement meetings to facilitate better outcomes ‘with a view to rolling out the option state-wide, with potential to legislate arrangements if a trial period is successful’.<sup>54</sup>

### **Quantifying the value of early engagement**

The Commission sought feedback on referral bodies supporting an evidence-based approach to calculating the value of pre-lodgement activity in the referrals process. This aspect of the draft recommendation was based on identifying the potential net benefit of pre-application activity over time, and recognising opportunities to improve the efficiency of the overall DA assessment process. This approach has been recognised in other inquiries into planning reform.<sup>55</sup>

NVC supported an evidence-based approach:

*The NVC very much supports the proposal for an evidence-based approach. Further work will be required on defining suitable systems to capture these metrics. It is anticipated that Planning and Land Use Services (PLUS) will take carriage of this element as part of the introduction of the Code. NVC is able to support PLUS in the provision of data, if required.*<sup>56</sup>

However, others offered contrasting views given the potential impact on human resources and IT systems, and noting that the quantification as proposed would not be an accurate method of calculating the value of early engagement activity:

*Calculating the value of pre-lodgement activity in the referrals process by capturing certain metrics as proposed in the SAPC draft report, is likely to be resource intensive and of*

<sup>49</sup> 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>> (Australian Productivity Commission Information Paper 2021).

<sup>50</sup> NVC submission (n 33) 1.

<sup>51</sup> LGA FR submission (n 26) 1.

<sup>52</sup> Department of State Development, Manufacturing, Infrastructure and Planning, *Pre-lodgement meetings* (Web Page, 19 August 2021) <<https://www.statedevelopment.qld.gov.au/coordinator-general/assessments-and-approvals/coordinated-projects/the-coordinated-project-process/pre-lodgement-meeting>>.

<sup>53</sup> New South Wales Department of Planning, Industry and Environment, *Development Assessment Best Practice Guide* (Web page, 10 August 2021) <<https://www.planning.nsw.gov.au/-/media/Files/DPE/Other/development-assessment-best-practice-guide-2017-03.pdf>>.

<sup>54</sup> 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>>.

<sup>55</sup> Australian Productivity Commission Information Paper 2021 (n 49).

<sup>56</sup> NVC submission (n 33) 2–3.

*questionable value. If this is to be implemented, such metrics need to be carefully designed and the purpose clarified—it is already broadly acknowledged that pre-lodgement activity is of value to applicants and regulators.*<sup>57</sup>

Whilst CoH acknowledged there is scope to improve record keeping of pre-application engagements, its feedback echoed concerns about additional reporting burdens.

The Commission heard that pre-application guidance provided by referral bodies during early engagement does not necessarily translate to a measurable efficiency in the DA assessment process. Early engagement activity may not manifest as a DA, and even if a DA follows, the proposal may have changed significantly from that discussed during early engagement when the applicant had limited information, given the stage of the proposal's development.

### **Early engagement and organisational culture**

A strong theme in the feedback from proponents and the planning industry was that they would rather see an improvement in referral body culture in the form of openness to engage rather than any further prescription of pre-application arrangements. This feedback is consistent with best practice principles associated with effective engagement, which identify an educative and facilitative regulatory posture.<sup>58</sup> A recent survey commissioned by the Commission to support its inquiry into South Australia's regulatory framework identified that poor communication with regulators is a challenge experienced by businesses, and that difficulty in finding relevant and readily available information is a challenge across most regulators.

There are benefits to be found in improving the culture and behaviours of regulators. Feedback from proponents and their agents indicated that in the absence of clear and accessible guidance materials about early engagement, regulators can resort to ad hoc practices. This can be experienced by proponents because of: referral body staff changes requiring the proponent to bring new staff 'up to speed'; different advice being provided by different representatives of the same referral body; and at least a perception that some referral bodies can be reluctant to engage early using their most appropriate staff.

Effective strategies to address these issues include hand over arrangements if planned absences occur and corporatisation of engagement records including advice regarding the current status of information requirements. An example of a useful strategy is implementing a model 'deed of delegation' that prescribes which matters can be determined by suitably senior staff, supporting a triage approach and reducing delays.<sup>59</sup>

The Commission addresses guidance materials in section 2.3.2 and culture in section 2.3.4.

### **Conclusions**

Good regulatory practice recognises early engagement is a non-binding, flexible and iterative process driven by applicants that provides a mutually beneficial opportunity to identify barriers to a proposal, reduce risk and clarify information requirements for assessment.

Based on feedback from referral bodies, proponents and their agents, and the specific responses to the Commission's draft recommendation, the Commission has concluded there is some scope to improve early engagement and pre-application activity. That improvement is

<sup>57</sup> Coast Protection Board Submission (n 48) 2.

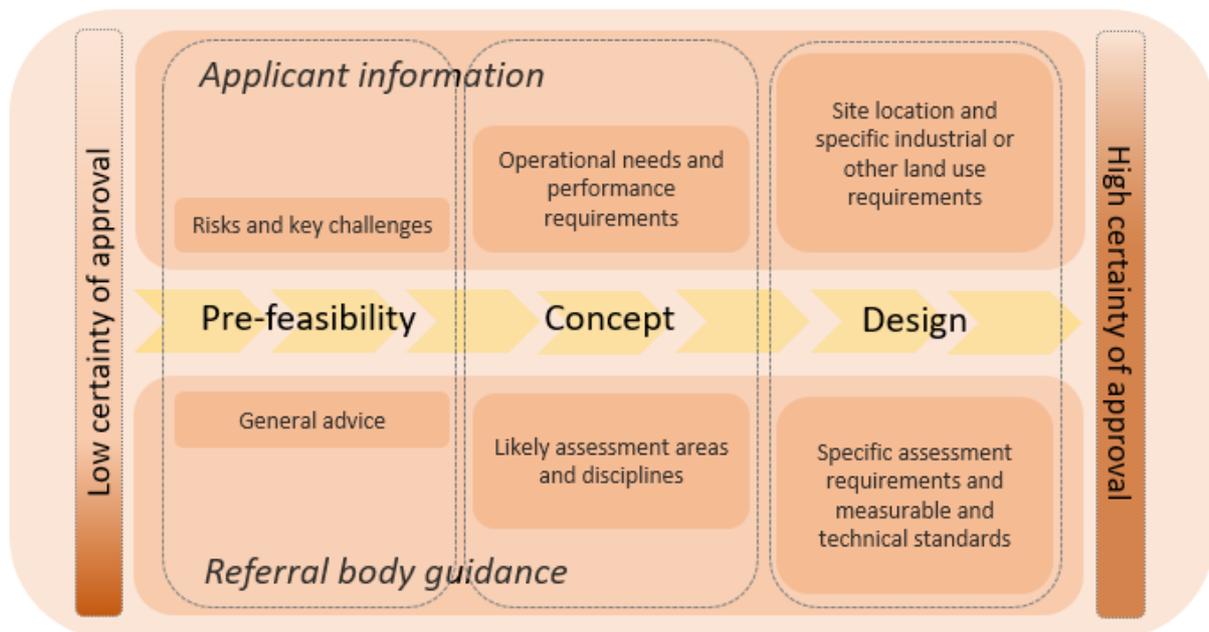
<sup>58</sup> Australian Productivity Commission, *Regulator Engagement with Small Business* (Research Report, September 2013) 65.

<sup>59</sup> Department of Treasury and Finance Victoria (Better Regulation Victoria), *Planning and Building Approvals process Review* (Discussion Paper, 2019) 113 <<https://www.vic.gov.au/planning-and-building-approvals-process-review>>.

centred around making clearer what proponents and their agents can reasonably expect from referral bodies before a DA is lodged, where they do not already do so, and why the type and amount of information referral bodies can provide is necessarily limited in the early stages of a proposed development. The Commission accepts the feedback from the three referral bodies that quantification of the value is unlikely to provide net benefits.

The application of the principle of progressive certainty effectively governs pre-application activity, which was evidenced most prominently by the EPA. Proponents and their agents can expect a level of service from referral bodies commensurate with the stage of their proposed development. Where there is little information known at the pre-feasibility stage about the site location and the type of industrial processes that may be present, the referral body's ability to guide the applicant is very limited. As more certainty and detail about the proposed development emerges during the concept and design stages, the referral body is in a better position to provide more guidance about what specific assessable criteria and information requirements would apply in the event the proposed development was referred to the referral body. This is illustrated in Figure 2.5

Figure 2.5: Progressive certainty – applicant information and referral body guidance



Source: Office of the South Australian Productivity Commission.

Referral bodies are obliged to assess the DA on its merits when it is lodged. Where the specifications of the DA differ from the information considered by the parties during early engagement, there can be no expectation by proponents that pre-application guidance from referral bodies continues to apply.

Improving the availability and consistency of information for proponents about early engagement arrangements, focusing on progressive certainty principles, is expected to add additional value to what is already, in the Commission's view, a generally effective part of the development assessment process.

### Recommendation 2.1 – Pre-application activity and early engagement

In order to support referral bodies to adopt best practice in early engagement, the Commission recommends that the three referral bodies review and revise relevant guidance materials:

- to include the level of service applicants can expect during early engagement with the referral body reflecting the proportionality of the information provided by an applicant;
- to ensure content is useful to both inexperienced developers and planning professionals alike; and
- are easily accessible on the referral body's website.

### 2.3.2 Guidance materials

Best practice regulatory principles encourage regulators to understand the business impacts of their process on applicants.<sup>60</sup> 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 and may mitigate the need for RFIs during the referrals process. The Commission seeks to improve this by ensuring there are limited gaps in existing referral body guidance material and ensuring ease of access to relevant referral information for all applicants and their agents.

The three in-scope referral bodies have adopted different approaches to their publicly available guidance for applicants. EPA provides a substantial amount of publicly available referrals process guidance material. This was confirmed by applicants and their agents during the Commission's consultations, albeit some feedback indicated the amount of information available can make it difficult to find information relevant to the applicant's interests. The Commission considers EPA the benchmark in relation to publicly available referral process materials.

CoH provides guidance to applicants relevant to their assessments but has not developed any published guidance material that would help applicants to understand and prepare for a referral. CoH indicated that the move to the Code and deemed-to-satisfy development criteria adequately capture CoH requirements in relation to the smaller developments and provide the appropriate guidance to those applicants. CoH acknowledged there is scope to develop publicly available materials, including user-friendly explanatory notes, to guide applicants on applicable assessment and technical standards that make up the majority of CoH referral information.

NVC and DEW provide guidance to applicants on native vegetation referrals processes. Material to support accredited consultants has been developed over time to support consistent and improved assessments. This material is not made available publicly and must be requested by the applicant. DEW advises that this material requires expert knowledge to understand and apply the information to a native vegetation assessment. NVC indicated:

<sup>60</sup> See for example Department of the Prime Minister and Cabinet, *Regulator Performance Guide* (Guide, July 2021) <<https://deregulation.pmc.gov.au/sites/default/files/regulator-performance-guide.pdf>>.

*...to support applicants, the NVC is currently developing guidance materials that will assist applicants and planning authorities to understand these processes and may be more useful than providing assessment materials such as score sheets.<sup>61</sup>*

The NVC is developing guidance materials that will assist applicants, consultants and planning authorities to better understand clearance of native vegetation and associated referral processes. Fact sheets are being prepared based on development-related activity, and on an industry-specific basis. These improvements will support accountability in the native vegetation referrals process and are expected to minimise rework through more informed applications and more transparent decision making.

The Commission notes that the assessment processes of all three referral bodies may necessarily involve professional consultants who have established relationships with assessing staff. This may explain why some technical assessment information is not published and must be requested by applicants. That said, 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 in these technical fields.

The Commission sees merit in making available all referral process guidance material and assessment standards and requirements. For materials the referral body determines are for use by specialist or accredited consultants, the referral bodies can identify documents as requiring relevant knowledge and specialised skills to interpret and apply. Publishing all information used to assess a DA as part of the referrals process is consistent with best practice regulator governance principles of accountability and transparency, and engagement.<sup>62</sup> It may also address the potential barrier to entry issues.

An absence of relevant assessment information can result in incomplete applications and potentially delays and costs to applicants as the relevant authority or referral body goes back to the applicant for further information. This was recognised as part of a review of New South Wales DA processes where it was recommended that the state investigate setting guidelines relating to what information is required for different types of development application.<sup>63</sup>

Referral bodies and PLUS indicated this strategy would also benefit relevant authorities (mainly local government), particularly for Code assessed development, by providing more information for them to effectively undertake their verification process when the DA is lodged.<sup>64</sup>

## **Conclusions**

Whilst the amount and type of information made publicly available by the three referral bodies varies, there is consensus among them that guidance materials are of value to proponents, their agents and relevant authorities. Lifting all three referral bodies published guidance materials to a consistent level will assist transparency, reflect best practice regulator governance principles and minimise RFIs and rework, increasing process efficiencies. This may also be relevant to other referral bodies in the development assessment process.

It will be necessary to ensure these materials are useful for inexperienced applicants and planning professionals. They should be as simplified and as consistent in format and structure as possible, acknowledging the differences in referral body mandates and assessable

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<sup>61</sup> NVC submission (n 33) 2–3.

<sup>62</sup> OECD, *Governance of Regulator's Practices: Accountability, Transparency and Co-ordination* (Report, 2016) 17.

<sup>63</sup> Australia Productivity Commission Information Paper 2021 (n 49) 20.

<sup>64</sup> *PDI Regulations* (n 3) r 31.

requirements. Making all guidance materials available centrally through the SA Planning Portal would improve access and support implementation of the new planning system.

### **Recommendation 2.2 – Guidance material**

In order to support efficiencies in the referrals process, avoid requests for additional information and minimise rework, the Commission recommends that the three referral bodies review and revise their suite of guidance material following the coming into operation of the *Planning, Development and Infrastructure Act 2016* to ensure it:

- clearly identifies assessment and information requirements and standards;
- is equally useful to inexperienced applicants and planning professionals alike, which may take the form of technical materials accompanied by user-friendly notes or equivalent; and
- includes advice about the level of service and indicative timeframes an applicant can expect in relation to the referrals process.

All materials supporting referral activity are to be published, including materials used by accredited or specialist consultants which can be identified as requiring technical skills to understand and apply.

To support the implementation of the state planning reforms, and in the spirit of a single planning system, the Commission recommends that by the end of 2022 the three referral bodies, in collaboration with the State Planning Commission:

- adopt a consistent format and structure to referral process guidance material; and
- make all such material available centrally through the SA Planning Portal.

### **2.3.3 Consultants**

Most of the feedback received about consultants can be characterised as relating to impartiality. The Commission also received anecdotal feedback regarding the costs of engaging consultants, timely access to consultants, and their mandated use. The Commission considered consultants from a capability and resource perspective as part of its diagnostic evaluations. This section considers the role and value of consultants in referral processes and responds to the views expressed by regulated entities regarding mandated use and impartiality by exploring the relevant accreditation schemes.

#### ***Impartiality and consultant reports***

There was a common view from applicants and their agents that consultants are an essential part of preparing material for referral bodies, and that they add important value to the referrals process, with the most valuable consultants having good, established relationships with industry and regulators. It was acknowledged that the role of consultants differs in different fields and that the role of consultants has been increased with the operation of the *PDI Act*.

Some stakeholders expressed concern about the reasonableness of information requirements set by referral bodies that required the use of consultants. Those concerns raised queries about the reasonableness of some of the information sought, particularly where referral bodies sought to use applicant consultant reports to establish a body of evidence in an emerging or

previously unassessed field. Requests of this nature may lead to delays that can threaten financial viability or project feasibility arising from the need to undertake long-term sampling to obtain data to support an assessment determined necessary by the referral body. This may be an indication, at least in part, that some referral bodies are not considering the proportionality of their information requests, and the impacts on a proposed project. The examples provided to the Commission related to major projects. The Commission did not consider the reasonableness or otherwise of the information sought.

The Commission heard from planning industry businesses there is a perception of a conflict of interest arising where the regulator who accredits a consultant is the same regulator that assesses that consultant's reports. The Commission heard two contrary views. Firstly, that consultants may draft reports to reflect the preferred outcomes of the accrediting regulator to ensure their ongoing accreditation. This was most acutely reflected in the Urban Development Institute of Australia (UDIA)'s concerns about site contamination consultants' reticence to 'sign off' that the land is suitable for a more sensitive use '...based on other factors including risk to reputation, insurance premiums and ongoing practice approval by the EPA'.<sup>65</sup>

Conversely, the LGA indicated that in the absence of auditing and minimum standards, native vegetation consultants may produce reports that may benefit applicants' interests over protection of native vegetation.<sup>66</sup>

The Murraylands and Riverland Landscape Board indicated their ecologists had expressed concerns regarding native vegetation consultants producing conservative reports. They also echoed previously expressed views mentioned in the Commission's draft report about native vegetation consultants reaching pre-determined outcomes.<sup>67</sup>

The Commission has considered these issues by considering the accreditation and governance arrangements applicable to the consultants used by the in-scope referral bodies.

### ***Accreditation and use of consultants***

Whilst accredited consultants are engaged by applicants, they provide an important and necessarily specialised capability in the referrals process. They support effective assessment by synthesising technical and scientific issues, together with information for an applicant's proposed development, relevant to the applicable regulatory framework. The use of subject-matter experts subject to accreditation regimes and effective governance arrangements creates overall efficiencies in the referrals process.

Accreditation frameworks ensure consultants have an appropriate level of experience in their field and possess relevant qualifications. They also ensure consultants have an effective understanding of the referral body's regulatory framework. Consultants are also familiar with referral body expectations such as information requirements, how information should be presented, and acceptable scientific and technical standards. This supports the provision of the appropriate type and amount of information to the referral body at the right time, to enable an effective assessment against the applicable assessment requirements, minimising rework and avoiding potential additional costs and delays to the applicant.

The mandated use of native vegetation consultants, site contamination consultants, and site contamination auditors is a key feature of managing the volume, complexity and quality of

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<sup>65</sup> UDIA submission (n 24).

<sup>66</sup> LGA FR submission (n 26).

<sup>67</sup> Murraylands FR submission (n 38).

work for referral bodies using private sector resources. The alternative would be to retain the capability within the referral bodies with commensurate resourcing and budget implications.

### Site contamination consultants and auditors

The EPA's site contamination accreditation arrangements are intended to '...facilitate an improvement in the quality, reliability and accountability of site contamination reports and documentation provided to government, planning authorities, land-owners and those who have liability for site contamination.'<sup>68</sup>

The EPA does not certify site contamination practitioners.

Site contamination auditors are mandated and accredited subject to a comprehensive legislative scheme and form part of a national audit system.<sup>69</sup> EPA advised that the site contamination auditor regime has been in place since 2009 and the state planning reforms have now incorporated those arrangements into the planning system.<sup>70</sup>

Site contamination consultants are accredited by an independent body or scheme established for the purpose of certifying site contamination practitioners. Such bodies must be approved under the EPA's stringent governance arrangements and processes for recognition, including assessment against Australian Standards.<sup>71</sup> The use of site contamination consultants is prescribed by EPA policy as is the use of site contamination instruments that must be prepared by a site contamination practitioner.<sup>72</sup>

The *EP Act* includes offences and financial penalties in relation to the provision of false or misleading reports applicable to both corporations and natural persons.<sup>73</sup> It also includes conflict of interest and honesty provisions applicable exclusively to site contamination auditors.<sup>74</sup> Site contamination consultant governance includes complaints arrangements.<sup>75</sup>

### Native vegetation consultants

The use of NVC's native vegetation accredited consultants is mandated to prepare data reports necessary for native vegetation clearance assessments.<sup>76</sup> DEW advised that native vegetation consultants are endorsed by the NVC and must meet minimum qualification and experience standards, including a minimum tertiary qualification in botany or ecology plus at least ten years of experience relating to conducting vegetation assessment and plant identification. They are trained in the requirements of the *NV Act* and *NV Regulations*, as well as Native Vegetation Council policies and vegetation assessment methodologies. Accredited consultants must meet minimum performance requirements and their accreditation is subject to annual review which may include requirements to attend NVC professional development training. There are currently over 80 accredited native vegetation consultants and the panel is opened annually to new entrants.

<sup>68</sup> Environment Protection Authority, *Site contamination policy: certification of practitioners* (Policy, July 2018) 4 <[https://www.epa.sa.gov.au/files/13547\\_sc\\_policy\\_certification.pdf](https://www.epa.sa.gov.au/files/13547_sc_policy_certification.pdf)> (EPA Site Contamination Policy).

<sup>69</sup> *EP Act* (n 23) s 103V; *Environment Protection Regulations 2009 (EP regs)* regs 53-68; *National Environment Protection (Assessment of Site Contamination) Measure 1999* made under the *National Environment Protection Council Act 1994* (Cth).

<sup>70</sup> For example, through the Planning and Design Code and Practice Direction 14: Site Contamination Assessment 2021.

<sup>71</sup> EPA Site contamination policy (n 68).

<sup>72</sup> *Ibid* [6].

<sup>73</sup> *EP Act* (n 23) ss 119, 120A.

<sup>74</sup> *Ibid* 103X.

<sup>75</sup> EPA Site contamination policy (n 68) [4.3], [5.2].

<sup>76</sup> *Native Vegetation Act 1991* s 28(5); *Native Vegetation Regulations 2017* r 18(2).

The NVC indicated in its submission to the draft report that:

*...in some instances, the quality of the consultant's work is limited by the information provided by the applicant. This impacts on the ability of the NVC officers to undertake the assessment in a timely and streamlined way.<sup>77</sup>*

This observation is consistent with the substantial feedback provided to the Commission in relation to pre-application arrangements; the Commission's views regarding progressive certainty in the referral process is addressed in section 2.3.1.

DEW indicated it has seen substantial improvements in the quality and consistency of information in native vegetation consultants' reports, which in part is attributed to DEW's consultant training program and additional specialised resources being made available. Early engagement has also improved through native vegetation consultants, enabling native vegetation clearance input into designs earlier in the development assessment process.

### Traffic engineering consultants

Whilst CoH does not mandate the use of consultants by applicants, the technical nature of its assessment requirements often necessitate the use of industry accredited traffic engineering consultants within the relevant discipline to prepare Traffic Impact Assessments. CoH advised it has developed effective relationships with competent and reputable traffic consultants who deal with traffic and road issues in a proactive way. They understand national and departmental standards, practices and expectations, which results in quality assessment reports, reducing rework and CoH requests for further information from applicants.

Traffic engineering consultants are accredited by their respective industry or professional association e.g. Engineers Australia and may also be members of the department's prequalified consultants undertaking planning, design and construction work on departmental projects. CoH does not see any requirement to further accredit these practitioners as the current standards for industry and professional accreditation are accepted across the wider transport sector.

### **Conclusions**

The Commission was unable to find evidence of the in-principle concerns raised regarding biased consultant practices and reports, or conflicts of interest relevant to the accreditation schemes. The use of accredited consultants by the in-scope referral bodies supports efficiency in the referrals processes and effective assessment by synthesising technical and scientific issues in reports that meet referral body assessment requirements.

The accreditation regimes applicable to site contamination consultants and auditors pre-date the state planning reforms and have a long history embedded in national legislation and other legal instruments and policy. The regimes adopt national certification standards. State legislation includes conflict of interest provisions and offences for providing false or misleading information attracting substantial financial penalties. EPA policy requires independent certifying bodies have complaints processes. There is a substantial amount of information regarding site contamination and site contamination auditors and consultants. The Commission can understand that even planning consultants may find it difficult to navigate all the information available.

Native vegetation consultant accreditation is also subject to established professional standards and minimum qualifications and experience requirements set by the NVC. The

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<sup>77</sup> NVC submission (n 33).

Commission was unable to link the NVC standards to a national, industry or professional standard. The information provided by DEW about native vegetation consultant accreditation is not publicly available. Publication of native vegetation consultant accreditation arrangements and professional standards would improve transparency and align more closely with better regulatory practice principles.<sup>78</sup> It may also help educate industry, proponents and their agents about the qualifications and experience of the consultants they are using.

### 2.3.4 Culture, capability and behaviours

The Commission's draft report found that all three referral bodies demonstrated examples of continuous improvements and improved regulator performance. Examples included responses to external reviews, such as the state planning reforms, other regulatory reviews and internally-driven business performance initiatives. The Commission also found that the referral bodies demonstrated variable commitments to high-performance and service-orientated cultures.

Stakeholder feedback on issues of culture, capability and behaviours focused on the service-oriented culture of the referral bodies and the extent of their engagement with applicants and their agents involved in proposed or referred DAs. Feedback indicated that there is scope to better align referral body practice with continuous improvement through adopting better regulatory practice principles. In this section the Commission considers the extent to which the commitments to continuous improvement and high-performance, service-oriented cultures are published, measured and reported on by referral bodies, and how existing practice can be enhanced.

#### ***Culture and capability supporting better regulatory practice***

The Australian Productivity Commission has made recommendations that recognise good regulatory outcomes rely on a culture that promotes a facilitative and educative posture towards business.<sup>79</sup> Ideally, principles, values, beliefs and attitudes shaped and adopted by a regulator's leadership would be embraced at the officer-level, but this is not always the case.<sup>80</sup> This is an important aspect of regulator culture because the attitude of public-facing regulator representatives shapes the way the organisation engages and communicates with regulated entities and the public at large.<sup>81</sup>

Organisations that have adjusted their internal culture by focusing on clear priorities, training and skills of staff, performance monitoring, stakeholder feedback, and rewarding behaviour consistent with desired practices can demonstrate how much regard is given to investment facilitation principles while they exercise their legal mandate.<sup>82</sup>

Better continuous improvement practices are 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. Based on feedback received, and the demonstrated history of continuous improvement in the referral bodies, this section approaches culture and capability from the perspective of internalising and embedding better continuous improvement practices.

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<sup>78</sup> See for example OECD Best Practice Principles (n 20).

<sup>79</sup> Australian Productivity Commission, *Regulator Engagement with Small Business* (Research Report, 2013) 65 <<https://www.pc.gov.au/inquiries/completed/small-business/report/small-business.pdf>>.

<sup>80</sup> Ibid 64.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid 2.

### ***Evaluations of referral body culture and capability***

EPA's performance and continuous improvement arrangements are set out in several corporate documents including its Planning Framework, Corporate Plan and annual report.<sup>83</sup> 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.<sup>84</sup> EPA uses IT solutions to manage and monitor work performance and has adopted some performance targets. It provides opportunities for staff training to maintain industry knowledge. The state planning reforms were used as an opportunity to remove low-risk activities from referrals to enable a focus on higher risk activities. In response to specifically identified performance issues, EPA has undergone internal reviews and structural changes over time to improve referral process performance, including the establishment of the PIAB.

DEW's NVB and NVC have established client response timeframes, developed applicant engagement checklists, codified assessment criteria for approvals, introduced templates for improved consistency and begun monitoring operational performance. NVC's Charter, Governance Framework and Service Standards provide guidance on operational aspects of native vegetation clearance administration. These documents indicate a culture of encouraging good governance, consistent performance and timely delivery of services with standards focused on efficient, fair and transparent services meeting applicant requirements.<sup>85</sup>

CoH advised that it reviews management and reporting arrangements to improve its processes and performance and has undertaken several internal administrative reviews. Recent reforms addressed business process transparency, information requirement proportionality and improved engagement of relevant authorities, leading to a substantial reduction in referral response timeframes. CoH did not indicate it has a regular continuous improvement cycle specifically aimed at improving regulatory practice in its referral function.

The Commission understands the referral bodies, as regulators in their own right, have adopted or are subject to whole-of-agency public sector performance frameworks and other commitments to support improved performance. The Commission observed that continuous improvement activity across the referral bodies has generally been in response to external reviews or specific performance concerns raised by leadership or through governance arrangements. Whilst the referral bodies' responses to those ad hoc triggers are commendable, the Commission did not observe integrated and ongoing continuous improvement cycles to support the referral function.

Accordingly, the Commission sees two areas of enhancement for continuous improvement by referral bodies:

- implementing a structured formal cycle of continuous improvement for the referral body function of the regulator; and
- incorporating that process into the regulators' existing continuous improvement or performance evaluation processes.

<sup>83</sup> Environment Protection Authority, *Corporate Plan (2020–21)* <[https://www.epa.sa.gov.au/files/14642\\_corporate\\_plan\\_2021.pdf](https://www.epa.sa.gov.au/files/14642_corporate_plan_2021.pdf)>.

<sup>84</sup> Environment Protection Authority, *Strategic Directions (2018–2022)* <[https://www.epa.sa.gov.au/files/13720\\_strategic\\_1822.pdf](https://www.epa.sa.gov.au/files/13720_strategic_1822.pdf)> (EPA strategic directions).

<sup>85</sup> Native Vegetation Council, *Native Vegetation Branch Governance Framework and Native Vegetation Council Service Standards* (11 March 2020).

## Conclusions

The Commission considers there is scope, to varying degrees across the three referral bodies, to strengthen continuous improvement efforts informed by performance monitoring arrangements and stakeholder feedback loops. This approach will assist the referral bodies to transition to the new planning system and deliver material improvements in accountability and efficiency in business process, as well as achieving other best-practice regulator outcomes.

Enabling regulator behaviours to support this approach include building on the early engagement practices that the Commission considered in section 2.3.1, with the intention of establishing the conditions for an efficient referral response and identifying early those proposals that are not viable. Further, regulatory systems need to be based on a culture of collaboration if they are to support an ethical regime, and to maximise performance, compliance, and innovation.<sup>86</sup> These practices promote:

- a facilitative and educative attitude towards business which seeks to achieve regulatory objectives without needlessly constraining business activity and growth; and
- continuous improvement, including critical evaluation of existing practices, and opportunities to learn from the experience of applicants and other regulators.

Based on feedback received from applicants, their agents and the referral bodies, and having regard to the work completed in relation to the Commission's inquiry into the state's regulatory framework, the Commission considers there is value in promoting structured continuous improvement cycles in all referral body functions across the planning framework. Such practices would benefit those regulators where it is incorporated into existing agency-wide performance improvement practices. The Commission addresses systemic embedding of better regulatory practice in chapter 4.

Monitoring of continuous improvement processes and reporting on changes being implemented are important elements of the regulator better practice cycle. Monitoring of continuous improvements in referral processes provides the mechanisms and accountability for performance improvements identified by stakeholders or through internal process review. The reporting of continuous improvement will include progress in implementing the pre-application and guidance material recommendations made in sections 2.3.1 and 2.3.2.

### **Recommendation 2.3 – Regular continuous improvement cycle for referral functions**

In order to build on referral body past performance improvements, and to embed and institutionalise continuous improvement practices, the Commission recommends that:

- all three referral bodies implement a regular and structured continuous improvement cycle in relation to their referral body functions that captures the applicant experience of the regulator's practices through feedback loops; and
- the cycle is integrated into the regulator's existing continuous improvement or performance evaluation processes with regular monitoring and reporting on progress.

<sup>86</sup> Christopher Hodges, *Ethics in Business Practice and Regulation* (Web Page, 20 September 2021) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/550542/Prof\\_Cristopher\\_Hodges\\_-\\_Ethics\\_for\\_regulators.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/550542/Prof_Cristopher_Hodges_-_Ethics_for_regulators.pdf)>.

### 2.3.5 Public interests and economic considerations

In this section the Commission considers the extent to which the mandates of referral bodies enable consideration of economic and financial matters either as an independent regulator, or as referral body in the planning system, when preparing referral responses. The Commission considers assessment of economic effects and major projects in section 3.3.

#### ***Prescribed economic considerations and principles***

##### Environment Protection Authority

EPA advised it is an economic agency, and that economic matters are considered in early engagement and the preparation of referral responses. The *EP Act* includes several references to economic and financial considerations, including:

- the core principles of ecologically sustainable development (ESD) that form part of the objects of the *EP Act*;<sup>87</sup>
- that economic considerations are given weight when considering long and short-term effects of environmental protection;<sup>88</sup> and
- the ‘general environmental duty’ which includes consideration of the financial implications of measures to prevent or minimise environmental harm.<sup>89</sup>

There are other references in the *EP Act* to economic or financial matters that relate to governance<sup>90</sup> and penalties.<sup>91</sup> EPA’s vision is ‘a better environment for the health, wellbeing and prosperity of all South Australians’.<sup>92</sup> Supporting the vision, the objectives of EPA’s Strategic Directions includes reference to enabling innovative and sustainable industry practices.<sup>93</sup>

EPA advised that whilst regard is given to these principles and considerations in relation to referrals, the overriding consideration is environmental protection and harm minimisation. The prescribed mandates and assessable criteria are established in the Code, the applicable *EP Act* policies and other instruments e.g. Practice Direction 14: Site Contamination Assessment.

EPA indicated that whilst it does not have in-house capability to undertake economic analysis, it does form common sense judgements when preparing referral responses having regard to the general environmental duty and ESD principles. This includes consideration of proponents’ advice about the economic impacts of a development’s design and location and how those impacts are affected by potential variations. Difficulties in obtaining information and data of an economic and financial nature from proponents can be an impediment to these considerations.

EPA may consider capital and operational costs, particularly when application of the general environmental duty to a proposed development may give rise to material ongoing operational costs to the proponent. These considerations enable EPA to work through the implications of

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<sup>87</sup> *EP Act* (n 23) s 10(1)(a)(i).

<sup>88</sup> *Ibid* s 10(1)(a)(ii).

<sup>89</sup> *Ibid* s 25(2)(b).

<sup>90</sup> *Ibid* s 14B(5)(b).

<sup>91</sup> *Ibid* ss 133(1a), 133(1)(b).

<sup>92</sup> EPA Strategic Directions (n 84).

<sup>93</sup> *Ibid*.

potential conditions and how a proposed development could be varied to minimise cost impacts on the proponent.

EPA's approach is fundamentally about balancing the costs to the environment against the costs to the proponent, but not to the extent that harm minimisation is compromised. Early engagement is an important part of considering economic and financial matters. The Commission did not receive any specific evidence of how economic matters are considered in the preparation of referral responses, but EPA indicated they are moving towards a more structured approach to the application of the economic considerations established in the *EP Act*.

### Native Vegetation Council

The *NV Act* does not include any mandate for the NVC to consider economic matters in preparing a referral response. DEW advised that NVC is mandated to assess for vegetation impacts only but may consider the economic impacts of mitigation strategies on proposed major and Crown projects. This does not extend to analysing the viability of a project proposal.

### Commissioner of Highways

The *Highways Act 1926* does not include a mandate to consider economic matters; it establishes a technical mandate to make further and better provision for the construction and maintenance of roads and works.

CoH indicated they consider economic matters as part of their regulatory practice, particularly when assessing large projects that may have a direct or indirect impact on the state's economy. CoH cited several examples of where they 'have an eye' to economic impacts. For example, CoH, when working with a proponent on road network access requirements, raised the potential economic and productivity benefits of using High-Performance Vehicles as an option. Another example included a proposed development that required a road access treatment. CoH were open to finding a temporary, simpler solution to address the issues requiring treatment that only arose during the build/construct phase in the first 12 months. CoH considers how to achieve fit-for-purpose outcomes at better value to all parties without compromising on their regulatory mandate and applicable technical standards.

CoH applies DIT's corporate policies and commitments. The DIT Strategic Business Plan 2021-22 includes a focus on economic recovery through stimulus spending programs, and sustained economic growth guided by the Growth State Strategy.<sup>94</sup> DIT's annual report identifies the agency's contribution to the whole of government objectives of increasing jobs, lowering costs and the provision of better services.<sup>95</sup>

The Transport Planning and Program Development Division Business Plan 2019-20 includes aspirational vision statements which aim to deliver economic outcomes for customers and communities and help the economy grow. These statements have key deliverables attached to outcomes including timeliness and staff ownership of measurable actions.<sup>96</sup>

CoH stated that as part of its continuous improvement cycle, there are several approaches to reviewing both the Strategic Business Plan and the Transport Planning and Program

<sup>94</sup> Department of Infrastructure and Transport, *2021-22 Strategic Business Plan* (Report, 2021) 7 <[https://cms.dpti.sa.gov.au/browse\\_dit/documents/DIT\\_Strategic\\_Business\\_Plan\\_2021-22.pdf](https://cms.dpti.sa.gov.au/browse_dit/documents/DIT_Strategic_Business_Plan_2021-22.pdf)> (DIT Strategic Business Plan).

<sup>95</sup> Department of Infrastructure and Transport, *2019-20 Annual Report* (Report, 2020) 17 <[https://www.dit.sa.gov.au/\\_\\_data/assets/pdf\\_file/0008/761381/DPTI\\_Annual\\_Report\\_2019-20.pdf](https://www.dit.sa.gov.au/__data/assets/pdf_file/0008/761381/DPTI_Annual_Report_2019-20.pdf)>.

<sup>96</sup> Department of Planning, Transport and Infrastructure, *Transport Planning and Program Development Division Business Plan 2019-20* (Report, 2019) 5.

Development Division Business Plan which aim to improve best practice regulatory processes. These include reviewing the business plan activities; reporting and measuring of the plans and additional programs against appropriate timeframes; and agency wide updates of DIT's planning, governance and legislative frameworks and processes, amongst others. CoH advised that the Divisional Business Plan is continuously reviewed to reflect the Department's Strategic Business Plan.

The Strategic Business Plan also indicates DIT staff will be measured and linked to the strategic priorities of the South Australian Public Sector.<sup>97</sup>

### ***PDI Act and the Code***

The SPC indicated that the purpose of each of the in-scope referral bodies under the Code is to provide 'expert assessment' and 'direction' to the relevant authority in relation to their prescribed mandate. The Commission did not identify any explicit references in the Code (applicable overlays or referrals) for the in-scope referral bodies to consider economic matters.

The *PDI Act* provides that bodies involved in the administration of the Act must have regard to and seek to further the objects of the Act, including supporting and enhancing the State's liveability and prosperity in ways that are ecologically sustainable.<sup>98</sup> It also provides that in furthering those objects regard should be given to the principles of good planning which include strengthening the economic prosperity of the State, facilitating proposals that foster employment growth, and promoting public and private investment towards common goals.<sup>99</sup>

If a referral body is a 'body' for the purposes of the promotion of the objects of the *PDI Act*, which the Commission acknowledges is a legal question, this creates a conditional requirement on referral bodies to give regard to those economic matters in the conduct of their referral functions. The referral bodies indicated to the Commission they do not specifically consider the objects and principles in the *PDI Act* as part of their referral activity. They indicated that the most appropriate arbiter of economic merit of state significant projects is the state (the relevant authority), as the state is best placed to consider business cases and other economic modelling and analysis, and the collective responses of all relevant referral bodies. Referral bodies have a narrower and technical role in terms of applying their prescribed mandates to a specific DA.

### ***Conclusions***

The EPA is the only in-scope referral body with establishing legislation that includes economic consideration as part of its mandates. Whilst regard is given to these principles and considerations in relation to referrals, the overriding consideration is environmental protection and harm minimisation. In the absence of dedicated in-house capability to undertake economic analysis EPA makes broad judgements when preparing referral responses having regard to the general environmental duty and ESD principles. This approach enables EPA to work through the implications of potential conditions and how a proposed development could be varied to minimise cost impacts on the proponent. The EPA's approach is fundamentally about balancing the costs to the environment against the costs to the proponent.

There are legal questions about whether referral bodies are bodies for the purposes of furthering and having regard to the good planning principles in the *PDI Act* which include several economic considerations. In the Commission's view there are legal issues that,

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<sup>97</sup> DIT Strategic Business Plan (n 94) 20.

<sup>98</sup> *PDI Act* (n 1) s 13.

<sup>99</sup> *Ibid* s 14(f).

depending on their resolution, may impact the extent to which referral bodies should have regard to the state's economic objectives, namely:

- whether a referral body (i.e. a body prescribed in schedule 9 of the *Planning, Development and Infrastructure (General) Regulations 2017*) is a 'body' for the purposes of section 13 of the *Planning, Development and Infrastructure Act 2016 (PDI Act)*; and
- to what extent a referral body that is a 'body' for the purposes of section 13 of the *PDI Act*, must give regard to the good planning principles, including strengthening the economic prosperity of the State, facilitating proposals that foster employment growth, and promoting public and private investment towards common goals.

Generally, consideration of economic matters does not form part of best practice regulatory practice principles. The Commission has found those principles focus on systems and practices that support role clarity, transparency and accountability, consistency in decision-making proportionality and continuous improvement.<sup>100</sup> These principles support an efficient and effective process without prescribing what regulators should be assessing for, which is naturally a matter prescribed by their establishing legislation. In chapter 3 the Commission considers the statutory requirement to assess for economic effects for major projects.

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<sup>100</sup> SAPC Regulatory Framework Draft Report (n 21) [3.1.2].

## 3. Major projects and referrals

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### 3.1 Projects of state significance

The Commission has confined its focus on state significant projects to impact assessed developments declared by the Minister, also known as major projects. 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. Where major projects are significant infrastructure or strategic developments they can also support or achieve government objectives 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.<sup>101</sup>*

Whilst proponents benefit financially from a successful project, they also bear its risks. To help mitigate risk proponents want certainty in relation to assessment requirements and timeframes and to obtain an assessment outcome as quickly as possible. Certainty is often a precursor to generating necessary investment early in a project's development.

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

- concerns around protracted project assessment timeframes;
- a lack of understanding by the state of the business impacts arising from protracted assessments (e.g. holding costs, redirected investment);
- unclear and irregular communication between the relevant authority and the proponent; and
- misalignment of government policy objectives and timely assessments, particularly for innovative and strategic major projects.

In this chapter the Commission considers the role of referral bodies in the major project assessment process, given the importance of major projects to the state. Costs of delay are explored, along with an examination of the governance and practices of the process from both referral body and relevant authority perspectives. The chapter concludes with an evaluation of the extent to which the state assesses the economic effects of significant projects as required under the *PDI Act* and more broadly as part of government's economic policy objectives.

### 3.2 Costs of delay

The review's terms of reference asked the Commission 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. The terms of reference included making recommendations aimed at an improved understanding by state agencies of the impacts of the referrals process on a proponent's

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<sup>101</sup> 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](https://www.infrastructure.sa.gov.au/__data/assets/pdf_file/0006/197511/20-Year-State-Infrastructure-Strategy-Full.pdf)>.

preparedness to undertake a development application; namely holding costs, timeframes and certainty of decision making.

The Commission proposed to develop a financial model using information about major projects approved in SA in order to quantify the costs and foregone income of a proponent attributable to meeting referral body assessment requirements beyond a benchmarked timeframe. The requirements include RFIs, notification and consultation requirements, preparing an EIS and conditions related to approvals. The project was also proposed to document the major project assessment process and define delays attributable to referral bodies.

The Commission sought the services of an economic consultant with suitable skills and experience to design and develop a model and methodology to achieve these outcomes. Market responses indicated the proposal could not be completed within the timeframes of the review, even with a reduced scope.

Modelling to identify costs imposed on business has been undertaken in other jurisdictions. For example, the Victorian Competition and Efficiency Commission (VCEC) commissioned detailed business surveys on key areas of Victorian environmental regulation that had been identified as imposing the most costs on business activities. The costs included unnecessary delays in environmental regulatory processes such as project approvals.<sup>102</sup> The Australian Productivity Commission (APC) attempted to estimate delays in costs for individual projects, finding that delays gave rise to avoidable costs. The APC estimated that the indicative cost of a one-year delay to a major offshore liquefied natural gas project worth \$11.3 billion was 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) was estimated to be \$26 million to \$59 million.<sup>103</sup>

The Commission heard from proponents about unforeseen project costs resulting from delays in the process or obtaining a decision and redesigning projects or responding to conditions. Proponents usually undertake cost-benefit studies of their proposal taking in expected and current timeframes and an alternative design. The difference between proposed and alternative designs for one proponent was in the order of 5-10 per cent of the total project revenue.

Additional costs can relate to elapsed time in project approvals and capital costs. Proponents told the Commission that additional capital costs include servicing debt, and paying project staff which can both increase during unforeseen and unreasonably protracted assessment processes.

The Commission is not aware of modelling of the costs involved in major project approvals being conducted by any South Australian public sector agency. The Commission considers that economic assessment and cost-benefit analysis are in-principle an important part of decision-making considerations on projects and initiatives of economic significance to the state. The Commission addresses statutory requirements to provide information to assess major projects for their economic effects in section 3.3.

Modelling could quantify the costs and impacts attributable to meeting regulatory requirements of an impact assessed development application in South Australia. The modelling

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<sup>102</sup> Victorian Competition and Efficiency Commission, *A Sustainable Future for Victoria: Getting Environmental Regulation Right* (Draft Report, March 2009), Overview 35 (VCEC 2009).

<sup>103</sup> Australian Productivity Commission, *Major Project Development Assessment Processes* (Research Report, 2013) 202 <<https://www.pc.gov.au/inquiries/completed/major-projects>>.

methodology would be a matter for the state government to decide and the work of the APC and VCEC may be instructive.

PLUS have developed a benefits realisation model to quantify the expected savings from the implementation of the new planning reforms. PLUS advised that the South Australian Planning Reform benefit management methodology will be used to support the management, tracking and reporting of benefits associated with the introduction of the new planning system. The measurement of benefits is focused on planning process timeframes under the new system relative to timeframes under the arrangements prior to reforms, and centres on time savings resulting from faster approval processes and strategic coordination. PLUS have indicated that reporting methods for qualitative benefits are still being considered as part of the implementation of the benefit management methodology, to support evidence-based decision making.

The Commission considers this to be a useful initiative and that the model has the potential to provide the basis for assessing economic impacts associated with major projects and other state-significant developments. A capability to estimate the value of time savings through more efficient processes and practices is also relevant to monitoring and improving major projects assessment processes.

Time savings from the planning reforms are a key economic benefit to proponents. Delays through reworking plans, extended decision-making times and RFIs impose costs on business. It is understood that the codification of development assessment, statutory timeframes for referral responses, and moving to powers of direction for referral bodies are expected to improve efficiency in the DA assessment process.

The Commission places high importance on 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 in their practices and assessment process. Regulatory practices can have substantial impacts on the financial payoff for individual proponents, and affect state productivity and employment. Just as importantly they have a material impact on the attractiveness of South Australia as an investment location.

The Commission understands that the implementation of the benefits realisation model is in its early stages. PLUS is considering enhancements to the arrangements currently being implemented including: publication of results accompanied by review of outputs and methodology; identification of additional opportunities for tracking and reporting; and addressing internal processes and structures supporting the management and reporting of benefits over time. The Commission supports these enhancements as the identification of further efficiencies and review of methodology reflect better regulatory practice. Further, the application of tracking and reporting within an agency is more effective with the requisite resources and organisational processes.

### **Recommendation 3.1: Modelling the cost of delay in major project assessments**

In order to capture the full benefit of the planning reforms, the Commission recommends that Planning and Land Use Service's proposed enhancements to its benefits realisation model to quantify the expected savings from the planning reforms be given effect, including by:

- publishing results generated by the model incorporating both the value of realised and forecast future benefits.

- continuing to review the model's outputs and methodology to ensure relevance and to inform ongoing assessment of the planning reforms.
- continuing to work with relevant authorities and industry to identify additional system wide benefits of the model; and
- ensure this ongoing work is adequately resourced.

The Commission also recommends that this capability to measure and value time savings and other costs to business be extended to monitoring major projects, addressing among other aspects:

- from the proponent's perspective, the overall process to obtain a major project approval, including ongoing operational licensing and condition impacts;
- estimates of the timeframes of the requirements of the referrals process to obtain a major project approval; and
- estimates of proponents' costs and loss of income due to a lapse of time for referrals beyond industry standards or determined benchmarks.

### 3.3 Trust, transparency and performance

The feedback received by the Commission from proponents and their agents about major project assessments can be collectively characterised as a lack of trust in the process. Whilst the feedback reflected experience under the *Development Act*, the lack of material changes to major project assessment referrals during the state planning reforms suggests the feedback remains current and relevant (see section 1.1.2). Given the proportionately high impact major projects have on the state economy, and the high level of discretion the relevant authority has over the process, the application of best-practice regulatory governance principles is warranted.

In this section the Commission considers the contribution of referral bodies to the assessment of major projects. The focus is on how the SPC and PLUS manage, coordinate and assemble the input from referral bodies through the statutory-mandated impact assessed development process, as well as through regulatory practice and other sub-legislative governance arrangements. The Commission addressed internal referral body practice and performance in chapter 2.

The Commission aims to identify regulatory practice improvements in the relevant authority having regard to the referrals process, and to build higher levels of trust between the state and proponents to support investment, growth and productivity.

#### 3.3.1 Major project assessment practices

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. The role of referral bodies in major project assessments is akin to consultation sought by the Minister as one of several inputs to support the state's assessment of a proposal. This is significantly different to the prescribed and structured Code assessed process. Referral bodies feed into major project assessments at several points during the statutory process:

- participating in the preparation of assessment guidelines by the State Planning Commission;<sup>104</sup>
- determining the level of detail required in the mandatory EIS;<sup>105</sup>
- commenting on the EIS following its production;<sup>106</sup>
- supporting the SPC's Assessment Report<sup>107</sup> and
- assessing amended EISs.<sup>108</sup>

They may also participate in bilateral or multilateral pre-lodgement discussions with proponents and other referral bodies and public sector agencies. At each of these points referral bodies may perform practical tasks including:

- engaging with proponents on issues relevant to the mandate of the referral body before the project is declared as an impact assessed development by the Minister;
- providing technical expertise to determine the nature and extent of issues to be addressed by applicants in the project assessment guideline and EIS, and assessing the proponent's response against the relevant regulations and policies;
- undertaking a formal 'adequacy check' to ensure that the draft documentation prepared by the applicant effectively responds to the assessment guideline and EIS, and is in a form suitable for public consultation; 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 effective assessment against their regulatory mandate.

The relevant authority may exercise substantial discretion in relation to which referral bodies are involved and how and when they contribute to the assessment process.

### ***Coordinating referral body input – relevant authority practice***

#### Project management

PLUS advised that it does not dedicate a case manager to each major development assessment process. Instead, a team is established from the eight staff in the major projects group, led by a principal planner within PLUS who is assigned to each major development. The principal planner is responsible for proponent liaison, project performance, and departmental and ministerial briefings. PLUS indicated it needs to accommodate peaks and troughs in the demand on its staff depending on the progress of each of the active major project assessment processes over time. Given it can be unclear when a proponent may lodge a response to an EIS this can create challenges with a finite work force.

Whilst the Commission accepts major projects assessment staff are not able to control proponent response timeframes, there may be an opportunity through improved and proactive proponent liaison to obtain an indication of when responses can be expected, enabling better forecasting of impacts on staff resources.

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<sup>104</sup> Practice Direction 4.

<sup>105</sup> *PDI Act* (n 1) s 112(b).

<sup>106</sup> *Ibid* s 113(5).

<sup>107</sup> *Ibid* s 113(9).

<sup>108</sup> *Ibid* s 114.

PLUS manages major project assessments based on established custom and practice and uses simple project management tools such as Gantt charts that are prepared in consultation with proponents to identify key steps and dependencies in the assessment process. PLUS indicated they have dated guidance available to support staff in managing major project assessments, and that there are no existing standard operating procedures (SOPs) in relation to impact assessed development declared by the Minister. Given the introduction of the *PDI Act*, it would be timely to consider an SOP for major project assessment staff. There are several potential benefits to standardising the group's practice and better aligning it with best practice regulatory governance principles, including:

- supporting consistency of approach over time and a consistent experience for proponents;
- providing continuity of service in the event of staff departures and to support induction of new staff into the group;
- providing role clarity for members in each team and prescribe the responsibilities of the lead planner;
- supporting structured and regular communication with proponents, referral bodies and other public sector agencies, including communicating about following up time-sensitive triggers to keep an assessment process progressing;
- establishing indicative timeframes and actions to keep the assessment process on track and better manage risk; and
- providing a corporate standard to which all relevant staff are accountable.

#### Relevant authority/referral body relationships

PLUS advised that an officer-level working group is often established involving referral bodies and other public sector agencies. A single contact point is usually assigned in each referral body to act as an internal coordinator managing information arrangements applicable to the assessment process. These coordinators work with the assigned PLUS staff member in relation to the preparation of assessment guidelines, proponent response materials and addressing post-approval conditions, among other things. 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 have the appropriate authority and can commit an appropriate amount of time to the process is important to ensure an efficient assessment process.

#### Taking account of the overall public interest and reconciling competing mandates

As PLUS is effectively the hub of the major project hub-and-spoke-model assessment process, it can receive information from referral bodies that addresses the same development activity issue from several different perspectives. PLUS indicated that from time-to-time some referral body advice is provided that can be construed as falling outside its mandate or creating a tension with the mandate of another referral body.

PLUS advised it reconciles referral body advice using referral body reference groups, or through bilateral discussions to clarify the application of a regulatory mandate to specified development activity. PLUS does not evaluate the overall public interest of referral body advice in relation to the assessment of a major project. There is no weighting of referral body advice from risk or complexity perspectives. PLUS requires referral bodies to rank each of the matters they have raised in relation to the proposal as either A – required to be addressed by

the proponent, or B – recommended to be addressed, or C – for noting. Referral bodies are also expected to indicate additional information to assist the proponent on how to best address the issue raised. This is documented and provided to the proponent to respond to.

In the Commission's view it would be reasonable for proponents to raise queries about whether matters raised by the referral bodies must necessarily be addressed or not. It is unclear what impact there would be on obtaining an approval or specifying a condition if a proponent did not respond to a matter ranked as B – recommended for response. In what are already very complex proposed projects, ambiguous advice to proponents is likely to cause frustration and delay in terms of seeking clarifications, especially when responding may require substantial investment in consultant reports, or materially affect the feasibility of at least parts of a proposed project.

Under the *PDI Act* and *PDI Regulations* the SPC must now provide a 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.<sup>109</sup> These consultative provisions may assist in addressing the feedback received by the Commission in relation to proportionality issues and the risk of referral bodies overlapping their mandates under previous major projects assessment processes.

### Project performance

PLUS advised that whilst the Minister may be the relevant authority, and the SPC has delegated responsibilities under the *PDI Act*, the PLUS Executive Director and other senior executives are operationally responsible for a major project assessment process. 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 did not see examples of these reports.

There are no statutory timeframes in relation to the time for the SPC to prepare assessment guidelines, or the assessment report, or for the Minister to make a decision. PLUS follows up with referral bodies who have not responded to the EIS within the statutory 30-business day notification period. Extensions of time may be granted where the grounds are relevant to supporting an effective assessment of the proposal. 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 the proponent's response time can be influenced by the complexity of the project and the resources at the proponents' disposal.

The Commission requested performance data from PLUS in relation to each phase of the major project assessment process in the *Development Act*, *PDI Act* and *PDI Regulations*. PLUS advised that major projects information is held in several repositories and that there is no automated process for monitoring the performance of major project referral activity. PLUS advised that major project assessment activity is managed on a project-by-project basis with no capture of performance indicators common to all major projects.

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

PLUS did indicate that draft economic modelling has been undertaken to identify the financial benefits of faster processing times under the new planning system. PLUS advised it was

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<sup>109</sup> *PDI Act* (n 1) s 113(5); *PDI Regulations* (n 3) r 71.

unable to provide any information about the modelling to the Commission given the short timeframe since the data has been collected.

### Continuous improvement

The Commission was advised that there is currently no legislatively mandated continuous improvement process applicable to the state's regulatory practices governing the assessment of major projects. PLUS engages 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 at the conclusion of each major project development assessment process, including participation of referral bodies and other public sector agencies involved. The Commission supports this proposal, which could be complemented by a data strategy and KPIs supporting a systemic approach to continuous improvement of major project assessments.

### ***Referral body perspectives***

#### Environment Protection Authority

EPA adopts the same perspective and approach in applying their regulatory mandate to both major projects and Code assessed DAs. The EPA is required to further the objects of the *EP Act*, having regard to the general environmental duty and relevant environment protection policies for any development referred to it under the *PDI Act*.<sup>110</sup> The EPA is 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*.

EPA confirmed that major projects can require up to six separate touch points with a proposed development and sometimes 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) requires a large team of staff from several technical areas across EPA including air, noise, water quality and site contamination. The extent of participation of technical area staff varies with the nature of the proposed development.

#### Native Vegetation Council

The *NV Regulations* provide that 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.<sup>111</sup> Approval to clear also requires an NVC-approved significant environmental benefit (SEB). The NVC will comment on the Assessment Report within eight weeks in relation to avoidance and minimisation of clearance, alternatives to clearance and to determine the SEB.<sup>112</sup> DEW indicated there is some uncertainty on how major project assessment processes will operate under the *PDI Act*.

The NVC within DEW engages with major development proponents on issues relevant to its mandate before the major project is declared by the Minister. DEW also provides technical advice on matters to be addressed by applicants contained in the project assessment

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<sup>110</sup> *EP Act* (n 23) s 57.

<sup>111</sup> *NV Regulations* r 27.

<sup>112</sup> Department for Environment and Water, *Major projects* (Web Page, 9 June 2021) <<https://www.environment.sa.gov.au/topics/native-vegetation/clearing/major-projects>>.

guideline and EIS. Developing guidelines for major developments involves ensuring the applicant addresses their obligation to provide an SEB.

The conceptual nature of some major developments can create difficulty early in the assessment process in terms of native vegetation clearance advice, where changes in specifications or site location can impact on consent conditions and amendments to the SEB.

### Commissioner of Highways

CoH advised that the relevant Australian standards, applicable engineering requirements and risk management perspectives apply equally in the assessment of proposed major projects as they do for Code assessed developments. The complexity of road network access arrangements in major project proposals may require additional detail and increased engagement with proponents to enable CoH to undertake an effective assessment. This may necessitate the proponent providing a comprehensive traffic impact assessment undertaken by a professional traffic consultant operating within a relevant discipline.

CoH liaises with PLUS regarding early engagement with proponents prior to lodgement of an application. CoH participates in referral agency stakeholder forums and briefings for large state or Crown developments.

Like other referral bodies, CoH responds proportionately to the quality of the information provided by the proponent. CoH considers that PLUS understands their information requirements and rely on PLUS to liaise with the proponent on their behalf. CoH see the value added by the centralised process comes from liaison with proponents and provision of information to and from proponent and referral body.

### ***Proponent experience and feedback***

Few non-government 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 suggests 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 some concern. Among other explanations it may reflect an absence of transparency and checks and balances in the assessment process and the absence of a pathway available for proponents and their agents to provide feedback free of concerns about the relationship with the referral body.

Proponent and planning professional feedback on major project assessments and referral body input included examples of several lengthy assessment processes and highlighted the impact delays have had on project viability and cost. What the Commission heard indicated there is a perception the process is not well structured, assessable requirements and outputs are unclear or uncertain, and delays can be experienced at every step of the process. The number of touch points where referral bodies and other public sector agencies are involved in the assessment process was of concern to proponents, primarily because there was a belief that referral bodies can introduce an unspecified number of information requirements which has the potential to significantly prolong the assessment process.

The Commission heard the following matters have given rise to unforeseen or additional costs and delays:

### Early engagement

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 result from staff changes at the referral body requiring the agent 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 early.

### Requests for information

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 as early as reasonably possible in the process may minimise rework and reduce the risks of additional holding costs and other delays to the applicant.

### Sequential assessment

Sequential assessment processes cause avoidable delays. It was unclear to proponents why there is not a single point of coordinated assessment for all RFIs rather than successive information requests passed from individual referral bodies through PLUS. It is believed more coordination would create time efficiencies and reduce the risks of additional delays and costs to the applicant.

### Proportionality

Whilst accepting the importance of the role of referral bodies, some proponents indicated the volume of matters referral bodies required to be addressed in the EIS process, and multiple rounds of consultation, were unreasonable and time consuming. Uncertainty about the length of the process and the state's preparedness to make a decision is a serious concern when approvals can take two to three years to obtain.

### 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. The Commission heard examples of major projects that were established to support specific national economic and industry growth commitments where the length of the assessment process did not appear to consider those priorities.

## **Conclusions**

Given the impact of major projects on the state, their assessment warrants the highest levels of transparency and accountability. While accepting the need for flexibility in a state-assessed process that accommodates variations in risk and complexity in major developments, in the Commission's view there is opportunity to better align major project assessment practices with best practice regulatory governance principles. Practice improvements can be achieved swiftly and will drive efficient and effective major project assessment processes of importance to the state.

PLUS indicated that following the implementation of the substantial Code assessed reforms, it is open to reviewing state-significant project assessment processes. It was acknowledged that potential improvements could be found in administrative actions such as tool kits,

standardisation of documentation and streamlining processes through better IT solutions. The Commission has identified useful matters to be considered in any such review in both this final report and the draft report.

### **Recommendation 3.2 – Consistency and transparency in major project assessment regulatory practice**

Given the potential impact of major projects on the state economy, and in order to better align relevant assessment practices with best practice regulatory governance principles, the Commission recommends the State Planning Commission (SPC) and Planning and Land Use Services (PLUS) take administrative actions to establish:

- standard operating procedures to provide PLUS staff who are supporting the relevant authority/SPC with consistent practices, structured communication arrangements and service standards;
- a continuous improvement cycle to capture the experience of all entities involved in a major project assessment, including the role of referral bodies, to distil improvements in assessment practices and regularly apply those improvements back into the assessment process; and
- a strategy to capture key performance data, including time elapsed indicators for each stage of the statutory assessment process, to complement a systemic approach to continuous improvement of major project assessments.

### **3.3.2 Assessing for economic effects**

In section 2.3.5 the Commission examined the extent to which the mandates of the referral bodies enable them to incorporate economic matters into their assessment of a referred DA and the preparation of a referral response to a relevant authority. In this section the Commission considers the same question but from the perspective of the state as the relevant authority, and specifically in relation to major project development assessments. That is, to what extent do the Minister and the SPC consider economic matters as part of the assessment of a proposed major project?

#### ***The statutory process***

The *PDI Act* requires that an EIS must be prepared in relation to an impact assessed development declared by the Minister i.e. a major project.<sup>113</sup> The EIS must address several matters, including a statement of the ‘expected environmental, social and economic effects of the development’.<sup>114</sup> Once prepared, the Minister must refer the EIS to several persons and bodies, and may refer the EIS to authorities or bodies as the Minister thinks fit.<sup>115</sup> Following public consultation on the EIS, and receipt of the proponents responses to any submissions arising, the SPC must prepare an assessment report that includes the Minister’s comments on the EIS and other comments as the Minister thinks fit.<sup>116</sup>

One of the changes to major project arrangements under the *PDI Act* is that the Minister is now the decision maker, instead of the Governor. The *PDI Act* requires the Minister ‘must not grant a development authorisation ... unless an EIS, and an Assessment Report have been

<sup>113</sup> *PDI Act* (n 1) s 111(2)(e).

<sup>114</sup> *Ibid* s 113(4)(a).

<sup>115</sup> *Ibid* s 113(5)(a).

<sup>116</sup> *Ibid* s 113(9).

prepared in accordance with the requirements of this Subdivision...'.<sup>117</sup> The Minister must also have regard to several policies, plans and rules before approving a major development, including the EIS, assessment report, and may take into account other matters considered relevant by the Minister.<sup>118</sup> There is no appeal against the Minister's decision.<sup>119</sup>

### **Requirement to provide economic information**

The Commission has considered some major project EISs that are publicly available on the SA Planning Portal.<sup>120</sup> Proponents have provided economic information in accordance with the requirements of the *PDI Act* to prepare an EIS that includes a statement of economic effects of the development. The material considered by the Commission ranges from what may be considered a minimum standard for assessment purposes, to professionally prepared and comprehensive economic modelling and cost benefit analyses, including methodology and assumptions. For example, the assessment report for the Whalers Way Orbital Launch Complex and the Kangaroo Island Deep Water Port Facility included detailed economic impact assessments prepared by the South Australian Centre for Economic Studies and EconSearch respectively.

### **Assessing for economic effects**

Based on feedback from referral bodies, PLUS and some proponents, the Commission has concluded that the economic information provided by proponents in relation to major project developments is generally accepted at face value. PLUS staff supporting a major project assessment process take a common sense approach and place the proponents information in the context of relevant state planning policies, regional development plans and other relevant planning policy. However, there are currently limitations on the extent of economic assessment that is undertaken.

As an example, the assessment report for the Kangaroo Island Deep Water Port Facility cited the proponent's economic impact assessment, and feedback of an economic nature received from interested parties during consultation. No state public sector economic agencies were cited as having been consulted on the EIS. Whilst the assessment report indicates the 'economic impacts of the proposal have been quantified', presumably a reference to the proponent's economic impact assessment, it also acknowledged that:

*...the broader impact on the Island's economy, particularly in relation to the tourism industry, have not been fully explored. The Commission acknowledges this is difficult to quantify. Acknowledging the mitigation measures proposed, based on the current level of understanding, this issue is unlikely to be fully realised or understood until after any operation of the development, should it be approved.*<sup>121</sup>

Given the importance of tourism and primary production to the Kangaroo Island economy this example may illustrate where strengthening the state's capacity to assess for economic effects may provide additional value in the assessment of major project proposals.

Referral bodies indicated assessing for economic effects is a matter for the relevant authority once it has received all feedback from referral bodies in relation to matters relevant to their

<sup>117</sup> Ibid s 115(3)(a).

<sup>118</sup> Ibid s 115(5).

<sup>119</sup> Ibid s 115(10).

<sup>120</sup> Plan SA, *Major projects/Impact assessed* (Web Page, 22 September 2021) <[https://plan.sa.gov.au/state\\_snapshot/development\\_activity/major\\_projects](https://plan.sa.gov.au/state_snapshot/development_activity/major_projects)>.

<sup>121</sup> State Planning Commission, *Deep Water Port Facility – Smith Bay, Kangaroo Island* (Assessment Report, July 2021) 8 <[https://plan.sa.gov.au/\\_\\_data/assets/pdf\\_file/0007/882880/KIPT\\_-\\_Assessment\\_Report.PDF](https://plan.sa.gov.au/__data/assets/pdf_file/0007/882880/KIPT_-_Assessment_Report.PDF)>.

mandates. This would enable a holistic economic assessment encompassing material provided by the proponent, and referral body input on the proponent's response to the assessment guidelines. The Commission agrees in-principle with this view.

The Commission received feedback on several other aspects of major project economic assessment, such as the extent to which the proponent should be required to respond to the economic impact on other interested parties. Having regard to its terms of reference the Commission has neither validated all of this feedback, nor has it conducted its own economic analysis of economic impact assessments or attempted to validate findings in major project assessment reports.

### ***Improving economic assessment***

It is clear there is a statutory requirement to provide information in relation to the expected economic effects of a proposed major project. That information must be subject to public consultation, and is to be included in the assessment report, which may also include the Minister's comments. The Commission received substantial feedback that provision of this information can be expensive, time consuming and is a burden carried exclusively by the proponent.

As provision of this information is mandated, its effective assessment and incorporation into the assessment report for consideration by the decision maker would reflect proportionate regulatory practice. The extent to which the Minister as decision maker has regard to or considers that information is prescribed by the *PDI Act* and is otherwise a matter for the Minister.

Based on the Commission's understanding the relevant authority would be in a better position to assess for economic effects of proposed major projects, as is required under the *PDI Act*, if it increased its access to capability to undertake economic analysis and assessment. This apparent capability gap could be addressed in several ways. The Commission notes that whilst there is no express requirement to seek input or an assessment from a public sector economic agency, or a third party acting for the relevant authority, there is sufficient scope in the *PDI Act* to do so. Seeking the input from the SPC, PLUS and other public sector agencies would be a necessary part of determining how this capability could be improved.

### **Recommendation 3.3 – Strengthening the state's capacity to assess major project proposals for economic effects**

In order to strengthen the capacity to analyse information regarding the economic effects of a major project, the provision of which is mandated by the *Planning, Development and Infrastructure Act 2016*, the Commission recommends that:

- existing gaps in this capability be identified through consultation with the State Planning Commission, Planning and Land Use Services, Infrastructure SA and the Department of Treasury and Finance;
- the required economic analytical and modelling capability is scoped and defined; and
- the optimal business model is determined to source this required capability for the relevant authority as required.

## 4. Enhancing the new planning system

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The referrals process for Code assessed development, and the input of referral bodies into major project assessments are both integral to ensuring that broader public interests are considered at the right time and in the right way having regard to land use in the state. The state planning reforms have introduced fundamental changes to development assessment through codification of most types of development assessment, statutory timeframes for referral responses, and moving to powers of direction for referral bodies, among other things. The Performance Indicators (System) Scheme is expected to provide more transparency through measuring the volume and outcomes of development applications.

The Commission's approach to this review acknowledges the substantial recent reforms and, in line with the terms of reference, has confined its work to the regulatory practice of the three referral bodies, and the management of their input into major project assessment processes. The recommendations made in this final report are intended to lift specific regulatory practices in the referrals process to a common standard across all three referral bodies. This section builds on those recommendations by considering how better practice can be embedded in the referral bodies. The report concludes by recognising the feedback the Commission received from proponents and planning professionals in relation to major project assessments and the Commission's preliminary analysis as an early guide to a potential review of the major project assessment system.

### 4.1 Referral bodies, the public interest and embedding better regulatory practice

Referral bodies play a vital role in ensuring that the public interests they are responsible for protecting are considered, at the right time, in relation to land use proposals. In this section the Commission looks at the extent to which best regulatory practice is embedded in the referral bodies, and what additional measures referral bodies can consider to improve the efficiency of referral activity.

The Commission found that the three referral bodies are effective in executing their referral functions in the planning system. The recommendations made in this final report are aimed at lifting specific aspects of regulatory practices to a consistent standard across the board in relation to early engagement, guidance materials and continuous improvement. In terms of efficiency, the three referral bodies each record the number of referral responses completed within the statutory timeframe applicable to their organisation,<sup>122</sup> with variable approaches to what other data is captured in relation to referral activity. The Commission's detailed analysis of referral body performance arrangements can be found in section 2.3.7 of its draft report.

Following the publication of the draft report the Commission consulted further with the referral bodies about how better regulatory practice is embedded in their referral processes. That consultation canvassed if the referral body function has a better regulatory practice strategy or similar document, if that strategy is accompanied by standard operating procedures and other supporting tools, and if the strategy includes objectives or indicators that are measured and published. The Commission was looking for the extent to which each referral body has adopted best regulatory practice and a system to continue to improve.

None of the three referral bodies indicated it had a single document or strategy that captured its overall approach to regulatory practice. All three indicated the referral function is, or is

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<sup>122</sup> *PDI Regulations* (n 3) sch 9 s 3.

being, incorporated into agency-wide performance commitments and measures. For example, DEW is developing an integrated performance framework for its boards and committees which will include objectives, KPIs and measures for the NVC. The EPA Office of the Chief Executive considers agency-wide risks and liabilities and supports best regulatory practice across the regulator. EPA also actively participates in several national regulator communities of practice, contributes to issue-specific sub-committees and applies best practice tools including aspect and impact registers as part of its referral activity. A 2012 board-initiated review led to many improvements to EPA's referral-related regulatory practices. CoH contribute to their divisional business plan, which includes vision statements to deliver economic outcomes for customers and communities, and which has key deliverables and measurable actions, including timeliness.

When considering accountability for regulatory practice by the referral bodies it is also important to recognise their corporate structure and how the referral function is incorporated into the wider agency. EPA is an independent body with a board, chief executive and focused management systems with better regulation arrangements monitored from the centre. Performance measures and clear accountability are reasonably expected from a regulator that effectively forms part of a national network. The referral function is the single point of entry and gatekeeper to the specialist functions across the regulator and plays a dual value-add and coordinator role.

NVB and CoH are both part of large public sector agencies that have wide responsibilities, including other regulatory functions. Whilst these two referral bodies engage other parts of their agency to different extents (CoH engaging with DIT project management functions in relation to construct phase planning conditions, and NVB working in conjunction with and on delegation from the NVC), they are largely discrete operational functions. In the absence of oversight by the board, the Commission considers it is important that the chief executives of DEW and DIT respectively have visibility of the performance of those 'internal' regulators in terms of metrics, performance and accountability as part of their role.

The Performance Indicator (System) Scheme established under the *PDI Act* came into operation on 1 July 2021 and will collect data against indicators applicable to all relevant authorities. Those indicators include the number of referrals by development type, the percentage which meet statutory timeframes and the percentage giving direction to refuse.<sup>123</sup> The Scheme provides that indicators may be broken down to sub-indicators to support more detailed reporting.<sup>124</sup> This may present an opportunity to capture individual referral body performance against the Scheme's referral activity indicators. Capturing individual referral body activity would be required to drive best regulatory practices on an individual regulator basis.

While the Commission has not observed performance indicators specific to the referral functions, it acknowledges the baseline reporting undertaken by referral bodies on new referral response statutory timeframes, the potential value of the data generated by the Performance Indicator (System) Scheme, and the important additional work referral bodies are doing to support best regulator practice. Given the statutory requirement for referral bodies to provide referral responses in either 20 or 30 days necessitates timeliness,<sup>125</sup> the design and expected efficiencies of operational-level performance measures would need to consider the net cost and the expected benefit to each regulator.

<sup>123</sup> Plan SA, *Performance Indicators (System) Scheme* (June 2021), Attachment A [2.4]

<[https://plan.sa.gov.au/\\_data/assets/pdf\\_file/0007/573334/Performance\\_Indicators\\_System\\_Scheme.pdf](https://plan.sa.gov.au/_data/assets/pdf_file/0007/573334/Performance_Indicators_System_Scheme.pdf)>.

<sup>124</sup> *Ibid* [4.1]–[4.3].

<sup>125</sup> *PDI Regulations* (n 3) sch 9.

Support for additional performance measures and accountability for achieving any established KPIs would need to recognise the different governance arrangements of each referral body. EPA is subject to board oversight, NVC is an independent council established under statute, and the CoH is a body corporate established under statute; all of which also have a chief executive involved and are supported by public sector employees. Accountability may be at different levels for different referral bodies.

The Commission considers there is scope to inject the existing work of the referral bodies and the potential benefits of the Performance Indicator (System) Scheme into a community of practice to develop a set of measures that among other things focuses on the speed, simplicity and cost of the referrals system. PLUS's existing referral body reference group may provide an appropriate community of practice to facilitate this approach.

The development of common referral process performance measures would be expected to embed and drive best regulatory practice in an evidence-based way. It would assist in the transition to the new planning system and inform feedback from referral bodies to the SPC and PLUS about, for example, the impact of statutory timeframes on the quality of referral responses. Consistent measurable outcomes could be compared across the state's community of referral bodies, promoting the sharing of efficient business process and best regulatory practices. Additional performance measures are one of several approaches aimed at improving the overall performance and efficiency of referral functions.

## **4.2 Towards improved major project assessments**

### ***Strengthening regulatory practice in major project assessment***

Major projects can have a significant impact on the economy and jobs and may support or achieve government objectives and improve productivity. Unlike Code assessed development, the impact assessed pathway gives the relevant authority substantially more discretion over the management of the assessment process. Given this discretion, and the importance of major projects to the economy, the Commission has concluded that the application of best practice regulatory governance principles is warranted.

The Commission has made a recommendation aimed at improving transparency and accountability in major project assessments through straight-forward administrative practices. In addition to better aligning assessment processes with best regulatory practice, this recommendation addresses the considerable feedback the Commission received from proponents and their agents. That feedback included protracted assessment timeframes, a lack of understanding by assessing authorities on the impact of the process on business, unclear and irregular communication, and misalignment of government policy objectives and assessment of innovative and strategic major projects.

Improved assessment practices are expected to provide consistency of approach and will provide a corporate standard to which all assessment staff are accountable. This may also address proponent perceptions of the time taken to undertake assessments and ambiguity surrounding the steps in the process.

The Commission considered the extent to which the relevant authority assesses information regarding the expected economic effects of a proposed major project, where the provision of that information is mandated under the *PDI Act*. Given the importance of major projects to the economy, and having regard to proportionality principles of regulatory practice, this information warrants proper assessment to ensure all relevant advice is able to be considered by the Minister in making a decision.

Based on its consultations with state authorities and proponents, the Commission concluded that economic information provided in relation to major project developments appears to be accepted at face value, and there are currently limitations on the extent of economic assessment that is undertaken. In this context the Commission has recommended that the state's capacity to analyse information regarding the economic effects of a major project be strengthened. Instead of prescribing the capability required or where that capacity be located the Commission has suggested key users of this information be consulted to determine the best solution.

To complement this, the Commission has also recommended work be undertaken to quantify time savings and other costs to business in relation to major projects. In so doing the Commission acknowledges the positive work PLUS has commenced in relation to modelling time savings resulting from faster approval processes and strategic coordination from the implementation of the new planning reforms. Taken together these recommendations are intended to improve the level of confidence that major project proponents and their agents have in the major project assessment process and bolster the state's reputation as a preferred investment location.

### ***Potential improvements to the major project assessment system***

The Commission was advised that the state planning reforms did not result in material changes to the way referral bodies contribute to major project assessments. It is understood that the focus of the recent reforms was on introducing a single planning system and codifying development assessment through the introduction of the Code. It is acknowledged that the introduction of the impact assessed development pathway has included changes to governance and decision-making provisions for major projects.

Substantial feedback was received from proponents and planning professionals about the major projects assessment process. Whilst that feedback related to experiences under the *Development Act*, it is reasonable to assume it remains relevant in the absence of material change to the assessment process.

In its draft report the Commission made the following observations in relation to major project assessment:

- 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 systemwide 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.

Since the publication of the draft report the Commission received considerable further feedback from several proponents and planning professionals on case management of major projects. The main burden of that feedback was that there is currently no central coordinating function to drive major project assessments. The former State Coordinator-General and the Commissioner for Kangaroo Island were cited as having material influence over progressing project assessments. The overarching view was that there is no longer an equivalently influential role and that there is no custodian of the state's overall economic interests in major project assessments. The independence of these roles, and their ability to coordinate and persuade key government authorities to achieve an outcome within the established assessment framework is something the development community values.

The Commission has started to address some of the issues raised by proponents through the recommendations in this final report. The reviews terms of reference have limited the extent to which the Commission has considered the major projects assessment process more broadly. The Commission considers that the relevant matters it has identified in both this final report and the draft report provide a useful runway to any future review of state-significant project assessment processes.

# Appendices

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## 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.<sup>1</sup>

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.

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<sup>1</sup> 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 / 3 / 2021

## Appendix 2: Submissions in response to the Development Referrals Review

Organisation name	Submission number
<b>Submissions responding to the draft report supporting the final report</b>	
<a href="#"><u>Coast Protection Board</u></a>	FR1
<a href="#"><u>Local Government Association of South Australia</u></a>	FR2
<a href="#"><u>Murraylands and Riverland Landscape Board</u></a>	FR3
<a href="#"><u>Native Vegetation Council</u></a>	FR4
<b>Submissions responding to the issues paper supporting the draft report</b>	
<a href="#"><u>Campbelltown City Council</u></a>	DR1
<a href="#"><u>City of Adelaide</u></a>	DR2
<a href="#"><u>City of West Torrens</u></a>	DR3
<a href="#"><u>Hickinbotham Group</u></a>	DR4
<a href="#"><u>Local Government Association of South Australia</u></a>	DR5
<a href="#"><u>Murraylands and Riverland Landscape Board</u></a>	DR6
<a href="#"><u>State Planning Commission</u></a>	DR7
<a href="#"><u>Urban Development Institute of Australia (South Australia) Inc</u></a>	DR8

## For more information

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