



**ENVIRONMENTAL  
DECISION MAKING  
PUBLIC PARTICIPATION  
PROVISIONS IN SOUTH  
AUSTRALIAN LEGISLATION  
March 2017**

Photograph : Adelaide Parklands Preservation Association

# **ENVIRONMENTAL DECISION MAKING - PUBLIC PARTICIPATION PROVISIONS IN SOUTH AUSTRALIAN LEGISLATION**

## **FOREWORD**

This Report discusses public participation provisions in South Australian legislation which directly and indirectly impact on environmental decision making. The involvement of the public in this area is essential as it facilitates appropriate scrutiny and gives a level of confidence to the public that there has been an open and rigorous decision making process.

Research has shown that the most effective consultation processes are where stakeholders are involved from the beginning of the process, often helping to set out the terms and ground rules of the process.<sup>1</sup> There is recognition of the expertise that sits within the general community. Their needs are listened to and their views properly taken into account in reaching decisions. If this occurs, it is more likely that the outcome of the process will be accepted by the public at large. Without community acceptance the risk of a legal challenge to the decision increases. Public confidence in decision making is promoted by public participation, transparency and accountability which also safeguard against corrupt conduct and the perception of corrupt conduct.

For example, in the area of environmental assessment, a good process is one where free and frank debate and discussion can be undertaken on particular development proposals whether they be for mining, industrial, agricultural or commercial projects. It is one where third parties have statutory rights to comprehensive information about proposals and the ability to make representations on the proposal, have them considered as part of the assessment and decision making processes and then a right to take any decision makers decision to an independent body for review.

**Dr Iris Iwanicki – Chairperson EDO Management Committee**

---

<sup>1</sup> Bubna-Litic K and Lloyd-Smith M, 'The Role of Public Participation in the Disposal of HCBs – An Australian Case Study' (2004) 21 *Environmental and Planning Law Journal* 264.

## **Acknowledgments and thanks**

This Report was written by EDO Solicitor Melissa Ballantyne and EDO Committee member Associate Professor Karen Bubna-Litic, from UNISA Law School. Special thanks to volunteers Gabriella Coote, Dejana Graziano, Yvonne Baulderstone and Claudia Zimmerman for their assistance with research and other tasks.

We also acknowledge the financial contribution of the Law Foundation of South Australia – without their support the production of this Report would not have been possible.

## **The Environmental Defenders Office (SA) Inc. – who we are; what we do.**

The EDO is a non-profit, non-government community legal centre which assists those who cannot afford private lawyers to understand and access their legal rights to protect the environment in the public interest. The EDO also undertakes community legal education and engages in law reform activities in an effort to improve the State's environmental laws.

The information in this Report is of a general nature only and not a substitute for legal advice. Contact the EDO for specific advice.

## **Terminology**

The Minister – South Australian Minister for Sustainability, Environment and Conservation

EPA- South Australian Environment Protection Authority

ERD Court – South Australian Environment, Resources and Development Court

## CHAPTER 1 - INTRODUCTION

Access and participation by citizens in decision making is at the heart of modern policy and law making. Citizens should have a say in decisions about actions which could affect their lives and legislation should facilitate this by providing ways in which public participation in decision making is maximised.

Public participation is an internationally recognised procedural right which plays an important role in environmental and planning law.<sup>2</sup> It manifests in many ways, from the right to be notified of an opportunity to participate in a decision-making process, the right to have access to and to comment on particular proposals and the right to challenge government decisions in court. Typical areas of public participation include strategic planning, access to information, community forums, commenting on specific proposals, formal submissions or representations, appeals and civil enforcement.

Public participation has been recognised in a number of inquiries as adding to the integrity of environmental decision making and protecting against corrupt influences. For example, in relation to the planning system, the NSW ICAC, in its February 2012 Report, *“Anti-corruption Safeguards and the NSW Planning System”*, emphasises the significance for transparent decision making, of community participation: “Meaningful community participation and consultation in planning decisions helps ensure that relevant issues are considered during the assessment and determination of plans and proposals. It also allows the community to have some influence over the outcome of decisions. Community participation and consultation requirements also act as a counter balance to corrupt influences. The erosion of these requirements in the planning system reduces scrutiny of planning decisions and makes it easier to facilitate a corrupt decision”.<sup>3</sup>

The Report also recognises the importance of access to justice provisions: “The limited availability of third party appeal rights under the EP and A Act means that an

---

<sup>2</sup> <http://www.cepal.org/en/infographics/principle-10-rio-declaration-environment-and-development>

The United Nations Economic Commission for Europe (UNECE) [Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters](#) (pdf ~50K) was adopted on 25 June 1998 in the Danish city of Aarhus (Århus) at the Fourth Ministerial Conference as part of the "Environment for Europe" process. It entered into force on 30 October 2001.

<sup>3</sup> p19

important check on executive government is absent. Third party appeal rights have the potential to deter corrupt approaches by minimising the chance that any favouritism sought will succeed. The absence of third party appeals creates an opportunity for corrupt conduct to occur, as an important disincentive for corrupt decision-making is absent from the planning system.”<sup>4</sup>

In our view best practice public participation:

- includes a provision (the promise) that the public’s contribution will influence the decision
- promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers.
- seeks out and facilitates the involvement of any person.
- seeks input from participants in designing how they participate.
- provides participants with the information they need to participate in a meaningful way.
- communicates to participants how their input affected the decision.

Advancing public participation rights in environmental decision making is a key concern of the EDO. There has been a rapid development of environmental law and policy in this area. However the EDO is concerned that these processes have not, for the most part, prioritised public participation rights. Good and robust environmental decision making processes occur where there are broad public participation rights including the right to information, the right to participate and the right to challenge decisions in a court of law. This Report analyses these areas with respect to a number of key South Australian laws. We have identified where the legislation has beneficial and deficient public participation rights. Where there are deficiencies we have made recommendations for reform.

In relation to **access to information** law and policy should generally provide for;

- Full and meaningful information to be disclosed with respect to both policy and application matters
- Requirements that information be available in hard copy without charge and on the internet

---

<sup>4</sup> P22

- The use of a range of notification methods including social networking sites, blogs, video sharing sites, hosted services, and web applications.
- Public availability of all information to be taken into account by the ultimate decision-maker
- Public availability of all submissions with only limited exceptions for specific circumstances
- Requirements that all decisions (together with reasons as to the process that was followed and where applicable why community input was not followed) be made publicly available
- Legal challenges if access to information is denied or where any agency refuses to publish information
- Requirements that Statutory Authorities have:
  - Public registers of members' names, qualifications/expertise/experience and statements of members' professional memberships or affiliations
  - Mechanisms for guaranteeing access to board members, e.g. e-mail or postal address. Alternatively, enshrine obligation on secretary of statutory authorities to forward information from members of the public to board members.

In relation to **public consultation** law and policy should generally provide for;

- Broad consultation on policy and application decisions
- The community to be involved in setting the protocols for public participation, such as timing, venue, provision for babysitting, wheelchair access, accessibility of interpreters, transport for participants and other similar matters
- Methods which maximise the opportunity for public participation and can extend to providing a forum for exchange of ideas or mediation between opposing views
- Processes (such as public meetings and displays) to be adopted where there may be wide ranging environmental impacts
- Submissions in writing or verbally

- Consultation which is structured in such a way that potential participants are not discouraged by reason of cost or intimidation and that those most affected are able to attend or participate
- Reasonable time frames for the provision of submissions
- Clear explanations to be given as to the nature of the inquiry, the identity of the ultimate decision-maker, the timelines for decision making and the availability of any review rights
- Public consultation to be undertaken by independent facilitators
- Specific requirements for consultation with Indigenous Australians wherever a proposal or assessment involves cultural heritage
- Submissions to be allowed even if not in the “correct” format or are of a low literary standard
- A legal obligation on decision makers to take due account of the outcome of public consultation

In relation to **access to justice** law and policy should generally provide for;

- Open standing where applications have potentially wide environmental consequences.
- The right to join in appeals if seeking to protect the environment in the public interest
- Own costs provisions if “public interest” nature of proceedings is established.
- Orders for security for costs or undertakings as to damages should not be imposed if the proceedings are public interest proceedings
- Adequate time for the lodgment of court proceedings

## CHAPTER 2- LEGISLATION-ANALYSIS AND RECOMMENDATIONS

### A. *Adelaide Dolphin Sanctuary Act 2005 (SA)*

This Act establishes a sanctuary to protect the dolphin population and the natural habitat of the Port Adelaide River estuary and Barker Inlet.<sup>5</sup> The Minister makes decisions under this Act. There is a particular consultation function which they have which is to consult with relevant persons, bodies or authorities, including indigenous peoples with an association with the Sanctuary, about the goals or outcomes that should be adopted or pursued in order to achieve or advance the objects and objectives of the Act.<sup>6</sup>

The Minister is advised by the Parks and Wilderness Council.<sup>7</sup> The Council advises on matters including the preparation and effectiveness of the Adelaide Dolphin Sanctuary (ADS) Management Plan<sup>8</sup>, the effectiveness of the implementation program and the application of money belonging to the ADS Fund. For further information on this statutory authority see the discussion under the National Parks and Wildlife Act.

When reviewing any proposal to create or amend a plan the Minister must give notice that copies are available for inspection and the general public can comment within a specified time. The form of notice is not specified. Any representations made by the public must be made public. No hearings are held.<sup>9</sup> There is no specific requirement that draft plans, public submissions and the like be made available online. Before adopting or amending the plan the Minister must have regard to any views expressed by the Council, relevant Ministers, prescribed bodies and any public representations.<sup>10</sup> The finalised plan is available for inspection at a place nominated by the Minister. Copies can be purchased but they are not available online.<sup>11</sup>

---

<sup>5</sup> *Adelaide Dolphin Sanctuary Act 2005 (SA)* ss 7, 8.

<sup>6</sup> *Ibid* s 25 (1) (c).

<sup>7</sup> *Ibid* s 17.

<sup>8</sup> *Ibid* s 11.

<sup>9</sup> *Ibid* s 11 sub-ss (5), (6).

<sup>10</sup> *Ibid* s 11 (7).

<sup>11</sup> *Ibid* s11 (9)

The Minister can issue protection orders for the purpose of preventing/minimising harm to the ADS. A reparation order can be issued if a person has caused harm to the ADS. The Minister must provide written notice to a person if they issue a protection order or a reparation order.<sup>12</sup> A person to whom a protection order or reparation order has been issued may appeal to the ERD Court within 21 days. Third parties have no review or enforcement rights.

The Minister must on or before 30 September each year prepare a report on the operation of the Act. A copy of the report must be laid before both Houses of Parliament.<sup>13</sup>

**Recommendation:** all documents including plans and reports should be made available online.

### **B. Adelaide Parklands Act 2005 (SA)**

This Act provides for the management of the Adelaide Parklands. The Act establishes the Adelaide Parklands Authority which has a Board comprising ten members. However there is no specific requirement that the Board's agenda's, minutes and reports be made available online.

The Minister is the decision maker. The community's interests are expressly required to be considered in decision making and community consultation processes must be established.<sup>14</sup> A parklands management strategy must be prepared and regularly reviewed. All Council management plans which cover the parklands must be consistent with the parklands strategy. There is public consultation in relation to the strategy. Notification is by way of public advertisement rather than a specific requirement for online notification. The minimum period for consultation is just one month. Furthermore, no public consultation applies to Ministerial plans to change the intended use of land for land that is no longer required for any of its existing uses.<sup>15</sup>

### **Recommendations:**

---

<sup>12</sup> Ibid pt 6.

<sup>13</sup> Ibid s 26.

<sup>14</sup> *Adelaide Parklands Act 2005 (SA)* s9(g)

<sup>15</sup> Ibid s23

Amend Act to require:

1. Online access to Board documents
2. Online notification in relation to review of the Parklands Strategy
3. Minimum of two months consultation on reviews of the Parklands Strategy
4. Consultation where the Minister plans to change the intended use of land which is no longer required for its existing uses.

### **C. *Animal Welfare Act 1985 (SA)***

This Act provides for the promotion of animal welfare. The Minister is the decision maker under the Act, advised by the Animal Welfare Advisory Committee.<sup>16</sup> The Committee has a number of functions including to develop codes of practice for animal welfare/evaluate the likely effect of proposed codes relating to animals.<sup>17</sup> The committee has 8 members appointed by the Minister. The Committee's meetings are not open to the public and there is no public access to agendas nor minutes.

There is no public consultation on draft Codes of Practice. Finalised Codes of Practice must be kept available for inspection by members of the public, however this is limited to business hours, at a business location determined by the Minister.<sup>18</sup> There is no explicit right to purchase a copy of a Code.

The Minister can grant licences for teaching and research involving animals and a licensee may be approved as an animal ethics committee but details of these processes are not available on line.<sup>19</sup> The applicant has a right of appeal to the Minister against any decision of the Committee and a further right of appeal to the Supreme Court against any decision of the Minister. There are no third party rights of review and enforcement.

### ***Recommendations:***

Amend Act to require:

---

<sup>16</sup> *Animal Welfare Act 1985 (SA)* s 6.

<sup>17</sup> *Ibid* s 12.

<sup>18</sup> *Ibid* s 42A.

<sup>19</sup> *Ibid* pt 4 div 1.

1. Public consultation on draft Codes of Practice
2. Minister to consider public submissions made with respect to draft Codes of Practice
3. All documents to be available online including agendas, minutes , reports and Codes of Practice

#### **D. *Arkaroola Protection Act 2012 (SA)***

This Act provides for the establishment, proper management and prohibition of mining activities in the Arkaroola Protection Area. Decision making is by the Minister. A key decision is the approval of a management plan for the Arkaroola Protection Area.<sup>20</sup> The Minister must undertake consultation with persons or bodies who hold interests in the Arkaroola Protection Area and in adjacent areas. Consultation must occur before commencing to develop/alter a management plan and it must also occur once a draft management plan has been prepared. After public consultation the Minister may adopt the proposed plan without changes or with changes as they see fit. However, if the Minister thinks that the changes are significant or substantial then the Minister must undertake additional consultation. When making their decision the Minister must ensure that the plan is consistent with the objects of the Act. The Planning Minister must also ensure that any development plan is consistent with the plan. The finalised plan is published in the government gazette and reviewed every 6 months thereafter.

#### ***Recommendation:***

Publish plan online

#### **E. *Botanic Gardens and State Herbarium Act 1978 (SA)***

This Act provides for the establishment and management of public botanic gardens and herbaria. Decisions under this Act are made by a Statutory Authority – the Board of the Botanic Gardens and State Herbarium.<sup>21</sup> The authority comprises eight

---

<sup>20</sup> *Arkaroola Protection Act 2012 (SA)* s 8.

<sup>21</sup> *Botanic Gardens and State Herbarium Act 1978 (SA)* s 6.

members appointed by the Minister and is subject to the general control and direction of the Minister.<sup>22</sup> The Act does not stipulate public availability of agendas and minutes. Apart from carrying out functions which promote the objects of the Act the Board may grant leases or licences for management of land or premises.<sup>23</sup> There is no public consultation in decision making nor any applicant or third party rights of review and enforcement.

**Recommendation:**

Amend Act to require publication of agendas and minutes online

**F. *Climate Change and Greenhouse Emissions Reduction Act 2007 (SA)***

This Act provides for measures to:

- address climate change with a view to assisting to achieve a sustainable future for the State; set targets to achieve a reduction in greenhouse gas emissions within the State;
- promote the use of renewable sources of energy;
- promote business and community understanding about issues surrounding climate change;
- facilitate the early development of policies and programs to address climate change.

Most of the decisions are made by the Minister. The Premier's Climate Change Council has a role "to achieve ESD by addressing issues associated with climate change" and "to enter into agreements to promote strategies supporting the objectives of the Act". The objects include consultation with business, the environment and conservation movement regarding issues associated with climate change.<sup>24</sup> The Council must prepare an annual report.

The Climate Change council gives advice to the Minister, including the impact of climate change on the wider community.<sup>25</sup> The Council is also to take a leadership

---

<sup>22</sup> Ibid ss 15, 7.

<sup>23</sup> Ibid s 13.

<sup>24</sup> *Climate Change and Greenhouse Emissions Reduction Act 2007 (SA)* s3

<sup>25</sup> Ibid s 11(3)(i).

role in consulting with the community about climate change issues and in disseminating information on implementing practices that will help minimise the impacts of climate change or help to adapt to the impacts of climate change.<sup>26</sup>

### **G. Coast Protection Act 1972 (SA)**

This Act provides for the conservation and protection of the beaches and coast of South Australia. The Coast Protection Board has the responsibility to develop a management plan to protect the coast in the best interests of the public.<sup>27</sup> It consults with the relevant council in developing these plans and then provides for input from the public in two ways. The Board arranges for the display of the management plan in an office or offices readily accessible to members of the public. The Board also publishes an advertisement in a newspaper circulating generally throughout the State stating that the management plan may be inspected at the office or offices specified in the advertisement and that representations may be made to the Board in respect of the proposals contained in the plan at any time within a period specified in the advertisement, being a period expiring not less than two months after the date of the advertisement. The Minister manages and controls the Coast Management Board. The Board has no members of the public. Board agendas and minutes are not available to the public.<sup>28</sup> The Board is required to consider any public representations made in respect of the management plan and may amend the plans as a result.<sup>29</sup> No provision is made for the representor to be informed of any action taken as a result of their representations nor are there any third party appeal or enforcement rights.

#### **Recommendation:**

Act be amended to:

1. Require online publication of consultation notice with respect to a draft management plan, draft management plans, finalised plans, agendas and minutes;

---

<sup>26</sup> Ibid s 11(3)(b).

<sup>27</sup> *Coast Protection Act 1972 (SA)* s 20 (1).

<sup>28</sup> Ibid s20(4)

<sup>29</sup> Ibid s20(8)

2. Require Board to inform representors of any act taken as a result of their representations;

#### **H. *Crown Land Management Act 2009 (SA)***

This Act provides for the disposal, management and conservation of Crown land. The Minister makes decisions regarding the disposal, management and conservation of Crown land. Decisions are made by the Minister with support from management and advisory committees.<sup>30</sup> A key function of the Minister is to develop management plans for crown land which must be done after appropriate consultation.<sup>31</sup> However what is “appropriate consultation” is not detailed anywhere in the Act.

The following applications for review may be made to the Minister:

- the holder of a lease may apply for a review of a determination as to the current market rent applicable in relation to the lease or the market value of any improvements made to the land subject to the lease;
- the owner of personal property may apply for a review of a determination of the Minister to compulsorily acquire property;
- a person who has applied for the consent of the Minister;
- the holder of a lease may apply for a review of a determination of the Minister to cancel the lease or to resume land subject to the lease; or the terms and conditions of a new lease granted by the Minister following a resumption of land;
- a person served a remediation notice;
- a person required to lodge with the Minister a financial assurance and;
- a person required to remove property or fixtures.<sup>32</sup>

---

<sup>30</sup> *Crown Land Management Act 2009 (SA)* pt 2.

<sup>31</sup> *Ibid* s 12 (1).

<sup>32</sup> *Ibid* s 65.

Applicants have 28 days to seek review and the Minister must make a decision within 28 days of the lodgement of the application.<sup>33</sup> There are no third party rights of review and enforcement.

**Recommendations:**

Act be amended to:

1. Provide further detail on what is appropriate public notification and consultation with respect to the development of management plans;
2. Require online publication of plans and details of review matters

**I. *Development Act 1993 (SA) and Planning, Development and Infrastructure Act 2016 (SA)***

These Acts provide for planning and regulate development in the State; regulate the use and management of land and buildings, and the design and construction of buildings and to make provision for the maintenance and conservation of land and buildings where appropriate. In April 2016 the *Planning, Development and Infrastructure Act 2016 (SA)* (the PDI Act) came into force. It is expected that the PDI Act will fully replace the *Development Act 1993 (SA)* by 2020.

The primary object of the PDI Act is to create a planning system which amongst other matters provides a scheme for community participation in relation to the initiation and development of planning policies and strategies.<sup>34</sup> To further this goal a Community Engagement Charter will be developed by the new State Planning Commission (the Commission).<sup>35</sup> The Charter will set out specific mandatory requirements and principles and performance outcomes for decision makers to follow.<sup>36</sup> The preparation and amendment of the Charter is subject to community consultation.<sup>37</sup> Certain principles apply in relation to preparation/amendment of the

---

<sup>33</sup> Ibid s 65 sub-ss (2), (5).

<sup>34</sup> *Planning Development and Infrastructure Act 2016 (SA)* s 12.

<sup>35</sup> Ibid s 44.

<sup>36</sup> Ibid s 44 (5) (b).

<sup>37</sup> Ibid s 44 (3).

Charter including “members of the community should have reasonable, timely, meaningful and ongoing opportunities to gain access to information about proposals to introduce or change planning policies and to participate in relevant planning processes”.<sup>38</sup>

The Commission will be South Australia’s principal planning advisory and development assessment body and will, in effect replace the bodies currently in place namely the Development Assessment Commission<sup>39</sup> and the Development Policy Advisory Committee.<sup>40</sup> Meetings of all of these are open to the public and agendas and minutes readily available.

Another feature is the proposed online planning portal which will contain all relevant planning information such as applications and policy documents to make access to information easier for all those involved in the planning system and the public generally. This is an improvement on the current situation where information is dispersed across numerous council and other websites. The *Development Regulations 2008 (SA)* require local Councils and the Development Assessment Commission to keep a register of applications for consent, approval or assignment of building classifications under the *Development Act 1993 (SA)*.<sup>41</sup> Where a development is of a type that requires neighbour or public notice (category 2, 2A or 3), certain additional information such as plans and specifications, must also be made available for public inspection.<sup>42</sup>

The PDI Act has similar exemptions for privacy reasons as in the *Development Act 1993 (SA)*.<sup>43</sup>

There will be less prescription as to how planning processes will occur compared to the current situation. The Commission can issue practice directions in relation to any matter including how notification and consultation are to occur. It is argued that this

---

<sup>38</sup> Ibid s 44 (3).

<sup>39</sup> *Development Act 1993 (SA)* s 10.

<sup>40</sup> Ibid s 8.

<sup>41</sup> Reg 98

<sup>42</sup> Reg 34

<sup>43</sup> Ibid s 54.

is a more flexible approach than is provided for in the Development Act but it also creates a certain degree of uncertainty particularly as to community rights.

Finally, a new Code, the Planning and Design Code will essentially replace all development plans.<sup>44</sup> Also of importance are new design standards.<sup>45</sup> Amendments to the Code or a design standard can occur on the initiative of a number of bodies and individuals including a person who has an interest in land and who is seeking to alter the way in which the Code or design standard affects that land.<sup>46</sup> Any proposed changes must comply with the new Community Engagement Charter for the purposes of consultation.<sup>47</sup>

### 1. Policy development

Under the *Development Act 1993 (SA)* and the *Development Regulations* the key policy document is the *Planning Strategy* which sets out the Government's vision for planning in metropolitan Adelaide and country South Australia.

Each local Council is responsible for controlling development in its area. Each Council is obliged to maintain a *Development Plan* which is aimed at facilitating "proper, orderly and efficient planning and development". Each Development Plan must be consistent in its aims and objectives with the Government's overall Planning Strategy. Some specific aims of Development Plans are to enhance the proper conservation, use, development and management of land and buildings, facilitate sustainable development and the protection of the environment and finally advance the social and economic interests and goals of the community.

From a practical point of view, one of the main purposes of a Development Plan is to set out the things that a Council must take into account when considering development proposals in its Council area. This is done through provisions such as zoning, which aim, for example, to keep heavy industry away from residential areas. Development Plans also contain broad principles and specific objectives that cover

---

<sup>44</sup> *Planning Development and Infrastructure Act (SA) 2016* s 65.

<sup>45</sup> *Ibid* s 69.

<sup>46</sup> *Ibid* s 73 (2).

<sup>47</sup> *Ibid* s 73 (6) (b).

all aspects of planning in that area. However many Plans are very complex and not written in plain English.

Just as local Councils are responsible for most development control, they are also responsible for preparing amendments to the Development Plan for their areas. In some cases, the Planning Minister can prepare an amendment to a Development Plan, in which case the procedure is slightly different. Development Plan amendments by Council form the bulk of amendments.

All local Councils are required to review their Development Plans every five years. Essentially the process which is followed is 1) production of a statement of intent; 2) consultation with advisory committee; 3) development plan amendment proposal and 4) three processes to follow (A, B or C) in accordance with agreement met with the minister but each includes public consultation.

Certain matters must be included in a statement of intent such as: scope, planning strategy policies, minister's policies, council policies, policy library, investigations, agency consultation, public consultation, process, planning procedures, document production, and a timetable.

If the final outcome is a recommendation that the Development Plan be amended, then another process will be started, which also includes opportunities for the public to make submissions. After Government agencies have had their say, the general public is invited to comment on the proposed changes. The changes are set out in a document called a *Development Plan Amendment (DPA)*.

The process of public participation may vary slightly from Council to Council, however there are some minimum requirements set out in the Act and Regulations. The main requirement is the publication of a notice in the Government Gazette and a newspaper which advises the time and place at which the DPA can be inspected, inviting written submissions from interested persons for one to two months and setting a place and time for a public hearing.

The Council must publicly advertise the fact that it is conducting a review of its

Development Plan and give the public at least two months (typically 8 weeks but under process C it is as little as 4 weeks)<sup>48</sup> to make a written submission. If an individual makes a submission, the Council must give that person the opportunity to explain their submission to a meeting of the Council or a sub-committee of Council. A person can use someone else to represent them if they wish. If no submission has been received, it will indicate no interest is to be heard and a meeting need not be held. There is no special format for a submission.

At the end of the two month submission period, the Council will make all the written submissions available for inspection by the public. The Council is required to prepare a report for the Planning Minister, which summarises all the investigations the Council has undertaken, including the public submissions. This report should identify the issues each person made and the Council's response to those issues.

As far as the content of the Review goes, the *Development Act 1993 (SA)* simply provides that the issues of "appropriateness" and "consistency with the Planning Strategy" be addressed. Because the Planning Strategy is very broad in the issues it covers, Council can take an equally broad view of its responsibilities. For example, issues such as encouraging bicycle use or protecting biological diversity are covered in the Planning Strategy but are poorly dealt with by many local Councils in their Development Plans. The review is an opportunity for the community to put these issues into the Council's agenda. The ultimate decision however lies with the Governor acting on the advice of the Planning Minister. There are no third party rights of review in relation to rejection of points made in submissions.

The PDI Act introduces a new system. Amendments to the Code must comply with the requirements in the Community Engagement Charter amongst other matters.<sup>49</sup> In certain situations the Planning Minister can declare that an amendment to the Code come into operation at the same time as public consultation begins. This can occur to "counter applications for undesirable development".<sup>50</sup>

## 2. Assessment

---

<sup>48</sup> *Development Act 1993(SA)* ss 25-26.

<sup>49</sup> *Planning Development and Infrastructure Act 2016 ( SA )* s 73.

<sup>50</sup> *Ibid* s 78 (1).

The *Development Act* 1993 (SA) divides development into three classes of development; “complying”, “merit” and “non-complying” development and three categories of development: category 1, 2 and 3. The categorisation of the development impacts on the way in which the development must be notified and consulted upon as well as the appeal rights of third parties.

Category 3 developments are those that are not assigned to Categories 1 or 2 under the *Development Regulations* or a Development Plan. Category 3 developments can be described, in a general sense, to be the types of development that may not be appropriate for a particular Zone, unusual types of development and/or types of development that may be the subject of community concern.

Category 1 forms of development do not need to be notified to surrounding owners or occupiers and, other than for the applicant, there are no appeal rights. Category 2 forms of development have to be notified to adjoining owners or occupiers and they have a right of representation in relation to the development. Notification generally occurs by way of a letter and the full application is ordinarily available on the relevant authority’s website. A person contacted in this way has the right to make a representation which must be taken into consideration by the authority when assessing the application. Other people not directly notified may still make representations but there is a discretion as to whether they will be taken into account.

Category 3 developments have the same notification criteria as category 2 and in addition written notification must also be given to anyone directly affected to a significant degree and the public generally by way of a newspaper advertisement. For either category 2 or 3 proposals, representations either objecting to or in support of a particular development application which is being considered by the authority must be made to the authority and received within 10 business days of the public notice being given.

Anyone who lodges a representation in respect of a category 2 application has no appeal rights. A representor in a category 3 development has a right of appeal to the

ERD Court within 15 business days of a decision.<sup>51</sup> In respect of the classes of development applicants only have a right of appeal with respect to merit development.

With respect to major projects being those of major environmental, social and economic significance, the proponent must submit one of the following: Environmental Impact Statement (EIS), Public Environmental Report (PER) or a Development Report (DR). The decision on the level of the assessment is made by the Development Assessment Commission on referral by the Planning Minister. Public submissions for an EIS, PER and DR must be lodged within 30, 30 and 15 business days respectively from the date of notice.<sup>52</sup> There are no merit review rights of the Planning Minister's decision.<sup>53</sup>

For Crown developments, where the proposal has a development cost exceeding \$4 million the decision maker is the Development Assessment Commission. The Commission publishes a notice in a local newspaper advising of the type of development and its location. For these applications a longer period of time is provided for representations to be received (which must not be less than fifteen (15) business days from the date of notification). If a representor indicates a wish to be heard by the Commission, they must be heard. There are no third party rights to review decisions made in respect of Crown developments.<sup>54</sup>

Generally information is available on the authority's website up until the closure of the public notification and consultation period. If a member of the community is seeking information after that day a Freedom of Information application is usually required.

The above concepts will no longer exist once the PDI Act applies and overall there will be fewer third party rights. There will be a number of new classes of development with different notification, consultation and appeal rights.

---

<sup>51</sup> *Development Act 1993* (SA) s38

<sup>52</sup> *Ibid* ss 46, 46B, 46C, 46D.

<sup>53</sup> *Ibid* s 48.

<sup>54</sup> s49,49A

Importantly, the new Community Engagement Charter will not apply to assessment of proposed developments.<sup>55</sup> However, it is at the assessment stage that many community members want to have a say in decisions that affect their local environment. Local communities add very particular perspectives which might not otherwise be considered when these important decisions are being made. It was a recommendation of the Expert Panel which reviewed the planning system in the lead up to the passage of the PDI Act that the Charter cover both policy development and the assessment process.

With accepted development there is no notification of the proposed development and no approval is required.<sup>56</sup> There are no appeal rights of any type.

Code assessed developments are any development which is not accepted development or impact assessed development.<sup>57</sup> There are two sub-categories. Deemed to satisfy development is development which must be granted consent and there is no public notification, consultation. There are no third party rights of appeal, only the applicant can appeal.<sup>58</sup>

Performance assessed development is all other development under this category. Any such development is to be assessed on its merits against the new Code. Notice must be given to owners and occupiers of adjacent land and the public generally by way of a notice placed on the relevant land. However, public notification can be excluded by the new Planning and Design Code. Any person can make representations but only relevant matters may be taken into account. Community members cannot be heard at a meeting where a proposal is being considered.<sup>59</sup> There are no third party rights of appeal, only the applicant can appeal.

Impact assessed development is divided into general impact assessed development and restricted development. General impact assessed development may be classified in the regulations or declared by the Planning Minister.<sup>60</sup> Assessment of

---

<sup>55</sup> *Planning Development and Infrastructure Act 2016 (SA)* s 44.

<sup>56</sup> *Ibid* s 104.

<sup>57</sup> *Ibid* sub-div 3.

<sup>58</sup> *Ibid* s 106.

<sup>59</sup> *Ibid* s 107.

<sup>60</sup> *Ibid* s 108.

these proposals is by way of an environmental impact statement (similar to the current major projects process). To provide guidance the Planning Commission prepares a practice direction in relation to the environmental impact assessment process.<sup>61</sup> The environmental impact statement must be available for public consultation on the new planning portal.<sup>62</sup> The Planning Minister can undertake or require the proponent to undertake additional consultation.<sup>63</sup>

The Planning Minister must give the proponent copies of all submissions made within the specified time.<sup>64</sup> The proponent must then prepare a written response to matters raised by all representors including those from the public.<sup>65</sup> The Commission must then prepare an Assessment Report which includes the Minister's assessment of the proposal, Minister's comments on the Environmental Impact Statement, submissions and proponent's response. Also included are comments from other bodies such as the Environment Protection Authority.<sup>66</sup> The Planning Commission must notify a person who made a written submission of the availability of the Assessment Report and it must be published on the new planning portal.<sup>67</sup> Hard copies will also be kept for a certain period of time and will be available for purchase.<sup>68</sup> The Planning Minister makes decisions on these proposals but is not required to give reasons. Only judicial review is available in relation to decisions. There are no applicant or third party appeal rights with respect to the Minister's decision.<sup>69</sup>

Restricted developments will be classified in the new Planning and Design Code.<sup>70</sup> With restricted developments there is a requirement to give notice to the owners or occupiers of adjacent land or land directly affected to a significant degree by the development and the public generally, including by notice placed on the relevant land.<sup>71</sup> The Commission decides on procedural aspects including the giving of notice. A person who makes a representation and wants to be heard is able to

---

<sup>61</sup> Ibid s 109.

<sup>62</sup> Ibid s 113 (5) (b).

<sup>63</sup> Ibid s 113 (6).

<sup>64</sup> Ibid s 113 (7).

<sup>65</sup> Ibid s 113 (8).

<sup>66</sup> Ibid s 113 (9).

<sup>67</sup> Ibid s 113 (10).

<sup>68</sup> Ibid s 113 (11).

<sup>69</sup> Ibid s 115.

<sup>70</sup> Ibid s 108 (1).

<sup>71</sup> Ibid s 110 (20).

appear before the Commission. Representors and applicants will have access to all relevant documents and given at least five days' notice of the hearing.<sup>72</sup> The Planning Commission is the decision maker. The Planning Commission can only take into account relevant matters in representations and is not required to give reasons for its decision. Any representor is entitled to lodge an appeal in respect of the Commission's decision. The representor must appeal to the ERD Court within 15 business days.<sup>73</sup>

### ***Recommendations:***

1. Minimum notification and consultation rights in regulations
2. Application of Community Engagement Charter to the assessment of development proposals
3. Public availability of the proponent's written response to public submissions and Minister's reasons for decision re general impact assessed developments
4. Third party review rights in relation to general impact assessed developments
5. Reasons for decision with regards to all types of impact assessed development
6. Appeals lodged with respect to a restricted development to be published online within 7 days of being notified by the appellant or the Court
7. Online advertising of all applications
8. Portal to allow all citizens to track the progress of all applications
9. Use of a variety of decision making concepts including citizens' juries for projects with the potential to have significant social and environmental impacts- jury to be final decision maker
10. Community Engagement Charter to provide for a range of engagement tools including whole of community development of policy and proposals

The *Development Act 1993* (SA) does allow any interested person to bring civil enforcement provisions<sup>74</sup> where that person believes there has been a breach of the legislation. However, whilst third party planning appeals in the ERD Court have a "no costs (each party bear its own costs)" regime, enforcement matters do not. A "costs follow the event" regime strongly deters prospective litigants (whether private or

---

<sup>72</sup> Ibid s 110 (3).

<sup>73</sup> Ibid s 110 (7).

<sup>74</sup> Ibid s 85.

public interest) from exercising their rights because of the uncertainty inherent in litigation outcomes and the consequential uncertainty as to the quantum of costs potential liability. A “costs follow the event” regime for enforcement is not in the interests of public participation in planning or the provision of the means for access to justice. A party looking to take civil enforcement proceedings also faces possible risks as the Act contains security for costs and undertakings as to damages provisions.<sup>75</sup> Finally, the *Development Act 1993* (SA) does not provide third parties generally the right to join court actions where a development proposal may have significant impacts on the environment. Only those with a “special interest” can apply.<sup>76</sup>

The PDI Act does not change this situation.<sup>77</sup>

### ***Recommendations:***

Act be amended in the following ways:

1. No costs rule for enforcement proceedings brought in the public interest
2. Removal of security for costs and undertakings as to damages provisions
3. Third party right to join actions where acting in the public interest as development proposal may have significant impacts on the environment

### ***J. Dog and Cat Management Act 1995 (SA)***

This Act provides for the management of dogs and cats. Decisions are made by the Dog and Cat Management board which has nine members (selected by the Minister, LGA and Minister/LGA jointly).<sup>78</sup> The board is subject to ministerial direction and control.<sup>79</sup> The Act does not stipulate public availability of agendas and minutes. However the board must prepare an annual report before 30 September every year and forward it to the Minister, the LGA and each council. The Minister must cause a

---

<sup>75</sup> Ibid s85 (15)

<sup>76</sup> Ibid s86(f)

<sup>77</sup> *Planning Development and Infrastructure Act 2016* (SA) ss 202 (1) (g), 214 sub-ss (15), (18).

<sup>78</sup> *Dog and Cat Management Act 1995* (SA) ss 10, 12.

<sup>79</sup> Ibid s 11.

copy of the report to be laid before both Houses of Parliament within 6 days of receiving it.<sup>80</sup> There is no public consultation in decision-making.

***Recommendation:***

Act be amended to require online publication of agendas, minutes and reports.

Applicant appeals are available. A person who owns or is responsible for the control of a dog may appeal within 14 days to the Administrative and Disciplinary Division of the District Court against a decision of a council.<sup>81</sup> There are no third party rights of review or enforcement rights.

***K. Dog Fence Act 1946 (SA)***

This Act provides for the establishment and maintenance of dog-proof fences in the State in order to prevent the entry of wild dogs into pastoral areas. Decisions are made by the Dog Fence board.<sup>82</sup> The board consists of five members appointed by the Minister. The board's agenda and minutes are not publically available and there are no public participation provisions. However within 3 months after the close of each financial year, the Board must present the Minister with a report which is laid before both Houses of Parliament.<sup>83</sup>

***Recommendation:***

Act be amended to require online publication of agendas, minutes and reports

***L. Environment Protection Act 1993 (SA)***

This Act provides for the protection of the environment and has as one of its objects to promote industry and community education and involvement in decisions about the protection, restoration and enhancement of the environment; and disclosure of,

---

<sup>80</sup> Ibid s 24.

<sup>81</sup> Ibid s 58.

<sup>82</sup> *Dog Fence Act 1946 (SA)* pt 2.

<sup>83</sup> Ibid s 34.

and public access to, information about significant environmental incidents and hazards.<sup>84</sup>

The Act includes an object in relation to community involvement in decision making.<sup>85</sup> The Act also establishes the Environment Protection Authority (EPA).<sup>86</sup> The EPA has up to nine members appointed by the Governor.<sup>87</sup> There is a particular requirement that the Minister must consult with prescribed bodies in relation to selection of EPA members.<sup>88</sup> Whilst the EPA must keep minutes of its meetings there is no requirement that agendas and minutes be publically available.

***Recommendation:***

Act be amended to require online publication of agendas, minutes and reports.

The EPA has a number of key functions including the development of environment protection policies and consideration of applications for environmental authorisations.

Where a policy is to be developed a notice of intention to draft a policy must be published in the Gazette and in a newspaper circulating generally in the State.<sup>89</sup> In the case of an application for environmental authorisation the EPA is only required to place a public notice of the application in a newspaper inviting interested person to make written submissions. Representations on applications for environmental authorisations or variations to existing authorisations are only permitted where the variations relax any existing requirements. The EPA must have regard to those submissions when making its decision in so far as the submissions are relevant to the proposal.<sup>90</sup>

With respect to environment protection policies the EPA prepares a report which includes comment on public submission. The EPA is not required to publish either the report or the submissions online. In 2016 the EPA proposed revisions to the Air

---

<sup>84</sup> *Environment Protection Act 1993 (SA)* s 10.

<sup>85</sup> *Ibid* s10(1)(b)(ix)

<sup>86</sup> *Ibid* s 11.

<sup>87</sup> *Ibid* s 14B.

<sup>88</sup> *Ibid* s 14B (4).

<sup>89</sup> *Ibid* s 28.

<sup>90</sup> *Ibid* s47(1)(h)

Quality Policy. The EPA published the report online but decided not to publish community submissions online and only to make them available for inspection at the EPA office.

The Act and the *Environmental Protection Regulations 2009 (SA)*<sup>91</sup> require the keeping of a “public register” of information containing:

- details of incidents causing or threatening serious or material environmental harm that come to the notice of the EPA including any remedial action taken or proposed;
- details of any environment protection order, clean-up order or clean-up authorisation issued by the EPA and any consequent action taken including a report on compliance with the order issued;
- details of prosecutions (nature of the offence, name of proceedings, action number, name of court, outcome), copies of written warnings and other enforcement action;
- details of each application for an environmental authorisation (i.e. licenses, exemptions or works approval) and development authorisations, the outcome of these applications and (if granted) details of any conditions attaching to those authorisations.
- details of reports of environmental assessments carried out for purposes of voluntary site contamination and remediation, or carried out for any other purpose.

The Register can be inspected at the offices of the Environment Protection Authority. However it is not required to record EPA advices on matters such as applications for environmental authorisations and development proposals. In addition there is no requirement that listed documents must be available on line- at present the online Register only has some items such as licences, applications for licences, completed prosecutions and civil penalties, site contamination and environmental protection orders. If a document is not available online hard copies can be inspected and purchased from the EPA. Any documents not required to be on the register can be sought through a Freedom of Information application. Finally, there is limited

---

<sup>91</sup> Reg 16

availability of monitoring data.

**Recommendations:**

Act be amended to require

1. Online publication of all relevant notices and documents
2. Real time online public access to air quality data

Applicants have review rights but third parties do not. Third parties may bring civil enforcement proceedings in the ERD Court against someone in breach of the Act<sup>92</sup> provided they can meet the statutory standing test of either a person whose interests are affected by the subject matter of the application or if they obtain permission of the court. This has been interpreted to mean personally affected and so incorporated bodies could be excluded from bringing these types of actions. Before the Court may grant permission the Court must be satisfied that the proceedings would not be an abuse of the process of the Court; there is a real or significant likelihood that the requirements for the making of an order on the application would be satisfied; and it is in the public interest that the proceedings should be brought.<sup>93</sup>

There are other procedural barriers to third party enforcement including the prospect of the court ordering security for costs and/or an undertaking as to damages before the case gets underway<sup>94</sup> and an adverse costs order in the event an application is unsuccessful.<sup>95</sup>

**Recommendations:**

Act be amended to:

1. Allow open standing to bring civil enforcement proceedings.

---

<sup>92</sup> Ibid s 104.

<sup>93</sup> Ibid s 104 sub-ss (7), (8); For a decision on what constitutes a sufficient interest see the decision of the SA Supreme court in *One Steel Manufacturing Pty Ltd v Whyalla Red Dust Action Group Inc (2006)* 145 LGERA 415.

<sup>94</sup> Ibid s 104 (22).

<sup>95</sup> Ibid s 104 (17).

2. The making of no costs orders if civil enforcement proceedings brought in public interest
3. Remove the ability of court to make security for costs orders and require undertakings as to damages

#### **M. *Environment Protection (Sea Dumping) Act 1984 (SA)***

This Act provides for protection of the environment from the dumping into the sea and the incineration at sea of waste and other matter. It is an Act to implement the MARPOL Convention and allows the issuing of permits to dump under restricted circumstances. There is no public involvement in this process. Applications for a permit to dump are decided upon by the Minister. The Attorney – General or interested persons can seek review in the Supreme Court within 30 days of an application being approved.

#### ***Recommendation:***

Act be amended to require publication of permit information online

#### **N. *Fisheries Management Act 2007 (SA)***

This Act and its regulations control the management of fisheries in South Australia. Management rules for individual fisheries are provided in fisheries regulations under the Act. Each fishery is managed by licence conditions, management plans and fisheries regulations. Controls include recreational limits, restrictions on commercial operations and aquatic reserves.

There is no public involvement in the issue of licences, permits and registrations by the Minister. There is no public register nor any review rights. There is a consultation process in relation to the preparation of management plans. However notification of this process is only via a newspaper advertisement, there is no requirement to have

online access to the draft plan and the Minister is not required to take public submissions into account when deciding whether to approve or reject a draft plan.<sup>96</sup>

***Recommendations:***

Act be amended to provide for:

1. Public consultation on licences, permits and registrations
2. A Public register of all relevant information
3. A requirement that the Minister take public submissions into account when deciding whether to approve or reject a management plan
4. Notification of the management plan and access to the draft plan to be online.

**O. *Green Industries SA Act 2004 (SA)***

This Act establishes Green Industries SA, the function of which is to reform waste management in South Australia. One of the guiding principles of the Act is to involve the community in decision-making through a process of open dialogue with local government, industry and the community when developing waste management policies.<sup>97</sup>

The Board of Green Industries SA must include persons who have practical knowledge of, and experience in advocacy on environmental matters on behalf of the community.<sup>98</sup>

The Act prescribes the following measures to comply with its guiding principle of involving the public in decision-making:

1. Green Industries SA must submit a business plan to the Minister for approval. This plan will detail its major projects for the next three financial years together with the budget, goals and priorities.<sup>99</sup>

---

<sup>96</sup> *Fisheries Management Act 2007 (SA)* s44

<sup>97</sup> *Green Industries SA Act 2004 (SA)* S5(2)(b)

<sup>98</sup> *Ibid* s 9(6).

<sup>99</sup> *Ibid* s 14(6).

2. After approval by the Minister, the business plan is to be available for public inspection on a website and at its principal place of business during normal office hours.<sup>100</sup>

3. Green Industries SA is to develop a waste strategy. As part of its analysis of waste generation and waste management, it must include targets or goals for public and industry awareness and education programs.<sup>101</sup> Before adopting this strategy, Green Industries SA must publish a notice of the proposed strategy in a newspaper circulating throughout the State and make copies of the proposed strategy to be made available for public inspection on a website and at its principal place of business during normal office hours. They must then allow a period of at least 8 weeks for consultation with State and local government bodies and written submissions from the public on the proposed strategy. Green Industries SA are required to take into consideration the views and submissions gathered through that process.

#### **P. *Heritage Places Act 1993 (SA)***

This Act provides for the identification, recording and conservation of places and objects of non-Aboriginal heritage significance and establishes the South Australian Heritage Council.<sup>102</sup> The Council has up to 8 members appointed by the Minister.<sup>103</sup> Council meetings must be open to the public except where it is considered necessary to have a confidential discussion or it is considered necessary to protect a place which is or may be of heritage significance.<sup>104</sup> Minutes are available for inspection without charge but there is no right to purchase them nor are they available online.<sup>105</sup>

#### ***Recommendation:***

Act be amended to require online publication of agendas, minutes and reports.

---

<sup>100</sup> Ibid s14(6)

<sup>101</sup> Ibid s18(4).

<sup>102</sup> *Heritage Places Act 1993 (SA)* s 4.

<sup>103</sup> Ibid s 5.

<sup>104</sup> Ibid s 7 (6).

<sup>105</sup> Ibid s 7.

Any person may make an application to the council for it to consider whether a place should be entered on the Heritage Places register. In addition the Council may on its own initiative consider whether a place is listed.<sup>106</sup> If a place or object is given provisional listing the Council must give written notice to the owner as to the reasons for listing and an explanation that the owner has a right to make written submissions within 3 months of the of the date of the notice as to whether the entry should be confirmed.<sup>107</sup> Whilst notice is also given to the general public it is only via an advertisement published in a newspaper circulating throughout the State. Any person has a right to make written submissions within 3 months of the date of the notice.<sup>108</sup> The time for submissions can be extended if the Council regards it as in the public interest to do so.<sup>109</sup> If a person has made written submissions, unless submissions are frivolous they must be allowed to make an oral representation to the Council.<sup>110</sup>

***Recommendation:***

Act be amended to require publication of notices online

The Council must consider all written and oral representations. If, after considering the representations (if any) the Council is of the opinion that the entry in the Register should be confirmed, the Council may, subject to any direction of the Minister, confirm the entry. If the Minister is of the opinion that the confirmation of a provisional entry in the Register may be contrary to the public interest, the Minister may, direct the Council to defer making a decision on whether or not to confirm the entry until the Minister determines the matter (and the Council must comply with any direction of the Minister).

If the Minister is of the opinion that the confirmation of a provisional entry in the Register would be contrary to the public interest the Minister may, after consultation with the Council, direct that the entry be removed from the Register.<sup>111</sup> The Minister must set out the grounds on which they consider that the confirmation of the

---

<sup>106</sup> Ibid s 17 (1).

<sup>107</sup> Ibid s 17 (4) (a).

<sup>108</sup> Ibid s 17 (4) (b).

<sup>109</sup> Ibid s 18 (1a).

<sup>110</sup> Ibid s 18 (2).

<sup>111</sup> Ibid s 18 sub-ss (6), (7).

provisional entry would be contrary to the public interest.<sup>112</sup> If the Council, after considering the representations (if any) is of the opinion that a provisional entry should not be confirmed; or the Minister directs the removal of a provisional entry from the Register, the Council must remove the provisional entry from the Register.<sup>113</sup>

Public notice of confirmation or removal of a provisional entry must be given to the owner of the land, in a state wide newspaper, to the Minister and if appropriate to the local council.<sup>114</sup>

***Recommendation:***

Act be amended to require online publication of notices and reasons for decisions

Council also has the power to grant certificates of exclusion. When making decisions on these certificates Council has a discretion to allow public submissions.<sup>115</sup>

***Recommendation:***

Act be amended to require mandatory public consultation with respect to decisions to grants certificates of exclusion.

Property owners who have made submissions about a provisional entry onto the register may appeal to the ERD Court in relation to the decision. An appeal must be commenced within 2 months.<sup>116</sup> There are also rights of review in relation to decisions on permits<sup>117</sup> and protection orders.<sup>118</sup> There are no third party rights of review.

***Recommendation:*** third party rights of review

Enforcement can be undertaken by the Minister and local councils through the ERD Court. In addition there are third party enforcement rights, however, a person must

---

<sup>112</sup> Ibid s 18 (7a).

<sup>113</sup> Ibid s 18 (7c).

<sup>114</sup> Ibid s 18 (7d).

<sup>115</sup> Ibid s 22.

<sup>116</sup> Ibid s 20-22.

<sup>117</sup> Ibid s 29.

<sup>118</sup> Ibid s 39A.

have the permission of the Court to act.<sup>119</sup> There is no guidance as to the circumstances in which the court may give permission. In addition the ERD Court may make such orders in relation to the costs as it thinks just and reasonable. There is no reference to proceedings brought in the public interest.

***Recommendation:***

Act be amended to provide open standing for third party enforcement and no costs orders if proceedings brought in the public interest.

The South Australian Heritage Register is maintained by the Council.<sup>120</sup> The Register makes information available for public inspection only during ordinary office hours and members of the public have to pay for a certified copy of an entry on the register. The Register is available online and has an inventory attached to it containing information relating to State Heritage Areas, local heritage (as designated in Development Plans) and Commonwealth heritage sites. A list of State heritage places can also be found at the relevant local councils or online.

***Q. Historic Shipwrecks Act 1981(SA)***

This Act provides for the protection of certain shipwrecks and relics of historic significance.

The Minister may declare shipwrecks, historic relics and protected zones through the Gazette,<sup>121</sup> after which the Minister may publish this notice in newspapers, periodicals or other publications.<sup>122</sup>

After these declarations have been gazetted, it is an offence if someone has in their possession an article to which the gazetted notice relates, though it is a defence if they can show they didn't know the article in their possession or their control was the subject of a gazetted notice.<sup>123</sup>

***Recommendation:***

---

<sup>119</sup> Ibid s 38A.

<sup>120</sup> Ibid ss 13-14.

<sup>121</sup> *Historic Shipwrecks Act 1981 (SA)* ss 5, 6, 7.

<sup>122</sup> Ibid s 8.

<sup>123</sup> Ibid s 9.

Declarations by the Minister should also be publicly available on a Historic Shipwrecks and Relics website and/or online register.

### **R. *Marine Parks Act 2007 (SA)***

This Act provides for a system of marine parks for SA. The Minister makes decisions on establishment and alteration of marine parks. Finalised management plans and any other document whilst available for inspection free of charge, are not available on line.<sup>124</sup>

There are a number of public participation provisions in the objectives under the Act. The Act provides that the involvement of the public in providing information and contributing to processes that improve decision-making should be encouraged. It further states that the responsibility to achieve ecologically sustainable development should be a shared responsibility, including the involvement of the community.<sup>125</sup>

The Governor can proclaim Marine Parks.<sup>126</sup> After this proclamation, the Minister must give notice to the public specifying where copies of the proclamation may be inspected<sup>127</sup> and inviting submissions from interested persons within a period (of at least 6 weeks) specified by the Minister on the boundaries of the marine park.<sup>128</sup> These submissions must be considered and subsequently boundaries may be altered.<sup>129</sup>

Marine parks must be managed under a management plan, the requirements for which are detailed in the Act.<sup>130</sup> When proposing to make or amend a management plan, the Minister must publish her intention in the Gazette, a newspaper circulating in the state and on a website determined by the Minister and publish on a website determined by the Minister, a statement of the environmental, economic and social values of the area concerned.<sup>131</sup> Once it is drafted, the draft management plan and

---

<sup>124</sup> *Marine Parks Act 2007 (SA)* s 16.

<sup>125</sup> *Ibid* s8(3)

<sup>126</sup> *Ibid* s10

<sup>127</sup> *Ibid* s 10(7)(a).

<sup>128</sup> *Ibid* s 10(7)(b).

<sup>129</sup> *Ibid* s 10(8).

<sup>130</sup> *Ibid* s13

<sup>131</sup> *Ibid* s 14(4).

the impact statement must be published on a website where it can be printed without charge with notification of a place where it can be obtained without charge.<sup>132</sup>

There must be notification in the Gazette and in a newspaper circulating generally within the state and on a website determined by the Minister, of the availability of the draft plan and impact statement as well as an address to which people can send written representations within a specified period, not being less than 6 weeks from the date of publication of the notice.<sup>133</sup> The Minister must consider any representations made by members of the public.<sup>134</sup> Each management plan and any attached documents must be freely available for inspection as well as being available online.<sup>135</sup>

The Act provides for certain appeals to the ERD Court.<sup>136</sup>

### ***Recommendations:***

Act be amended to:

1. Establish local advisory groups to advise the Minister on aspects of marine parks management plans, in their development and review. An independent person with mediation experience should be chosen to chair each of these LAGs and to ensure that all stakeholder groups are represented at these meeting
2. Require publication of relevant information online

### **S. *Mining Act 1971 (SA)***

This Act regulates and controls mining operations.

There are various public participation mechanisms under the Act.

A mining operator may enter into an agreement with a person who has been granted an exemption from mining operations. If a mining operator fails to reach an

---

<sup>132</sup> Ibid s 14(4)(e).

<sup>133</sup> Ibid s 14(4)(f).

<sup>134</sup> Ibid s 14(7).

<sup>135</sup> Ibid s 16.

<sup>136</sup> Ibid s 46

agreement with the person to waive their exemption, they can apply to the ERD Court to have the exemption waived.<sup>137</sup>

Under the Act, the Minister may grant a number of tenements including exploration licences, mining leases and retention licences. With exploration licences, notification must be made by the Minister.<sup>138</sup> The Minister must give at least 28 days' notice with a description of the land over which the licence is to be granted. It must be published in the Gazette and in a newspaper circulating generally in the State and if there is a regional or local newspaper circulating in the part of the State in which the licence area is situated—in the regional or local newspaper.<sup>139</sup> There is no opportunity for submissions from the public in respect of an exploration licence.

After a decision is made by the Minister to cancel or suspend an exploration licence, the licensee can appeal to the ERD Court against the cancellation or suspension, within 28 days.<sup>140</sup> Similar provisions apply to the cancellation or suspension of a mining lease<sup>141</sup> and a miscellaneous purposes licence.<sup>142</sup>

Before granting a mining lease, the Minister must invite submissions from the owner of the land to which the application relates, the council and members of the public.<sup>143</sup> The Minister must specify where the application can be inspected and publish a notice in the Gazette and in a newspaper circulating generally in the State and if there is a regional or local newspaper circulating in the part of the State in which the licence area is situated—in the regional or local newspaper on a website maintained by the Department to which the public has access free of charge.<sup>144</sup>

Currently the Minister invites members of the public to make submissions within a period which must be at least 14 days from the date of publication.<sup>145</sup> The Minister must within 14 days give written notice of the application to the owner of the relevant land inviting them to make written representations within a 'specified' time.<sup>146</sup> The

---

<sup>137</sup> *Mining Act 1971* (SA) s 9AA(7).

<sup>138</sup> *Ibid* s 28.

<sup>139</sup> *Ibid* s 28(5).

<sup>140</sup> *Ibid* s 33(2).

<sup>141</sup> *Ibid* s 41.

<sup>142</sup> *Ibid* s 56(3).

<sup>143</sup> *Ibid* s 35A.

<sup>144</sup> *Ibid* s 35A(4).

<sup>145</sup> *Ibid* s 35A(1)(c).

<sup>146</sup> *Ibid* s 35A(1a).

Minister must within 14 days give written notice of the application to the relevant council inviting them to make written representations within a 'time fixed in the invitation'.<sup>147</sup>

The Minister is required to have regard to any representation made, in determining whether or not to grant an application for a mining lease.<sup>148</sup> There are similar provisions relating to retention leases.<sup>149</sup>

After the Minister makes their decision, this needs to be notified to every person who made a representation and published online.<sup>150</sup>

The Minister may also grant a miscellaneous purposes licence. A notice must be published in a newspaper circulating generally throughout the State describing the purpose of the licence and inviting members of the public to make submissions within a period which must be at least 14 days from the date of publication.<sup>151</sup> The Minister must within 14 days of receiving the application, send a copy of the application to the owner of the relevant land and to the relevant council inviting them to make written representations within a 'specified' time<sup>152</sup> and have regard to these representations in making their decisions as to whether or not to grant the licence.<sup>153</sup> Similar provisions relate to retention licences.<sup>154</sup> Consultation and representation requirements do not appear to apply to special mining enterprises. However such enterprises would normally undergo the environmental impact assessment processes outlined in the *Development Act* 1993 although whether they do or not is the subject of ministerial discretion.

Whilst there is no specific provision requiring public consultation in relation to a program for environment protection and rehabilitation (PEPR) that relates to mining operations to be carried out in pursuance of a mining tenement other than an exploration licence or a retention lease, a program must include information on any consultation undertaken in connection with the proposed operations and, in so far as

---

<sup>147</sup> Ibid s 35A(2).

<sup>148</sup> Ibid s 35A(3).

<sup>149</sup> Ibid s 41BA.

<sup>150</sup> Ibid s 35B.

<sup>151</sup> Ibid s 53(2)(c).

<sup>152</sup> Ibid s 53(4).

<sup>153</sup> Ibid s 53(5).

<sup>154</sup> Ibid s 41BA.

any issue appeared to cause concern to the persons with whom the consultation occurred, the steps that the holder of the tenements has taken, or proposes to take, to address those concerns. The Minister is not required to take into account any consultation undertaken with respect to the preparation of a PEPR.

The Mining Act sets up a Mining Register. Mineral claims, licences and “instruments” can currently be registered under the Mining Act. The term “instruments” is not defined in the Act however the Department of State Development interprets this to mean (amongst other matters) mortgages, renewals, transfers, some agreements and caveats.

Whilst DSD releases other information for example, public submissions on an application for a mining lease, there is no legal requirement under the Act. In addition PEPRs can only be released with the consent of the proponent, if the Minister determines release to be in the public interest or via a court order.

There are no third party review or enforcement proceedings of any sort.

***Recommendations:***

Act be amended to:

1. Require consultation on all mining applications, PEPR documents and management plans
2. Require online notification of right to make submissions
3. Allow 30 business days to make a submission on all applications
4. Require the Mining Minister to consider public submissions in all instances and provide online reasons for decisions
5. Provide open, free and online access to all licence and lease applications, public submissions, terms and conditions of grant of a licence or lease, approved PEPRs, management plans, compliance and incident reports, financial assurance documentation, geological information
6. Provide for third party enforcement and review rights

## **T. National Parks and Wildlife Act 1972 (SA)**

This Act provides for the establishment and management of reserves for public benefit and enjoyment and more generally for the conservation of wildlife in a natural environment. Decision making is undertaken by the Minister who is advised by the Parks and Wilderness Council. Delegation of decision making can occur.<sup>155</sup> Of interest is that membership of this Council must include a person who has expertise in community engagement and community partnerships.<sup>156</sup> Members are appointed by the Minister.<sup>157</sup> Whilst the Council must keep minutes there is no requirement that agendas and minutes be publically available.<sup>158</sup> The Council must prepare an annual report and copies must be laid before both Houses of Parliament within twelve days of receipt by the Minister.<sup>159</sup> The same applies to reports of co-management boards.<sup>160</sup>

### **Recommendation:**

Act be amended to require publication of all agendas, minutes and reports online

A 3 month consultation period applies to plans of Management, permits for commercial use of plant species, draft management codes in relation to animal species and harvesting protected animal species. Notice need only be given in the government gazette and in a state wide newspaper and written submissions are required.<sup>161</sup>

**Recommendation:** publish information online

Only a person who applied for a permit to take protected animals is able to have the decision reviewed.<sup>162</sup> No third party review or enforcement rights exist under the Act.

---

<sup>155</sup> *National Parks and Wildlife Act 1972 (SA)* s 12.

<sup>156</sup> *Ibid* s 15.

<sup>157</sup> *Ibid* s 15 (2).

<sup>158</sup> *Ibid* s 19A (9).

<sup>159</sup> *Ibid* s 19D.

<sup>160</sup> *Ibid* s 43L.

<sup>161</sup> *Ibid* ss 38, 41A, 60D, 60I.

<sup>162</sup> *Ibid* s 53.

**Recommendation:**

Act be amended to allow third party review and enforcement

**U. Native Vegetation Act 1991 (SA)**

This Act provides incentives and assistance to landowners in relation to the preservation and enhancement of native vegetation and controls the clearance of native vegetation. The Act also establishes the Native Vegetation Council (the NVC).<sup>163</sup> The NVC has seven members appointed by the Minister.<sup>164</sup> The Act does not stipulate that agendas and minutes be publically available but an annual report must be submitted to the Minister who must then cause copies to be laid before both Houses of Parliament.<sup>165</sup>

**Recommendation:** Act be amended to require online publication of agendas, minutes and reports

The NVC makes decisions regarding proposals by landowners to revegetate, funding to landowners and applications to clear. When considering these proposals the NVC must have regard to a number of matters including the principles of native vegetation clearance set out in the Regulations.<sup>166</sup> The NVC must allow any person “who desires to do so” to make written representations to the Council in relation to an application for consent to clear native vegetation. There is a proposed minimum period of 28 days in the new Native Vegetation Regulations for this process. The Council has a discretion as to whether or not to allow any person to appear personally before it in relation to any application for clearance.<sup>167</sup>

**Recommendation:**

Act be amended to require the NVC to hear any person on an application if they so request

---

<sup>163</sup> *Native Vegetation Act 1991 (SA)* s 7.

<sup>164</sup> *Ibid* s 8.

<sup>165</sup> *Ibid* s 17.

<sup>166</sup> *Ibid* s 29.

<sup>167</sup> *Ibid* s 29 (10).

The NVC must also prepare guidelines for the application of assistance and the management of native vegetation. The guidelines must be publically advertised. The public advertisement must specify an address at which copies of the draft guidelines may be purchased or inspected and specify an address to which representations in connection with the draft guidelines may be forwarded. There is no online availability.<sup>168</sup>

The public has two months following publication to forward submissions. Where the NVC thinks it is desirable to take the time to consult on proposed guidelines in more detail than is required, it may prepare and adopt guidelines as an interim measure with the intention of varying or replacing them if necessary after it has had time for further consultation.<sup>169</sup> The NVC must by public advertisement specify an address at which copies of guidelines adopted by the Council may be purchased or inspected.<sup>170</sup>

**Recommendation:** Act be amended to require online publication of draft guidelines, submissions and finalised guidelines

There are no third party rights of appeal from a decision of the Council and the only those who own or have some other legal or equitable interest in land that has been or will be affected by the breach can bring enforcement proceedings.<sup>171</sup>

**Recommendation:**

Act be amended to allow third party review and enforcement rights

The NVC must keep a register containing details of applications for consent to clear vegetation, heritage agreements and management agreements. The public can inspect the register during ordinary office hours but there is no requirement for an online register.<sup>172</sup>

**Recommendation:**

---

<sup>168</sup> Ibid s 25 sub-ss (2), (3).

<sup>169</sup> Ibid s 25 (5a).

<sup>170</sup> Ibid s 25 (5).

<sup>171</sup> Ibid s 31A (1) (b).

<sup>172</sup> Ibid ss 23-25.

Act be amended to require register to be published online

## **V. *Natural Resources Management Act 2004 (SA)***

This Act promotes sustainable and integrated management of the State's natural resources and makes provision for the protection of the States natural resources. One of the objects of the Act is to involve the public in providing information and contributing to processes that improve decision making.<sup>173</sup>

Decisions are made by the Minister and the Governor. For example, the Minister finalises State and regional NRM plans, the Governor declares prescribed water resources and the Minister makes decisions on the allocation of water, variation and transfer of water (also any interstate agreements). One of the functions of the Minister is to promote public awareness of the importance of the State's natural resources and to encourage the conservation of those resources.<sup>174</sup>

There are a number of NRM boards<sup>175</sup> which have up to nine members appointed by the Minister with specific skills, knowledge and experience are the relevant statutory authorities and make decisions regarding funding allocations.<sup>176</sup> The boards also join with the Minister in preparing NRM plans and water allocations for each water resource. Meetings are held in public subject to certain exceptions and notice must be given of meetings. Reports must be given to the Minister.<sup>177</sup>

### ***Recommendation:***

online publication of agendas, minutes and reports

There is substantial public involvement including with respect to draft NRM plans, water allocations and variation of site use.

Regional NRM boards must invite the public to make written submissions or attend a public meeting in relation to draft NRM plans. The board determines how notice is to

---

<sup>173</sup> *Natural Resources Management Act 2004 (SA)* s 7.

<sup>174</sup> *Ibid* s 10.

<sup>175</sup> *Ibid* s 23.

<sup>176</sup> *Ibid* s 25.

<sup>177</sup> *Ibid* s 38.

be given but it must be published on its website. Each plan and all submissions in respect of a draft plan must be available for inspection and purchase by members of the public. Consultation can be dispensed with if the plan is considered to be very limited. The consultation period must be at least two months. A report must be prepared on the matters raised during consultation and this report must be provided to the Minister. When considering a draft plan or amendments to an existing plan the Minister must have regard to the public submissions and the reports from the public meetings.<sup>178</sup>

Regional NRM boards must also put a notice outlining a proposed recommendation in the Gazette, in a state wide and in a local newspaper in relation to a declaration of prescribed water resources. Any person can make a submission. The consultation period is at least three months. The Minister makes a recommendation to the Governor and if accepted the Governor makes a declaration by way of regulation. Before making their recommendation the Minister must have regard to all submissions. After the regulation is made the Minister must publish in a state wide newspaper and a local newspaper a notice stating the date on which the regulation was made and explaining its effect.<sup>179</sup>

In relation to applications for permits notice must be given to persons specified in the plan and the public. Any person can make a submission and appear before the authority to be heard in support of their representation. Representors must be given notice of a decision and can appeal a decision to the ERD Court within 15 business days.<sup>180</sup>

Any recommendation for reduction of water allocation must be published in the gazette, in a state wide newspaper and in a local newspaper. Any person has at least three months to make a submission. When making their decision the Minister must have regard to all submissions.<sup>181</sup>

With applications for approval or variation of site use within a specified class a notice must be given to persons specified in plan and public generally. Representors can

---

<sup>178</sup> Ibid ss 77-84.

<sup>179</sup> Ibid s 125.

<sup>180</sup> Ibid s 136.

<sup>181</sup> Ibid s 155.

appear before the Minister in support of their representation and have appeal rights to the ERD Court.<sup>182</sup>

**Recommendation:**

Act be amended to require online publication of all information

The Minister must keep a NRM Register consisting of water management authorisations granted or issued, forest water licences grants, permits granted, action plans and any other prescribed matters. The register must be made available for public inspection. The Minister is not required to make available for public inspection any part of the register that, in the opinion of the Minister, should be kept confidential for safety or security reasons. The Minister may also establish or authorise arrangements that restrict or prohibit access to the register (or a part of the register) to protect information that, in the opinion of the Minister, is commercially sensitive or should be protected for some other reasonable cause. No fee may be imposed for the inspection of the register but the Minister may fix fees for the supply of copies of the register or for extracts from the register. Information on the register may be made available on conditions determined or approved by the Minister. Any part of the register may be kept in the form of a computer record.<sup>183</sup> There is also a Water Register.<sup>184</sup>

**Recommendation:**

Act be amended to require publication of the Register online

There is the ability for third parties to seek orders in the nature of civil enforcement orders to be made by the ERD Court.<sup>185</sup> Applications for orders can be sought where a person is engaging, has engaged or is proposing to engage in conduct in contravention of the Act and in various other circumstances.<sup>186</sup> The standing requirements for bringing such applications are the same as for the *Environment Protection Act 1993* (SA), that is, a person must be able to show that their interests are affected by the subject matter of the application or they have the permission of

---

<sup>182</sup> Ibid s 164D.

<sup>183</sup> Ibid s 226.

<sup>184</sup> Ibid sch 3A.

<sup>185</sup> *Natural Resources Management Act 2004* (SA) s 201.

<sup>186</sup> Ibid s 201 (1).

the court to bring the application.<sup>187</sup> There are no third party review rights, only applicants have such rights.

***Recommendation:***

Act be amended to allow open standing on civil enforcement matters and third party review rights

***W. Pastoral Land Management and Conservation Act 1989 (SA)***

This Act provides for the management and conservation of pastoral land. This Act provides for the management and conservation of Pastoral Land. A Pastoral Board is established under the Act, comprising 6 members, none of whom is a general member of the community. The role of the Board includes the requirement to assess the condition of the land subject to a pastoral lease.<sup>188</sup> A lessee who has received an assessment, may ask for assistance from a pool of people appointed under the Act.<sup>189</sup>

The Act provides the following provisions in relation to public access to information:

1. The Minister must maintain a public register containing the names and contact details of those appointed to the pool of people able to provide assistance to pastoral lease holders.<sup>190</sup> This public register is to be freely available for inspection during normal office hours at a public office, or public offices, determined by the Minister and at a website determined by the Minister.<sup>191</sup>
2. The Minister may, by notice in the Gazette, publish guidelines in relation to the provision of assistance.<sup>192</sup>
3. In the determination of public access routes and stock routes, before a notice is gazetted, the proposal to be implemented by the notice must be published in a

---

<sup>187</sup> Ibid s 201 (5).

<sup>188</sup> *Pastoral Land Management and Conservation Act 1989 (SA)* s 25(4).

<sup>189</sup> Ibid s 25B.

<sup>190</sup> Ibid s 25A(6).

<sup>191</sup> Ibid s 25A(7).

<sup>192</sup> Ibid s 25A(8).

newspaper circulating generally in the State inviting members of the public to comment on the proposal within a specified period of not less than three months. Before making its decision, the Board must consider these comments and consult with all affected pastoral lessees, the relevant regional NRM Board and such organisations that the Board believes has an interest in the matter.<sup>193</sup>

4. The Minister must maintain a public register<sup>194</sup> which is able to be inspected, without fee, during ordinary office hours at a public office, or public offices, determined by the Minister or on a website determined by the Minister.<sup>195</sup> Copies can be made for a reasonable fee.<sup>196</sup>

5. A person who is dissatisfied with a decision relating to windfarms can appeal to the ERD Court.<sup>197</sup>

6. In relation to decisions under this Act (except for decisions relating to windfarms), the applicant can appeal the decision to the Pastoral Land Appeal Tribunal.<sup>198</sup>

7. A lessee who is dissatisfied with a determination by the Valuer-General of the annual rent for his or her pastoral lease may, within 3 months of receiving a copy of the notice of determination, either apply to the Valuer-General for review of the determination; or appeal to the Land and Valuation Court against the determination.<sup>199</sup>

### ***Recommendations:***

Act be amended to:

1. Add another member to the Pastoral Board, being a general member of the community.

2. Require the Minister to publish guidelines in relation to the provision of assistance to lease holders under s25B.

---

<sup>193</sup> Ibid s 45(5).

<sup>194</sup> Ibid s48A

<sup>195</sup> Ibid ss 48A(4), (6).

<sup>196</sup> Ibid s 48A(5).

<sup>197</sup> Ibid s49L

<sup>198</sup> Ibid s 54.

<sup>199</sup> Ibid s 56(1).

3. Require online notification of the proposals for public access routes and stock routes
4. Require feedback to be provided to each representor on their representation

### ***V. Petroleum and Geothermal Energy Act 2000 (SA)***

This Act and regulations regulate the exploration for, and recovery or commercial utilisation of, petroleum and other resources in South Australia. One of the objects of the Act is to establish appropriate consultative processes involving people directly affected by regulated activities and the public generally.<sup>200</sup>

There is a three-stage process for petroleum and geothermal licensing and approvals in South Australia, all of which must be completed before production can commence. The first stage is approval for exploration or retention activities. The second and third stages focus on environmental and other aspects of the activity. All decisions relating to the granting of licences, including the granting of a pipeline licence, are done by the Minister who may delegate this role but there is limited provision for public consultative processes in making these decisions. This is despite the objective referred to above.

The Act prescribes the following measures to comply with its object of establishing consultative processes involving people affected by regulated activities:

- 1 Other than the requirement to negotiate conjunctive land access in accordance with the *Native Title Act 1993* (Cth), there are no other community consultation processes in the first stage of approval under the PGE Act.
- 2 The second and third stages of the process requires community consultation, depending on the identified level of impact of the activity. It is an offence against the Act to carry out regulated activities in the absence of an approved statement of environmental objectives (SEO).<sup>201</sup> The penalty is \$120,000. An SEO for low or medium activities is prepared on the basis of an environmental impact report (EIR).<sup>202</sup>

---

<sup>200</sup> *Petroleum and Geothermal Energy Act 2000* (SA) s3

<sup>201</sup> *Ibid* s96

<sup>202</sup> *Ibid* s 99(1)(a).

- 3 If the activity is regarded as high impact, the SEO is prepared on the basis of an environmental impact assessment under Pt 8 of the *Development Act 1993* (SA)<sup>203</sup>. Instead of a SEO the proponent must submit one of the following: Environmental Impact Statement (EIS), Public Environmental Report (PER) or a Development Report (DR). The decision on the level of the assessment is made by the Development Assessment Commission on referral by the Minister. Public submissions for an EIS, PER and DR must be lodged within 30, 30 and 15 business days respectively from the date of notice. (Note change to process in PDI Act – single EIS process). The Minister determines the impact level of the activity from the EIR and any criteria which the Minister has established for determining the impact of the regulated activity.<sup>204</sup>
- 4 If an environmental impact report is required under Part 12 (Environmental Protection), it must include information on any consultation that has occurred with the owner of the relevant land, any Aboriginal groups or representatives, any agency or instrumentality of the Crown, or any other interested person or parties, including specific details about relevant issues that have been raised and any response to those issues.<sup>205</sup> Information and material provided under this regulation must be kept available for public inspection in accordance with directions of the Minister.<sup>206</sup>
- 5 One of the criteria for assessing the environmental effects of the regulated activity is the interests and views (if any) of any interested person or party.<sup>207</sup>
- 6 These SEOs are central to the assessment process under the PGE Act and the regulator will not approve a SEO until it can be shown that genuine community concerns will be managed. It is at stage two of the process, in the development of the SEO, where community consultation takes place, with the intention that the community helps to set the objectives in the SEO.
- 7 The Minister must take submissions into account when making a decision as to whether to approve an SEO.
- 8 There are no third party merits review rights or civil enforcement rights under this Act.

---

<sup>203</sup> Ibid s 99(1)(b).

<sup>204</sup> Ibid s 98.

<sup>205</sup> *Petroleum and Geothermal Regulations 2013* (SA) reg 10(1)(f).

<sup>206</sup> Ibid reg 10(5).

<sup>207</sup> Ibid reg 11(1)(e).

The Act sets up 3 registers: the Environmental Register<sup>208</sup>, the Public Register<sup>209</sup> and the Commercial Register.<sup>210</sup> Online and open access applies only to the first 2 registers. In relation to the Commercial Register the Minister must consult with the licensee and only release information if considered to be in the public interest.

There is a landowner and proponent dispute resolution process but ultimately a court cannot order that operations do not proceed. There are no third party appeal or civil enforcement rights.

### ***Recommendations:***

Act be amended in the following areas:

1. Before granting an exploration licence, the Minister should allow public representations with respect to the criteria in section 23 namely the suitability of the applicant's proposed work program for evaluating, the prospectivity of the licence area and discovering regulated resources, the adequacy of the applicant's technical and financial resources and the stated criteria for evaluation of the applications.
2. Public consultation when licences are up for renewal.
3. Adjacent property owners should have the opportunity to comment when pipeline licences are being determined.
4. Online and unrestricted availability of information in all Registers
5. Online notification of all decisions and reasons for decisions
6. Third party merits review rights and civil enforcement rights

### ***X. Radiation Protection and Control Act 1982(SA)***

This Act provides for the control of activities related to radioactive substances and radiation apparatus, and for protecting the environment and the health and safety of people against the harmful effects of radiation. The Act establishes the Radiation Protection Committee which consists of 10 members. There is no specific requirement that agendas and minutes be publically available.<sup>211</sup> A report on the

---

<sup>208</sup> Ibid s106,107

<sup>209</sup> Ibid s115,116

<sup>210</sup> Ibid s117,118

<sup>211</sup> *Radiation Protection and Control Act 1982 (SA) s 9.*

administration of the Act must be provided to the Minister who must make a copy available to Parliament within 12 sitting days after the Minister receives the report.<sup>212</sup>

***Recommendation:***

Act be amended to require online publication of the committee's agendas and minutes and the annual report

All licences are granted by the Minister but all must be referred to the Radiation Protection Committee for its advice before a decision is made.<sup>213</sup> The Committee also has an investigative role upon request by the Minister. Applicants can apply for review to the Supreme Court.<sup>214</sup>

A register of accreditations and granted authorities must be made available for public inspection but there is no specific ability to purchase copies nor is there a requirement that the register be available online.<sup>215</sup>

***Recommendation:***

Act be amended to require online publication of the register

***Y. River Murray Act 2000 (SA)***

This Act provides mechanisms for the protection, restoration, and enhancement of the River Murray (combined with some other objectives).<sup>216</sup> The Act contains no third party rights by way of representation, appeal or enforcement. All power rests with the Minister for the River Murray whose role is to consider a range of applications for authorisations under other legislation and advise the relevant decision makers on those applications where they may have impact within the River Murray system, to prepare policy documents and to take a range of enforcement actions in the event of contravention of the general duty of care under the Act and for other defined contraventions.<sup>217</sup> The Minister is required to provide various reports.<sup>218</sup>

---

<sup>212</sup> Ibid s 22.

<sup>213</sup> Ibid s 35.

<sup>214</sup> Ibid s 41.

<sup>215</sup> Ibid s 38.

<sup>216</sup> *River Murray Act 2003 (SA)* ss 6-7.

<sup>217</sup> Ibid s 9, pt 8 div 1.

<sup>218</sup> Ibid ss 10-11.

## **Z. South Australian Public Health Act 2011 (SA)**

This Act provides for high level planning and policy development in relation to public health matters in South Australia and provides mechanisms for responding to matters and individual actions which threaten public health. There is public consultation on State and regional health plans and policies. However there is no requirement that drafts and finalised versions of these documents are available online.<sup>219</sup>

### **Recommendation:**

Act be amended to require online availability of all relevant documents

## **AA. Water Resources Act 1997 (SA)**

This Act provides for the management of the State's water resources to a limited extent as much of its operation has now been overtaken by the provisions of the *Natural Resources Management Act 2004*. The Minister may prepare a report relating to management of water but is only required to publish in a state wide newspaper the place or places at which copies of the report can be inspected or purchased.<sup>220</sup>

### **Recommendation:**

Act be amended to require online publication of the report

## **BB. Wilderness Protection Act 1992 (SA)**

This Act provides for the protection of wilderness and the restoration of land to its condition before European colonisation. Decisions are made by the Minister but some decision making can be delegated.<sup>221</sup> The Minister is assisted by the Parks and Wilderness Council (the PWC).<sup>222</sup> The Minister must report annually on the operations of the Act. The report must be presented to both Houses of Parliament

---

<sup>219</sup> *South Australian Public Health Act 2011 (SA)* Parts 4 and 5

<sup>220</sup> *Ibid* s 121.

<sup>221</sup> *Wilderness Protection Act 1992 (SA)* s 6.

<sup>222</sup> *Ibid* s 11.

and they must, by public notice specify an address at which copies of the report can be inspected or purchased by the public.<sup>223</sup>

**Recommendation:** Act be amended to require online publication of the report

There are a number of opportunities for public consultation under the Act. When a wilderness protection zone or area is proposed the Minister must give public notice of a three month consultation period and a specific consultation with affected aboriginal organisations. The Minister must refer all submissions to the PWC and must consider them in decision making. The Minister must also give reason for any decision to defer or not proceed with a proposal.<sup>224</sup> A similar process applies to any proposal to alter boundaries of wilderness protection areas and zones.<sup>225</sup>

The PWC has the task of preparing any changes to the Wilderness Code of Management at the request of the Minister.<sup>226</sup> The Minister can give public notice that the public can make submissions within 3 months. The notice must specify where the draft changes can be inspected or purchased. There is no requirement for the notice to be online nor the draft code. Submissions are referred to the PWC for comment. There is no requirement that the Minister must consider public submissions when making a decision on changes to the code.

A similar regime applies to management plans for individual wilderness areas but in this case the Act requires advance notice of intention to prepare a plan and public consultation for 3 months as to what should be in the plan. In addition all submissions must be made public and the Minister must consider all public submissions when making their decision. The Minister must give public notice of the adoption of a plan of management but it is not specified how this notice is to be given.<sup>227</sup>

The Act provides for third party enforcement rights<sup>228</sup> but not third party review rights.

---

<sup>223</sup> Ibid s 7.

<sup>224</sup> Ibid s 22.

<sup>225</sup> Ibid s 24.

<sup>226</sup> Ibid s 12 (3).

<sup>227</sup> Ibid s 31.

<sup>228</sup> Ibid s 34.

***Recommendations:***

Act be amended to:

1. Require online publication of notice, draft code and finalised code
2. Include requirement that the Minister must have regard to public submissions when making decisions on changes to the Wilderness code of management
3. Require online publication of draft plans of management, submissions and finalised plans
4. Include third party review rights

## CHAPTER 3 – CONCLUSION AND SUMMARY OF RECOMMENDATIONS

Broad and full public participation in environmental decision making processes is critical for rigour and community acceptance. The EDO strongly encourages community engagement as a central feature of legislation which impacts on the environment. Genuine and meaningful community engagement has the benefit of empowering local communities, utilising local knowledge and improving decision making by assisting decision makers to identify public interest concerns.

At the outset we noted that few Acts had community engagement as an object. Examples are to be found in the *Environment Protection Act 1993 (SA)* and the *Natural Resources Management Act 2004 (SA)*. We recommend that other Acts should include similar objects together with a requirement that decision makers have regard to such an object.

Generally, we noted that on the IAP2 Public Participation Spectrum most engagement is at the inform and consult levels with less at the involve and collaborate levels and none at the empower or community decision making level. In relation to this last level of public participation we recommend more usage particularly in relation to approval of projects likely to have significant environmental, social and economic impacts.

More specifically we looked at access to information, public consultation and access to justice provisions in the legislation.

Access to information varies widely. Whilst information such as Board documents, applications and draft and finalised plans, programs and policies may be available online as a matter of departmental or agency practice many of the Acts do not require free and open and where possible centralised online access. Notification of application processes and the like is often by outdated modes such as a State wide newspaper and we have made recommendations to update these processes. Online publication (of these various stages of should be made available into a minimum number of online sources as practicable. Centralisation in this respect prevents, to the extent it can, a political divide and conquer strategy to dealing with bothersome environmental hurdles. Arguably, degradation of the environment is occurring in a

'veiled where possible', patchwork manner throughout Australia. By centralising online updates, this could 'channel' public interest across a broad range of environmental areas.

The ability of the public to have a say in decision making processes varied widely. The focus of involvement tends to be in the area of consultation on proposals, plans and policies. Several Acts did not provide for any consultation to occur and we have recommended amendments to require consultation with respect to all relevant processes including draft plans, policies and conditions of approval. In other instances we have recommended better processes for consultation such as longer time frames for the public to make comment, greater use of modern consultation and information sharing platforms and requirements that decision makers take submissions into account, publish submissions and provide a level of feedback such as reasons for decisions.

Finally, in relation to access to justice it is noted that with the exception of the *Development Act 1993 (SA)* there is a lack of any third party rights of merits review to a body like the ERD Court, including most notably in South Australia's resource extraction legislation. Additionally, apart from a few Acts such as the *Development Act 1993 (SA)*, the *Environment Protection Act 1993 (SA)* and the *Natural Resources Management Act 2004 (SA)*, there are no Acts which allow any person to bring civil enforcement proceedings. We have recommended the inclusion of such rights in a number of the Acts and additional matters such as open standing and the removal of barriers such as usual costs orders, orders for security of costs and undertakings as to damages.

March 2017