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24th May

Dr Matthew Butlin
Chair and Chief Executive
SA Productivity Commission
30 Wakefield Street
Adelaide SA 5000

Dear Dr Butlin,

RE: South Australian Productivity Commission - Development Referrals Review

Further to UDIA's confidential submission, please find attached information for broader publication.

Yours sincerely,

Pat Gerace
Chief Executive

Native Vegetation referrals

It is clear that Native Vegetation referrals and the statutory scheme for native vegetation clearance has not been considered in any detail as part of the introduction of the PDI Act and the Planning and Design Code.

The scheme is broken in several respects. Critically, a number of important links connecting the legislative and policy processes either do not exist or are illogical and unworkable. This results in ambiguity and uncertainty about when a process is triggered, what that process is, and what the outcome of the process actually means.

The key issues can be summarised as follows:

1. The trigger for the referral of a development to the Native Vegetation Council under the PDI Act is inoperable such that at present there is no clear statutory requirement that would trigger the referral of any development application to the NVC notwithstanding the inclusion of mandatory referral provisions.

2. The referral trigger under the PDI Regs and PD Code ought to be amended to ensure clarity in respect of requiring a referral and that where the native vegetation clearance falls within an exemption (prescribed circumstances) under the NV Regs, including where the clearance has been authorised by the CFS, no referral to the NVC is required.

3. The process required to be undertaken by the NVC upon receiving a referral is oppressively convoluted and duplicates other processes by including the need for sub-referrals, consultation and potentially a public hearing. None of this is necessary, anticipated by, or achievable in the 20-day referral timeframe.

4. The process of referral to the NVC does not presently ensure that duplication of procedures is avoided. The outcome of a referral to the NVC is potentially meaningless as it may not avoid an applicant having to go through a subsequent approval process under the NV Act.

5. Unless there are appropriate carve-outs for native vegetation clearance which has the benefit of an exemption under the NV Regs, applicants may be required to commission expensive native vegetation reports even for relatively straightforward matters.

<u>The trigger</u>

A referral to the NVC is only required where a native vegetation report has been prepared which categorises the clearance as Level 3 or 4 clearance. However, there is at present no clear requirement for the preparation of a native vegetation report other than where the clearance is Level 1. Unless a native vegetation report has otherwise been requested by the planning authority or has been produced independently of the planning process, the formal referral will never be triggered.

The referral trigger operates through a combination of Schedule 8 of the PDI Regs and the P&D Code. The trigger needs to be amended to make it clear, certain and operable. However, the trigger should avoid a referral where a clearance falls within a prescribed class or prescribed circumstances under section 27(1)(b) of the NV Act. This would include circumstances where the CFS has authorised the clearance and would avoid duplicating that process.

The referral could be expressed as being required where a development involves the clearance of native vegetation, other than where:

1. The clearance has been categorised in a Regulation 18 native vegetation report as a Level 1 or Level 2 clearance;

2. The clearance falls within a prescribed class or prescribed circumstances under section 27(1)(b) of the NV Act;

3. The clearance is already the subject of a consent under the Native Vegetation Act.

The process upon referral

Section 29(17) of the NV Act states that the provisions of section 29 apply to a referral to the NVC under the PDI Act.

The provisions of section 29 are potentially very onerous and include a requirement for sub-referrals to various bodies and Ministers as well as a requirement to allow any person to make a representation to the NVC about the proposed clearance. The extensive processes envisaged by section 29 are fundamentally incompatible with the 20-day referral process under the PDI Act.

The outcome of a referral

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

This is important and could be addressed quite easily through the inclusion of an additional clause in Schedule 1 of the NV Regulations (a prescribed circumstance) to the effect that no further consent would be required for:

Clearance as part of a development approved under the PDI Act which has been the subject of a referral to the NVC under the PDI Regulations.

A final issue

The operation of the overlapping schemes for native vegetation and regulated/significant trees is presently unclear. The PDI Regs attempt to carve out native vegetation from the ordinary controls applying to regulated trees but leave significant ambiguity about what is in or out. Under the PDI Regs the regulated and significant tree provisions do not apply to “a tree that may not be cleared without the consent of the Native Vegetation Council under the Native Vegetation Act”. Whilst this makes it clear that a tree that requires a clearance consent from the NVC is not subject to the significant tree controls, it is not clear whether a tree which can be cleared under the NV Act under prescribed circumstances (a form of exemption) is intended to be subject to the regulated and significant tree controls.

Environmental Protection Authority referrals

We recognise that a framework was created in the PDI Act in order to provide a more consistent approach due to inconsistencies across Council areas. However, the industry remains concerned that unnecessary investigations and costs associated with developing land will arise.

Broadly, we are concerned that the new framework and procedures will lead to an increased number of audits having to be undertaken in the absence of any increased risk or benefit to public health or the environment.

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

While we are strongly in favour of appropriate action to be taken to ensure the public's safety, our members strongly believe that it is important to do all that is possible to limit the up-front cost to developers of assessing for the existence of site contamination and undertaking audits prior to getting approval.

Separating the requirement to obtain Development Approval from the requirement for EPA licencing provides proponents an early indication of project viability via the development approval being issued first. The detailed information necessary for an EPA licence can be delayed until Development Approval is issued.

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

The current site contamination policy suite "front-loads" the assessment of site contamination to require considerable cost and delay before planning consent is issued. Applicants will variously need to spend over $1000 on a "site history" report, $20,000-$200,000 on a "detailed site investigation" and $20,000-$150,000 on an audit before knowing that they have a consent. The delay in undertaking a DSI (even without an audit) can be many months, sometimes a year.

We believe that site contamination is relevant to cost, time and the engineering measures for development, however, the existence or the nature and extent of site contamination is not relevant to whether planning consent should be granted. It is not a factor that determines land use suitability or the design of buildings for planning purposes.

Any site contamination that exists on a development site can be addressed by some form of remediation prior to the development or by some other engineering solutions built into the development. In this sense it is analogous to building on reactive clay soils – they may require different measures or treatments prior to construction or that the structural design is different, but the house can still be built.

We remain concerned that the current site contamination policy suite is unnecessary given the EPA has extensive powers under Part 10A of the Environment Protection Act 1993 to regulate and manage site contamination.

Earlier this year, the UDIA provided to the Department in detail some text for an approach to the Practice Direction, referral trigger (and potentially the regulations) to put that requirement as a condition at the "back-end" once planning consent is in hand, however this was rejected.

Transport routes and corridors

The UDIA SA supports the principles of good planning contained in the Planning Code regarding integrated delivery principles that '*planning, design and development should promote integrated transport connections and ensure equitable access to services and amenities*'.

However, the process for delivery, including the complexity added by other applicable legislation and referrals, raises concern about the ability of parties, the Minister, Government and Councils to address this efficiently without ongoing need for referral or detailed interpretation. For example, a development of land within the *Adelaide Park Lands Act 2005* is excluded from section 129 of the Act and directed to Part 7.

In addition, the lack of consistency of definitions and their confusing use throughout the Act (and other legislation) will create delay and uncertainty. For example, under the Act an infrastructure reserve is defined to include land that is subject to a statutory easement. A statutory easement is defined extremely broadly as "*an easement under an Act that is brought within the ambit of this definition by the regulation*" but there is no corresponding definition in the regulations at this stage.

The Act itself does not identify or codify transport routes and corridors other than refer to the requirement to consider them (and for regional plans should include a long-term vision), however, Section 60 of the Act does require that the Minister "*must ensure that there is a specific state planning policy (to be called the integrated planning policy) that specifies policies and principles that are to be applied with respect to integrated land use, transport and infrastructure planning*."

In addition, while the intention in Part 8 of the Act to create an alternative assessment process for essential infrastructure (which includes public transport) is supported, the application of sub sections (such as section 130(7) which provides where Council don't provide a report within 4 weeks then the Commission will assume that Council does not intend to respond), will need to be reviewed to see whether it has provided efficiencies or simply created a "not supported/generic" response. While the alternative pathway is intended to create efficiency, the interaction of section 130(4) (which permits the Commissioner to '*request additional documents or information'* without any requirement for reasonableness or relatability) and section 130(17) (which identifies that the time period for the assessment does not include the time from this request by the Commissioner to the date of compliance by the applicant), shows that this can be delayed indefinitely.

Of particular note is section 130(25) states that if the "*Minister directs that an EIS be prepared with respect to a development…*" otherwise within section 130, then section 130 ceases to apply and environmental impact statement process will apply. Given section 130(26) provides that "*no appeal lies against a decision of the Minister under this section*", this referral ability may exclude some applicants simply on a risk management basis from using this alternative pathway.