OmbudsmanSA

Redacted Final Report

Full investigation - *Ombudsman Act 1972*

Complainant	**City of Burnside**
Government Agency	**Office of the State Coordinator-General**
Ombudsman reference	**2016/09720**
Date complaint received	**7 December 2016**
Issues	**Whether the Office of the State Coordinator-General erred in concluding that the total amount to be applied to works associated with a proposed development at 285-287 Kensington Road would exceed $3 million** **Whether the Office of the State Coordinator-General erred in determining that a proposed development at 285-287 Kensington Road was of economic significance to the State**

Jurisdiction

This investigation follows a complaint made to my Office by Mr Paul Deb, Chief Executive Officer of the City of Burnside, on behalf of the elected members of the council.

The complaint relates to a determination of the State Coordinator-General to appoint the Development Assessment Commission as the relevant planning authority for a proposed 'On The Run' service station development by Shahin Enterprises Pty Ltd at 285-287 Kensington Road, Kensington Park.

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

Investigation

My investigation has involved:

- assessing the information provided by the City of Burnside
- seeking a response from the State Coordinator-General
- clarifying the response with the State Coordinator-General
- seeking more particulars from the City of Burnside
- considering the *Development Act 1993* and the *Development Regulations 2008*
- preparing a provisional report and seeking the views of the State Coordinator-General, the Chief Executive Officer of the Department of the Premier and Cabinet and the City of Burnside
- preparing this final report.

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Response to my provisional report

1. I provided my tentative views to the Office of the State Coordinator-General and the City of Burnside by way of my provisional report dated 1 June 2017.

2. Mr Deb responded to my provisional report on behalf of the City of Burnside by letter dated 16 June 2017. The council expressed satisfaction with the conclusions reached in my provisional report however expressed dissatisfaction with my foreshadowed recommendation, submitting that it was 'inconsequential' in the circumstances.

3. The council invited me to consider recommending 'that the [Development Assessment Commission] remit the proposal to the Council, as relevant planning authority, for assessment and determination in accordance with the provisions of the statutory planning regime.'

4. By email later that same day, Mr Deb advised my investigation that the council had become aware that the Development Assessment Commission had refused development plan consent in relation to the proposed development. On this basis, Mr Deb acknowledged that aspects of the council's submissions to my investigation were now redundant, inviting instead that I recommend 'that any future Development Application that is submitted by the applicant at this site, be referred to the Council, as the relevant planning authority.'

5. Mr Hallion responded to my provisional report by letter dated 20 June 2017.

6. Concerning my provisional views with respect to the Office of the State Coordinator-General's assessment of the proposed development's satisfaction of the $3 million cost threshold, Mr Hallion submitted, *inter alia*:
   - the decision to approach Peregrine to clarify the estimate provided in the first cost estimate report was his decision, 'as a result of discussion with [Unit Manager, Crown Development and Grants (DPTI)], which in itself was the result of DPTI's analysis that had determined a potential discrepancy between the cost estimate provided for this site, and other sites Peregrine had estimated of a similar nature'
   - those involved in assessing the project within the Office of the State Coordinator-General were acting in accordance with his instructions and 'were not the decision makers in providing advice to Peregrine on reviewing their estimate'
   - the Office of the State Coordinator-General's suggestion that Peregrine review the figures provided in the first cost estimate report was not unreasonable in the circumstances, owing to advice from DPTI that the figures may have been inconsistent with other, similar projects
   - the decision to 'call-in' the proposal was consistent with advice from DPTI which determined that the figures within the second cost estimate report were 'accurate against the components of the proposal that Peregrine included'
   - he otherwise agrees with the conclusion expressed in my provisional report on this issue.

7. Concerning my provisional views with respect to the Office of the State Coordinator-General's assessment of the proposed development's satisfaction of the 'economic significance' test, Mr Hallion submitted, *inter alia*:
   - he does not agree with my view that the Office of the State Coordinator-General's assessment of this issue was based on an irrelevant consideration (that is, the benefit of a 'single assessment authority' to Peregrine)
   - his determination that the proposed development was of economic significance to the State was based on the employment figures identified in the relevant briefing

- this determination was 'reinforced' by his consideration of the benefit of a single assessment authority to Peregrine
- he disagrees with my view that the Office of the State Coordinator-General's decision to proceed on the information before it was wrong, insofar as he submits that 'it is appropriate practice to rely upon standard job construction estimates and employment data provided by the proponent'
- he disagrees with my view that the Office of the State Coordinator-General's determination that the proposed development was of economic significance to the State was unreasonable, submitting that 'both DPTI and [the Office of the State Coordinator-General] fully understand that the Schedule 10 Clause 20 requirements must be met at each individual site and that the threshold cost and economic significance tests must be met before any other consideration is given to the merits or otherwise of a "call-in" under the regulations.'
- he disagrees with my interpretation of the phrase 'economic significance to the State'.

8. Responding to the recommendation foreshadowed in my provisional report, Mr Hallion submitted that he is 'determined to act in the interest of continuous improvement in regard to [the Office of the State Coordinator-General's] processes and procedures, submitting, *inter alia*:

> I am prepared to set out with more clarity both the threshold "cost" of construction test (for example to clearly indicate what is able to be included eg construction, fit out, professional fees, GST etc and what is not able to be included eg land value) and the economic significance test. I emphasise these will still be guidelines to assist proponents in deciding whether to submit a proposal or not and I will retain my discretion once these tests are, in my opinion, satisfied as to my decision on a "call-in" or not for each proposal based on its merits.
>
> In relation to site specific employment numbers, I consider it a reasonable and well used practice to apply construction job estimates, based upon the estimated costs of construction and I intend to continue this practice. I will, however, update the checklist to ensure that proponents provide ongoing employment data specific to the site under consideration and I will ensure that proponents are aware that Schedule 10 Clause 20 requires two tests to be satisfied, namely construction costs to exceed $3 million and either the project to be judged to be of economic significance to the State or to be best assessed by a planning scheme administered by DPTI.

9. Dr Don Russell, Chief Executive Officer of the Department of the Premier and Cabinet, responded to my provisional report by way of letter dated 23 June 2017, advising that he had no comment to make.

10. I have considered the submissions of the parties and addressed them where necessary in the body of this report.

11. I have otherwise made minor amendments to my report in accordance with clarification provided by the parties.

Background

12. The Office of the State Coordinator-General (**OSCG**) is an administrative unit within the Department of the Premier and Cabinet. It comprises 4.6 staff including the State Coordinator-General.

13. The State Coordinator-General is appointed by the Governor.[1] On 2 October 2014 Mr Jim Hallion was appointed to this role for a period of five years commencing on 1 January 2015.[2]

14. Under the Development Regulations, the State Coordinator-General is in certain circumstances empowered to appoint the Development Assessment Commission as the relevant planning authority in relation to a specified development. The consequence of a determination to 'call in' a development in this manner is that the development will be assessed by the Development Assessment Commission rather than the relevant local council or regional development assessment panel.

15. Regulation 38 of the Development Regulations provides:

> **38—Determination of Commission as relevant authority**
>
> (1) Pursuant to section 34(1)(b)(i) and (ii) of the Act, the Development Assessment Commission is the relevant authority in respect of any development of a class specified in Schedule 10[.]

16. Clause 20 of Schedule 10 of the Development Regulations provides:

> **20—Certain developments over $3m**
>
> (1) Any development where—
>
> (a) the total amount to be applied to any work, when all stages of the development are completed, exceeds $3 000 000; and
>
> (b) the State Coordinator-General determines, by notice in writing served personally or by post on the proponent, and sent to the relevant council or regional development assessment panel within 5 business days after the determination is made, that the development is—
>
> (i) a development of economic significance to the State; or
>
> (ii) a development the assessment of which would be best achieved under a scheme established by the Department of the Minister to facilitate the assessment of such developments.

17. Regulation 15 of the Development Regulations in turn provides:

> **15—Application to relevant authority**
>
> […]
>
> (5) If an application is lodged with a council but the Development Assessment Commission is the relevant authority, the council must—
>
> (a) retain 1 copy of the application, and 1 copy of any plans, drawings, specifications and other documents and information accompanying the application; and
>
> (b) forward the application, together with the remaining copies of the plans, drawings, specifications and other documents and information, and a written acknowledgment that the appropriate fees have been paid, including details of each fee component paid, to the Development Assessment Commission within 5 business days after their receipt by the council.

18. On 12 May 2016 a representative of Peregrine Corporation (**Peregrine**) contacted the OSCG by email to request that the State Coordinator-General 'call in' a proposed 'On

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1 Constitution Act 1934, section 68.
2 South Australian Government Gazette, 2 October 2014 at p. 6016.

The Run' (**OTR**) service station development by Shahin Enterprises Pty Ltd[3] at 285-287 Kensington Road, Kensington Park (**the proposed development**).

19. Peregrine's request enclosed a letter signed by Peregrine's General Manager, Planning and Projects which identified the estimated construction value of the proposed development to be between $2,970,000 and $3,190,000, inclusive of GST. In this letter Peregrine described the proposal in the following terms:

> As you would be aware, our integrated service stations ordinarily comprise:
> - A control building (including retail and food offerings);
> - A fuel canopy;
> - Vehicle refuelling facilities;
> - Fuel tanks and LPG tanks;
> - Car wash facilities (at some of the Sites);
> - Illuminated freestanding signage (including blade walls);
> - Customer car parking;
> - A refuse collection area;
> - Pedestrian access;
> - Road access;
> - Landscaping; and/or
> - Perimeter fencing.
>
> As part of the development application, we will seek approval for 24/7 hours of operation.

20. Peregrine's request further enclosed a cost estimate report prepared by Rider Levett Bucknall for the construction costs associated with the proposed development (**the first cost estimate report**). A 'cost summary' within this report disclosed the following:

Cost Component	**Site 287 Kensington Road Kensington Park**
Early Works and Demolition	
Demolition (Full site pavement, fences and structures)	[$xxxxx]
Decommissioning of Fuel Systems	[$xxxxx]
Base Building	
Preliminaries	[$xxxxx]
Control Building	[$xxxxx]
Main Fuel Canopy	[$xxxxx]
Civil and Siteworks	[$xxxxx]
External Services	[$xxxxx]
Fitout (incl. Brand Fitout)	[$xxxxx]
Other Contracts	
Signage	[$xxxxx]
Refrigeration	[$xxxxx]
IT Equipment	[$xxxxx]
Security	[$xxxxx]
Electrical services	[$xxxxx]
Fuel Engineering / Systems	[$xxxxx]
Aluminium and Glazing	[$xxxxx]
Utilities and Infrastructure	
SAPN	[$xxxxx]

[3] Peregrine is the trading name of Shahin Enterprises Pty Ltd.

Local Council Fees	-
Slip lane/crossover works	-
Professional Fees	
Consultants Fees	[$xxxxx]
Statutory Authority Fees	[$xxxxx]
Contingency	[$xxxxx]
TOTAL PROJECT COST	**$2,802,000**
TOTAL PROJECT COST RANGE (EXCL. GST)	**$2.7m to $2.9m**

21. Peregrine's request sparked an exchange between various officers of the Department of Planning, Transport and Infrastructure (**DPTI**) and Mr Hallion.[4] On 13 May 2016 Mr Hallion emailed [then-Team Leader – Coordinator General and Public Housing (DPTI)]:

> [then-Team Leader – Coordinator General and Public Housing (DPTI)]
> The QS report looks like this one is below our threshold, therefore, a no call-in?

22. [Then-Team Leader – Coordinator General and Public Housing (DPTI)] responded later that day:

> Borderline – it seems it's only the inclusion of the GST component that moves the value marginally over the threshold.

23. On 18 May 2016 the [Planning Officer (DPTI)], forwarded a copy of the first cost estimate report to the [Senior Engineer, Civil & Commercial (OSCG)], for his review.

24. On 17 June 2016 the [Unit Manager, Crown Development and Grants (DPTI)], emailed the [Senior Engineer, Civil & Commercial (OSCG)]:

> Have been talking about the values attributed to the following two proposals.
>
> The proposals relate to:
>
> (a) An OTR at Kensington Road – which has an identified cost of $2.97 - $3.19M […]
>
> Jim asked that I send these through to you with a view to potentially further dialogue being held with the proponent on the values identified, in particular how they relate to other recent OTR proposals and the development costs identified (which I have attached along with some preliminary commentary for review).
>
> Happy to chat further as required.

25. A copy of the OSCG's Case Management Report concerning the proposed development discloses that a phone call was made or received (it is not clear which) by [Unit Manager, Crown Development and Grants (DPTI)] on this same date. The notes concerning this discussion record:

> [Unit Manager, Crown Development and Grants (DPTI)] noted that GST being added to costs for call-in is legitimate, as it forms part of the development cost. Even though proponents might be able to claim later, he claimes [sic] that doesn't matter, as they still have to pay upfront.[5]

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[4] Mr Hallion advised my investigation that three officers from DPTI's Case Management Team are assigned to support his role.

[5] The notes from this conversation similarly do not record the other party to this discussion. I infer it may have been either [Senior Engineer, Civil & Commercial (OSCG)] or [Team Leader – Coordinator General and Public Housing (DPTI)].

26. On 27 June 2016 Peregrine's Corporate Lawyer emailed the [Manager, Planning Reform (DPTI)], to seek an update concerning the call-in request concerning the proposed development. This email appears to have been forwarded to [Team Leader – Coordinator General and Public Housing (DPTI)], who at this stage had assumed the role of Team Leader – Coordinator General and Public Housing (DPTI). [Team Leader – Coordinator General and Public Housing (DPTI)] then emailed [Senior Engineer, Civil & Commercial (OSCG)] of the OSCG (also referring to another recent call-in request concerning a proposed OTR development in [Site B]):

> I am enquiring about these two Peregrine projects which were referred to you regarding the costing? Have you had a chance to review and/or speak with Peregrine?
>
> If their revised costing comes back at over 3 mil, we will prepare call in letters today for Jim to sign. If their numbers aren't over 3 million, we will not be in a position to recommend they be called in.

27. The OSCG's Case Management Report concerning the proposed development discloses that a phone call was made between the [Senior Engineer, Civil & Commercial (OSCG)] and Peregrine's Corporate Lawyer this same day. The notes concerning this discussion record:

> [Senior Engineer, Civil & Commercial (OSCG)] spoke with [Peregrine's Corporate Lawyer] of Peregrine. [Senior Engineer, Civil & Commercial (OSCG)] advised that DPTI and the SCG had noted the costing range falling below the $3m threshold without GST, and either side of the $3m threshold with GST. It was therefore likely not to be called-in at this stage. However, with the cost somewhat lower than other OTR sites, [Senior Engineer, Civil & Commercial (OSCG)] had been asked to provide feedback and confirm the accuracy of the figures. It was noted that the site is smaller than many of their other sites. [Peregrine's Corporate Lawyer] agreed to review and advise whether the costings will remain as they are, or whether there has [sic] been any errors.

28. On 30 June 2016 the [Senior Engineer, Civil & Commercial (OSCG)] emailed [Team Leader – Coordinator General and Public Housing (DPTI)]:

> Further to our recent discussion, [Peregrine's Corporate Lawyer] has provided some additional information as attached.
>
> Are you able to arrange for review and provide advice back for Jim's consideration.

29. In his response to my provisional report Mr Hallion clarified that the attachments referred to in this email related to the [Site B] project only.

30. On 4 July 2016 [Team Leader – Coordinator General and Public Housing (DPTI)] emailed the [Administrative Project Officer (OSCG)], to suggest that Peregrine be advised that the OSCG was 'waiting on a "revised" cost estimate for Kensington Park.' This appears to have been communicated by the [Senior Engineer, Civil & Commercial (OSCG)] to Peregrine that same day.[6]

31. On 25 July 2016 Peregrine's Corporate Lawyer emailed the [Senior Engineer, Civil & Commercial (OSCG)] to advise that Peregrine intended to supply a revised quantity surveyor's report in connection with the proposed development 'as soon as we can.'

32. On 3 August 2016 Peregrine emailed a 'revised call in request' to the OSCG. This request advised that the project scope had been amended to include a number of

[6] Email from [Senior Engineer, Civil & Commercial (OSCG)] to [Team Leader – Coordinator General and Public Housing (DPTI)] dated 4 July 2016.

additional items and enclosed a revised cost estimate report (**the second cost estimate report**). Under 'Basis of Estimate', this report disclosed the following:

> The following documentation has been utilised in the preparation of this estimate report:
>
> - ADS Architects Drawings
> - 1283sk01 Site and Floor Plan
> - 1283sk02 Elevations
> - Email advice 22/07/2016 confirming the following scope items to be included:
>
> *2 x Dog Wash; LPG; 'Stormceptor' treatment system in lieu of 'Ecosol'; Solar System; Paving to forecourt over concrete; '[Site C]' Fitout incl Electronic shelf pricing.*

33. This report included the following 'cost summary':

Cost Component	**Site 287 Kensington Road Kensington Park**
Early Works and Demolition	
Demolition (Full site pavement, fences and structures)	[$xxxxx]
Decommissioning of Fuel Systems	[$xxxxx]
Base Building	
Preliminaries	[$xxxxx]
Control Building	[$xxxxx]
Main Fuel Canopy	[$xxxxx]
Ancillary Buildings	[$xxxxx]
Civil and Siteworks	[$xxxxx]
External Services	[$xxxxx]
Fitout (incl. Brand Fitout)	[$xxxxx]
Other Contracts	
Signage	[$xxxxx]
Refrigeration	[$xxxxx]
IT Equipment	[$xxxxx]
Security	[$xxxxx]
Electrical services	[$xxxxx]
Fuel Engineering / Systems	[$xxxxx]
Aluminium and Glazing	[$xxxxx]
Utilities and Infrastructure	
SAPN	[$xxxxx]
Local Council Fees	-
Slip lane/crossover works	-
Professional Fees	
Consultants Fees	[$xxxxx]
Statutory Authority Fees	[$xxxxx]
Contingency	[$xxxxx]
TOTAL PROJECT COST	**$3,163,000**
TOTAL PROJECT COST RANGE (EXCL. GST)	**$3.0m to $3.3m**

34. This report further enclosed a more detailed breakdown and description of the items described in the above table, concluding with the following:

Building Construction	*$372/m²*	*$162,000.00*
Professional & Authority Fees, Levies and Other Allowances	*$518/m²*	*$226,000.00*
ESTIMATED NET COST	*$7,247/m²*	*$3,159,607.93*

35. Following discussions between DPTI and the OSCG, on 17 August 2016 the [Team Leader – Coordinator General and Public Housing (DPTI)] emailed Peregrine's Corporate Lawyer to advise that the information provided in the second cost estimate report was 'sufficient' and to request 'updated plans consistent with the changes'. [Team Leader – Coordinator General and Public Housing (DPTI)] further requested certain modifications to ensure the height of the proposed development did not result in its classification as a 'non-complying development' for the purposes of the Development Act.

36. On 7 September 2016 [Team Leader – Coordinator General and Public Housing (DPTI)] forwarded a 'call in package' concerning the proposed development to the [Portfolio Manager, Residential and Commercial (OSCG)]. The enclosed briefing to Mr Hallion provided (emphasis in original):

MINUTE TO: JAMES HALLION, STATE COORDINATOR GENERAL

SUBJECT: PEREGRINE CORPORATION REQUEST FOR DETERMINATION OF 'ON THE RUN' DEVELOPMENT PROPOSAL AT KENSINGTON PARK

PURPOSE

To provide a briefing and response to a request from the Peregrine Corporation (the proponent) that you appoint the Development Assessment Commission (Commission) as the relevant planning authority for an 'On The Run' (OTR) proposal at Kensington Park. A copy of the proponent's request is provided as **Appendix 1 and Appendix 2**.

BACKGROUND

The proponent is a major South Australian employer and significant investor, currently operating 134 OTR facilities employing in excess of 2,300 people. The proponent is continuing investigations into new development opportunities and redevelopment of several existing sites and has sought the appointment of the Commission to provide a single assessment portal for proposals across multiple Council areas.

To date in relation to applications proposed by the proponent, you have appointed the Commission as relevant authority for 22 proposals, all but one of which has been an OTR facility (the Motorsport Park facility at Tailem Bend).

The proponent has advised that the Kensington Park proposal is a priority development opportunity. Following the initial request in May 2016 (**Appendix 1**) the proponent has since revised the proposal and has provided an amended set of plans with a detailed QS report (**Appendix 2**). The revised Kensington Park OTR will be modelled on the new [Site C] concept store as well some [sic] additional facilities being provided which has increased the cost of the proposal.

The proponent has requested that you exercise your authority under Schedule 10(20) of the *Development Regulations 2008* to assign the Commission to consider its revised OTR proposal at 285-287 Kensington Road, Kensington Park.

DISCUSSION

The subject land is located within the Neighbourhood Centre Zone, Policy Area 1 of the City of Burnside Development Plan. The proposal will be of merit designation and Category 2 for public notification.

As part of any formal assessment process, the following site specific issues should be noted:

- The existing land use is a motor repair station
- The proposal will utilise/modify existing access points to and from the site. A formal referral to DPTI Transport Services will be required.
- Mitigation of amenity impacts to adjoining properties will be of prominence, with particular emphasis on traffic, visual impacts and hours of operation being 24/7.

Basis for Appointment of DAC as Relevant Authority

In considering whether to appoint the Commission as the relevant authority Schedule 10(20) of the *Development Regulations 2008* prescribes the following 'tests'.

Firstly, that the total amount to be applied to any work, when all stages of the development are completed, exceeds $3 million, Secondly that the development is –

(i) a development of economic significance to the State; or
(ii) a development the assessment of which would be best achieved under a scheme established by the Department of the Minister to facilitate the assessment of such developments.

The proponent has provided an independent detailed Quantity Surveyor (QS) report in relation to the required $3 million threshold. The QS report indicates that the proposed total project cost is $3.1 million. In this regard, **the proposal is considered to have satisfied the first test.**

In terms of the second test, the proponent has advised that each new store employs between 15-50 people, and supports up to 100 jobs during construction. The proposal would be one of many OTR sites located across separate Council areas and in this regard it is also considered sensible for a proponent with a portfolio of applications to deal with a single assessment authority, as this approach provides for consistency in process and interpretation of the relevant Development Plans. In this regard, the second test is considered to have been satisfied.

It is also important to note these proposals will be assessed against the relevant Development Plan, will be publicly notified and referred to council and any relevant state agencies (where required) consistent with conventional planning practice. This is not a fast track process but rather a streamlined one, which provides a significant local company with an opportunity to have multiple applications assessed by a single assessment authority.

RECOMMENDATION

It is recommended that you:

1. Sign the attached letter to Peregrine Corporation (**Attachment 1**), advising that the Commission has been appointed the relevant authority for the OTR proposal at Kensington Park; and

2. Sign the attached letters to the Chief Executive Officer, City of Burnside advising of your determination (**Attachment 2**).

37. It appears that a decision by Mr Hallion was deferred pending advice from DPTI concerning the potential for traffic management issues to be occasioned under the

proposal. On 14 September 2016 Peregrine's Corporate Lawyer emailed [Senior Engineer, Civil & Commercial (OSCG)]:

> I understand that the letter approving the call in for Kensington Park has been submitted to Mr Hallion's office. Are you able to provide me with an ETA as to when it will be signed considered and finalised? I am just working under contractual timeframes and just need to manage this.

38. Later that day the [Senior Engineer, Civil & Commercial (OSCG)] responded:

> Following advice from yesterday as below, I understand that there are some concerns in regard to access and that DPTI will be in contact with you direct.
>
> Happy to discuss if you need.

39. On 15 September 2016 Peregrine's Corporate Lawyer emailed the [Senior Engineer, Civil & Commercial (OSCG)] and [Team Leader – Coordinator General and Public Housing (DPTI)]:

> It was not my understanding that DPTI assesses the planning merits of the proposal on an application to call in the project – I had understood that this is undertaken by the planning officer once it is lodged with supporting documentation such as a traffic report.
>
> In any event, I am struggling to understand the delay in this issue being raised with us. It has been with DPTI on a call in request since May with no changes proposed to the access arrangements since it was first lodged for call in. This is particularly puzzling in circumstances where we are also utilising existing access points on a site that use to be a service station.
>
> Lauren, can you please contact me urgently to discuss.

40. Later that same day, Mr Hallion emailed [Team Leader – Coordinator General and Public Housing (DPTI)] to advise:

> Post a discussion this afternoon with A/CEO City of Burnside, I have determined to approve the call-in request for OTR at Kensington Park. As advised earlier, could you please relay to Peregrine the concerns raised by Transport for the subject site.

41. Concerning this discussion, Mr Hallion advised my investigation:

> I contacted the A/CEO City of Burnside to inform my intention to exercise authority under Section 10(20) of the Development Regulations 2008 to assign DAC as the relevant authority for the proposed development due to the fact that it is one of multiple applications that Peregrine has developed in the State, and assigning DAC offers consistency in approach and interpretation of the relevant Development Plans.[7]

42. Mr Deb advised my investigation:

> The State Coordinator General telephoned me to advise me that, as a courtesy, he was contacting me to advise that he had decided to 'call in' the proposed development.[8]

43. Shortly afterwards [Team Leader – Coordinator General and Public Housing (DPTI)] emailed Peregrine's Corporate Lawyer to advise that Mr Hallion had determined to call in the proposal. [Team Leader – Coordinator General and Public Housing (DPTI)] went on to relay advice received from DTPI's Traffic Operations unit, the substance of which suggested that the proposed development would require 'significant modification' to be feasible from a traffic management perspective.

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7 Letter from Mr Hallion dated 13 April 2017.
8 Email from Mr Deb dated 23 May 2017.

44. Mr Hallion wrote to both the council and Peregrine to formally advise of his determination.[9] The notification to the council relevantly disclosed:

> In accordance with Schedule 10(20) of the *Development Regulations 2008*, I have formed the opinion that this proposal is of economic significance to the State and that the Commission is the most appropriate assessment authority. I have formed this opinion being firstly satisfied that the proposed development, when all stages of the development are completed, exceeds $3 million.
>
> This determination also continues to provide a single assessment authority and point of contact for the proponent, which has continued delivery of its portfolio of development proposals across South Australia.

45. It appears that Peregrine continued to inform the OSCG of the progress of the proposed development and other developments within its portfolio through the assessment process. In this regard, my investigation was provided with copies of relevant emails between Mr Hallion and Peregrine's Executive Chairman. The contents of these emails, while suggestive of a somewhat familiar relationship between the two men, do not disclose anything that is otherwise of relevance to my investigation.

46. In his response to my provisional report, Mr Hallion advised:

> While I acknowledge the presence of a professional relationship due to the nature of my role, I provide the same level of courtesy to all proponents that I encounter. Working in a supportive manner with industry is an important component of my role in attracting investment and jobs to South Australia.

Submissions to my investigation

47. My investigation sought to clarify the considerations informing the State Coordinator-General's decision to assign the Development Assessment Commission as the appropriate authority to assess the proposed development. By letter dated 10 February 2017 Mr Hallion advised my Office:

> The Peregrine Group is a major South Australian group of private companies and associated entities fully owned by the Shahin family. Established in 1984 when Fred Shahin purchased a small BP service station in Woodville Park, South Australia (SA), Peregrine is now one of the Top 20 private companies in Australia and the largest private company in SA.[10]
>
> Peregrine generates over $1 billion dollars [sic] of revenue annually in retail operations including the On the Run (OTR) convenience operations. OTR is spread across metropolitan Adelaide and regional South Australia servicing almost all of the SA population with over 130 OTR fuel and convenience stores, over 105 C Coffee cafes, over 44 subway [sic] restaurants and over 55 other fast food franchises (such as Oporto, Hungry Jack's and Wokinabox). OTR employs over 2,500 South Australians over its 130 sites across the State.
>
> OTR and Australia's first perishable food rescue organisation OzHarvest, have also formed a partnership to provide 27,000 meals being rescued to those [sic] vulnerable people across South Australia.
>
> In accordance with Schedule 10(20) of the Development Regulations 2008 […] I have ability [sic] to exercise authority to assign the Development Assessment Commission as

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[9] I observe that this correspondence suggests that Mr Hallion's determination was made on 14 September 2016 (i.e. prior to his telephone discussion with Mr Deb and prior to Peregrine's 15 September 2016 email).

[10] This description appears to have been sourced directly from Peregrine's website. *See* <https://www.peregrine.com.au/about-us/>, last accessed 26 May 2017.

> the relevant assessment authority for projects each exceeding $3 million or more in construction value and of economic significance to the State. Project costs are verified by quantity surveyors.
>
> While each project is considered on its own merits and each must meet the Schedule 10(2) requirements, as a portfolio they are also incredibly significant to the State, as each new store employs between 15 and 20 people and up to 100 construction jobs.
>
> Further when a proponent has multiple applications, the assessment by one assessment authority (DAC) offers consistency in approach and interpretation of the relevant Development Plans. It is also important to note that proposals are assessed against the relevant Development Plan, will be publicly notified and referred to council and any relevant state agency (where required). This is not a fast track process but rather a streamlined one – one that provides a significant local company the opportunity to have multiple applications assessed by the one assessment authority.
>
> […]
>
> My approval is based upon advice received from the planning officers in the Department of Planning, Transport and Infrastructure. This advice covers both the economic and financial tests under Schedule 10(20) and the potential planning merits of the proposed development.

48. As requested by my Office, Mr Hallion provided a list of all development proposals submitted by Peregrine for which he has appointed the Development Assessment Commission as the relevant planning authority. This list discloses 24 such developments or proposed developments, of which:
    - 23 concern service station construction or upgrades[11]
    - a majority have an estimated construction cost of between $3 million and $4 million
    - 19 have been granted Development Plan consent by the Development Assessment Commission
    - four remain under assessment by the Development Assessment Commission
    - one is awaiting application before the Development Assessment Commission.

49. As requested by my Office, Mr Hallion provided a copy of a checklist used by the OSCG to assess 'call in' requests. This document provides:

> This checklist may assist proponents to provide relevant information if they are requesting the State Coordinator-General (SCG) to exercise authority under Schedule 10(20) of the Development Regulations 2008 to assign the Development Assessment Commission as the relevant authority for the proposed development.

REQUIRED INFORMATION	ATTACHED (√)
A letter that requests SCG authority to appoint the Development Assessment Commission as the relevant authority for development assessment purposes • Construction and ongoing employment impact estimates (to assess economic impact)	
Demonstration of land ownership or control	
Site Plan, Architectural Plans and Elevations • Plans should include the proposed building and other • [sic] Details on each proposed land use within the site (ie office, consulting rooms, serviced apartments)	
Cost Estimate • Confirmation of costing from a quantity surveyor (cost of works can include the construction cost, fil-out costs, design fees,	

[11] The exception being the Tailem Bend Motor Sport Park.

preliminaries, infrastructure etc) including GST	
Traffic and parking • Details of any off-street parking proposed and traffic access arrangements	
Location of Signage (if relevant) • Location and details of any external signs or advertising displays. If signs are to be illuminated or contain a moving display this needs to be identified	

50. By letter dated 24 March 2017 my investigation sought to clarify various matters raised by Mr Hallion's response and the documents supplied to my Office. Relevantly, my investigation sought to clarify:
    - the extent to which the OSCG or DPTI scrutinised the second cost estimate report
    - the extent to which the OSCG was concerned, if at all, by the total cost of the proposed development estimated in the second cost estimate report (noting that emails released to my Office suggested concerns about 'inflated costs' in relation to another, otherwise unrelated, development proposed by Peregrine and noting the lower limit of the second cost estimate report)
    - whether the OSCG considers the benefit of a 'single assessment authority' to the proponent to be a relevant consideration under the clause 20(1) criteria and, if so, where the OSCG considers this consideration sits within these criteria
    - whether the employment figures within the 7 September 2016 briefing were provided by Peregrine in connection with the proposed development and, if not:
        - the extent to which the OSCG sought information as to the employment to be generated by the proposed development (as opposed to developments by Peregrine, generally)
        - the extent to which the OSCG considers it appropriate to rely on figures supplied in connection with other proposed developments.

51. By letter dated 13 April 2017 Mr Hallion responded:

> Requests to assign DAC as the relevant assessment authority are lodged either direct with DPTI or my office. When received direct by DPTI, the practice is to provide a copy of the request to my office for preliminary review.
>
> On 12 May 2016, Peregrine lodged a call-in request with DPTI which was referred same day to my office[.]
>
> It is the role of Team Leader, State Coordinator-General and Public Housing, DPTI to undertake an assessment of each call-in request and provide formal advice to the State Coordinator-General.
>
> On 17 June 2016, it was noted by the [Unit Manager, Crown Development and Grants (DPTI)] that the values in the cost estimate report prepared by Rider Levett Bucknell [sic] were not consistent with other recent On The Run (OTR) proposals which had been submitted as part of development feasibility analysis.
>
> [Unit Manager, Crown Development and Grants (DPTI)] had telephoned me to inform the [sic] variance. It was agreed that my office would contact Peregrine to seek clarification of the cost estimate report. If either my office or DPTI consider cost estimates to be either too high or too low compared to other similar sites/developments then we can raise those concerns with the investor.
>
> On 3 August 2016, Peregrine advised additional [sic] scope to the proposed works and lodged a revised call-in request. The additional scope comprised:
> - 2 x dog wash
> - LPG
> - Stormceptor (in lieu of Ecosol)

- Solar
- Paving
- Revised fit out (as per [Site C] concept store)
- Electronic shelf pricing

On 7 September 2016, [Team Leader – Coordinator General and Public Housing (DPTI)] (DPTI's Team Leader, State Coordinator-General and Public Housing) submitted the assessment of the Peregrine request to appoint DAC as the relevant authority.

The assessment stated that the proponent had provided an independent detailed Quantity Surveyor (QS) report in relation to the required $3 million threshold. The QS report indicated a proposed total project cost of $3.1 million. In this regard, the proposal was considered to have satisfied the threshold (first test).

In terms of the second test, the proponent had advised that each new store employs between 15-50 people, and supports up to 100 jobs during construction. The proposal would be one of many OTR sites located across separate Council areas and in this regard it is also considered sensible for a proponent with a portfolio of applications to deal with a single assessment authority, as this approach provides consistency in process and interpretation of the relevant Development Plans. In this regard, the second test was considered to have been satisfied.

Legislation requires the State Coordinator-General to advise, in writing, the proponent and relevant council or regional development assessment panel on any determination that DAC has been appointed the relevant planning authority for the proposal. At this stage, I also take the opportunity to personally consult with the Chief Executive Officer of Council informing of my determination.

On 15 September 2016, I contacted the A/CEO City of Burnside to inform my [sic] intention to exercise authority under Section 10(20) of the Development Regulations 2008[.]

[…]

This determination accords with the role of the State Coordinator-General to assist private sector developers with proposals that have a construction value of more than $3 million, by unlocking red tape and streamlining the approval process.

In forwarding my determination to [Team Leader – Coordinator General and Public Housing (DPTI)], I asked that Peregrine be informed of the concerns raised by DPTI Transport for the subject site. These concerns included turning profiles that would need to be provided for fuel deliveries/service vehicles and that access can [sic] safely and conveniently enter and exit the site in a forward direction, without impacting the safety and operation of Kensington Road and the Kensington Road/May Terrace junction.

As outlined in my earlier letter, while each project is considered on its own merits and each must meet the Schedule 10(20) requirements, as a portfolio they are also incredibly significant to the State as each new store employs between 15 and 20 people and up to 100 construction jobs.

Further when any proponent has multiple applications, the assessment authority (DAC) offers consistency in approach and interpretation of the relevant Development Plans. It is also important to note that proposals are assessed against the relevant Development Plan, will be publicly notified and referred to council and any relevant state agency (where required). This is not a fast track process but rather a streamlined one – one that provides a significant local company the opportunity to have multiple applications assessed by the one assessment authority.

When exercising my authority under clause 20 of Schedule 10, the application is referred to Council for a period of six (6) weeks within which time Council may make comment in relation to their specific areas of expertise.

> It should be noted that making a determination to assign DAC as the relevant planning authority does not constitute a form of advocacy nor does it imply a favourable assessment outcome. The proposal is still required to go through a complete development assessment process in line with the requirements of the *Development Act 1993* and Development Regulations 2008.
>
> Following the assessment process, the final decision to grant or refuse Development Plan Consent to the proposal is made by DAC.

52. My investigation also sought to clarify whether the OSCG has 'called in' any other proposed service station developments (that is, service station developments not proposed by Peregrine). Mr Hallion accordingly advised:

> An ampm service station redevelopment at 65 Mount Barker Road, Stirling by the Agostino Group totalling $4.2 million was assigned to DAC on 20 November 2015 and subsequently granted Development Plan Consent. At the time, the proposal was expected to provide ongoing employment in the order of 15 positions and generate additional supply chain developments. A number of other proposals by the Agostino Group are also under assessment. My office is also assisting Caltex Australia with proposals at Dry Creek and Tintinara.
>
> In relation to investors with multiple sites, I have also assisted Woolworths, ALDI, Bunnings, Masters, Westfield (Scentre Group) and Life Care Incorporated offering them support if they are investing in the State on multiple sites.
>
> Since the introduction of the new planning reforms in July 2014, over 150 proposals have been referred to the State Coordinator-General for consideration and assistance. Of these 76 proposals have been called-in for assessment by DAC including but not limited to Wilderness College, ALDI, Life Care Incorporated, Peregrine Corporation, Hungry Jack's Pty Ltd, Rivergum Homes, Coopers Brewery Ltd, Concordia College, Resthaven Incorporated, Adelaide Resource Recovery, Woodforde JV Pty Ltd, Minda Incorporated, St Andrews Primary School, Southern Cross Care, Commercial & General Constructions, T&S Goodwood Pty Ltd, Perpetual Holdings, Scentre Group Bunnings/Coles, Hummingbird Homes, Cedar Woods, CLG Asset Management Investment Development, RES Australia Pty Ltd, Pembroke School, Starfish Developments, Winwest Group, and C&G Group.

Whether the Office of the State Coordinator-General erred in concluding that the total amount to be applied to works associated with the proposed development would exceed $3 million

53. Pursuant to clause 20(1) of Schedule 10 of the Development Regulations, the State Coordinator-General's discretion to 'call in' a proposal is only enlivened where 'the 'total amount to be applied to any work, when all stages of the development are completed,' exceeds $3 million.

54. Both the 7 September 2016 briefing and Mr Hallion's submissions to my investigation identify the cost estimate disclosed within the second cost estimate report as forming the basis for the OSCG's conclusion that the proposed development satisfied this first limb of the clause 20(1) criteria.

55. The second cost estimate report disclosed a total estimated cost of $3,163,000 within an estimated range of $3 million to $3.3 million, exclusive of GST. This followed the first cost estimate report which, in the absence of the additional works proposed in the second cost estimate report, suggested a total estimated cost of $2,802,000 within an estimated range of $2.7 million to $2.9 million, exclusive of GST.

56. It is clear that the second cost estimate report was prepared in light of the feedback provided by [Senior Engineer, Civil & Commercial (OSCG)] to Peregrine's Corporate Lawyer during the 27 June 2016 telephone call.

57. The notes concerning this discussion are somewhat troubling. It appears that the OSCG, having formed the view that the figures provided in the first cost estimate report fell below the $3 million threshold (and having compared these figures with those provided by Peregrine in connection with other OTR sites) suggested to Peregrine that it 'review' its initial cost estimates for 'any errors'.

58. I query the appropriateness of the OSCG taking such a pro-active approach and posit whether it would have been more appropriate to simply reject the call-in request in the form provided. I query whether the course adopted by the OSCG in this matter is consistent with its approach to other developments.

59. In my view, it would have been open to Peregrine to conclude from this exchange that an amended quantity surveyor's report increasing the costs of certain items so as to bring the total estimated cost over the $3 million threshold would not have been unfavourably received by the OSCG. This inference appears to be supported by the [Team Leader – Coordinator General and Public Housing (DPTI)] email to [Senior Engineer, Civil & Commercial (OSCG)] that same day.[12]

60. Peregrine appears to have ultimately determined to revise the scope of the proposed development itself so as to bring the total project cost above the $3 million threshold. Although one may wonder why a developer would willingly elect to increase the costs associated with a project by $361,000 in order to secure assessment before the Development Assessment Commission, I do not consider this to be a relevant consideration for the purposes of the present investigation. The only relevant consideration under clause 20(1)(a) for the OSCG was whether the figures within the second cost estimate report accurately described the project and were capable of being relied upon.

61. The records provided to my Office do not disclose any meaningful scrutiny on the part of the OSCG of the figures provided within the second cost estimate report. In my view, the circumstances of the revised call-in request justified such scrutiny.[13] One cannot but take notice that the lower bound of the total estimated project cost range within the second cost estimate report fell at the exact figure identified within the threshold clause of the Development Regulations.

62. This criticism aside, I accept that the OSCG was entitled to place a considerable degree of weight on the inclusion of the additional works identified within the second cost estimate report. As it stood, the OSCG was in receipt of a detailed cost estimate report (itself enclosing a detailed cost breakdown) provided by a licensed and independent quantity surveyor that provided a reasonable explanation for the difference between the first and second cost estimates.

63. My view on this issue would be markedly different had Peregrine supplied a report that merely adjusted the figures provided in the first cost estimate report (that is, in the absence of any revisions to the scope of the project itself).

64. I also accept, as Mr Hallion submitted in response to my provisional report, that the OSCG was entitled to place considerable weight on DPTI's 'expertise in assessment and determination of the accuracy of cost estimates' in its own assessment of the project's satisfaction of the cost threshold.

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12 'If their revised costing comes back at over 3 mil, we will prepare call in letters today for Jim to sign.'

13 I say this in light of both the communications between the OSCG and Peregrine leading to the submission of the second cost estimate report and certain comments within the records provided to my Office that suggest a concern on the part of the OSCG that Peregrine might have provided an 'inflated' cost estimate in connection with a separate, otherwise unrelated proposal; *see* email from [Team Leader – Coordinator General and Public Housing (DPTI)] to [Unit Manager Building Policy (DPTI)] dated 26 July 2016.

65. I simply note, however, that I have nothing before me to suggest that DPTI meaningfully scrutinised the figures provided in the second cost estimate report or, if it did, that the OSCG was advised as such. The briefing provided to Mr Hallion certainly did not address this issue.[14]

66. I accept that the records provided to my investigation suggest that the OSCG and DPTI have previously sought qualified advice in circumstances where the itemised costs supplied by Peregrine have not appeared commensurate with other, similar projects.[15]

67. On balance, and my criticism of the OSCG's approach to the second cost estimate report notwithstanding, I am not ultimately satisfied that the OSCG's acceptance of the figures provided in the second cost estimate report amounted to an administrative error of a kind contemplated by section 25(1) of the Ombudsman Act.

Whether the Office of the State Coordinator-General erred in determining that the proposed development was of economic significance to the State

68. Pursuant to clause 20(1)(b) of Schedule 10 of the Development Regulations, a project may be 'called-in' by notice in writing to the parties of the State Coordinator-General's determination that the development is 'a development of economic significance to the State'.[16]

69. I observe that the 7 September 2016 briefing to Mr Hallion relevantly provided:

> In terms of the second test, the proponent has advised that each new store employs between 15-50 people, and supports up to 100 jobs during construction. The proposal would be one of many OTR sites located across separate Council areas and in this regard it is also considered sensible for a proponent with a portfolio of applications to deal with a single assessment authority, as this approach provides for consistency in process and interpretation of the relevant Development Plans. In this regard, the second test is considered to have been satisfied.

70. Mr Hallion largely repeated this explanation in his submissions to my investigation.[17] Rather unfortunately, Mr Hallion did not directly respond to my request that he identify whether and how the OSCG considers the benefit of a 'single assessment authority' to the proponent to be a relevant consideration under clause 20(1)(b), or the extent to which the OSCG considers it appropriate to rely upon figures supplied in connection with other developments in considering the economic significance of a proposal.

71. In my view, the construction of clause 20(1)(b) is intended to require an evaluation of the economic significance of the individual development under consideration, as opposed to the cumulative significance of a number of developments or the relative importance of the proponent to the South Australian economy ('…is *a development*…'). In this regard, clause 20(1)(b) may be contrasted with section 46(1a) of the Development Act, which concerns the Minister's authority to issue a declaration with respect to a project of 'major environmental, social or economic importance' (emphasis added):

> (1a) A development or project may be considered to be of major environmental, social or economic importance due to the fact that ***the cumulative effect of the***

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14 'The proponent has provided an independent detailed Quantity Surveyor (QS) report in relation to the required $3 million threshold. The QS report indicates that the proposed total project cost is $3.1 million. In this regard, **the proposal is considered to have satisfied the first test**' (emphasis in original).

15 *See*, e.g., email from [Senior Engineer, Civil & Commercial (OSCG)] to [Team Leader – Coordinator General and Public Housing (DPTI)] dated 25 July 2016; email from [Team Leader – Coordinator General and Public Housing (DPTI)] to [Unit Manager Building Policy] dated 26 July 2016.

16 Subject to the $3 million threshold being satisfied.

17 Letter dated 10 February 2017.

> ***development or project, when considered in conjunction with any other development, project or activity*** already being undertaken or carried on, or proposed to be undertaken or carried on, at or within the vicinity of the relevant site, gives rise to issues of major environmental, social or economic importance.

72. I consider it of substantial import that Schedule 10 of the Development Regulations contains no equivalent or similar provision.

73. In my view, consideration of the economic significance of an individual proposal should not ordinarily be informed by a proponent's wider development portfolio. While it may be possible in certain circumstances for the success or failure of an otherwise non-significant proposal to be of wider import to a proponent's further economic dealings within the State, I do not consider this to be a common or even likely scenario confronting the OSCG.

74. In my view, clause 20(1)(b)(i) similarly does not contemplate the consideration of the potential benefit to the proponent in securing a 'single assessment authority' across multiple proposals. While this may be a consideration weighing in favour of the State Coordinator-General exercising his or her discretion to 'call-in' a given proposal, it is plain that this discretion is only enlivened once the cost threshold and 'economic significance' limbs are satisfied.

75. In my view, Mr Hallion's submissions to my investigation suggest a certain confusion on the part of the OSCG concerning the permissible considerations under clause 20(1)(b)(i). Contrast the following two (non-consecutive) passages from Mr Hallion's 13 April 2017 letter to my Office (emphasis added):

> ***[W]hile each project is considered on its own merits and each must meet the Schedule 10(20) requirements***, as a portfolio they are also incredibly significant to the State as each new store employs between 15 and 20 people and up to 100 construction jobs.
>
> In terms of the second test, the proponent had advised that each new store employs between 15-50 people, and supports up to 100 jobs during construction. The proposal would be one of many OTR sites located across separate Council areas and in this regard it is also considered sensible for a proponent with a portfolio of applications to deal with a single assessment authority, as this approach provides consistency in process and interpretation of the relevant Development Plans. ***In this regard, the second test was considered to have been satisfied.***

76. I consider that the terms of both the 7 September 2016 briefing and Mr Hallion's submissions to my investigation suggest that the OSCG placed significant weight upon the perceived benefit of a 'single assessment authority' to Peregrine in determining that the proposed development satisfied the second limb of clause 20(1). In doing so, I consider the State Coordinator-General's determination that the proposed development was of economic significance to the State to have been based on an irrelevant consideration within the meaning of section 25(1)(d) of the Ombudsman Act.

77. In his response to my provisional report, Mr Hallion submitted:

> I dispute your view that my determination that the proposed development was of economic significance to the State was based on irrelevant consideration [sic] (namely, the perceived benefit of a 'single assessment authority' to Peregrine)[.]
>
> […]
>
> On receipt of any given application, it is independently assessed by DPTI against the threshold tests and with regard to Clause 20(b) of Schedule 10, this development was considered to meet the requirements.

> On this occasion I deemed the employment figures of significance as per DPTI's recommendation, and therefore subsequently provided my approval.
>
> Reinforcing this position was the potential advantage for the proponent of a single assessment authority. The proposal by Peregrine would be one of many Peregrine sites located across separate Council areas and in this regard it was considered sensible for a proponent with a portfolio of applications to deal with a single assessment authority, as this approach provides consistency in process and interpretation of the relevant Development Plans. The proposal did, however, still need to meet the requirements of clauses (a) and (b) above and it was my determination that it did so on the advice from DPTI.
>
> Hence my determination to "call-in" the proposal included potential delays with the Council pathway and reaffirmed my position to assign DAC as the appropriate assessment authority for this development.

78. With all respect to Mr Hallion, I am not satisfied that the OSCG's previous submissions to my Office are consistent with this position. I simply note that Mr Hallion, notwithstanding my express request that he do so,[18] previously declined to identify whether and how the OSCG's consideration of the benefit of a 'single assessment authority' fell within the clause 20(1) criteria.

79. As I have observed above, the terms of both the 7 September 2016 briefing and Mr Hallion's earlier submissions to my investigation suggest that this issue significantly informed the OSCG's assessment of the economic significance of the proposal. Viewed in the most charitable light, it appears that the OSCG may have conflated these considerations to some degree.

80. The 7 September 2016 briefing and Mr Hallion's submissions suggest that the OSCG's assessment of the economic significance of the proposed development was also heavily reliant on prospective employment figures said to relate to OTR sites, generally, as opposed to the proposed development itself.

81. While the OSCG's understanding of the employment ordinarily generated by each OTR development may not have been wholly irrelevant, strictly speaking, to its assessment of the economic significance of the proposed development, I do not think it was appropriate for the OSCG to proceed on an assumption (that is, absent explicit confirmation from Peregrine) that the employment to be generated by the proposed development was necessarily consistent with other Peregrine sites.[19]

82. Overall, there appears to have been a concerning lack of rigour in obtaining and assessing information in relation to this particular site.

83. In any case, I consider the employment figures relied upon by the OSCG to have been impermissibly vague. In my view, there will be a substantial difference between the economic impact of a store that employs 15 persons and the economic impact of a store that employs 50 persons. Similarly, the OSCG appears to have received no evidence that this particular development was likely to employ 'up to 100' persons during construction, even if one ignores the inherent imprecision in this description.

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[18] Letter from Ombudsman SA to the OSCG dated 24 March 2017 ('please provide my Office with […] an explanation as to whether your Office considers the benefit of a "single assessment authority" to the proponent to be a relevant consideration under the Schedule 10(20) criteria and, if so, where your Office considers this consideration sits within the criteria'). *See also* letter from Ombudsman SA to the OSCG dated 1 February 2017 ('please provide my Office with […] an explanation as to how you determined the development to be of economic significance to the State[.] […] Please also provide my Office with […] an explanation as to the extent to which, if at all, […] the portfolio of Shahin Enterprises informed your determination in the present matter.').

[19] I note, for example, that the correspondence supplied to my Office suggests that the proposed development is somewhat smaller than is typical of OTR sites.

84. In my view, the call-in request submitted by Peregrine was not capable of satisfying the first requirement identified within the OSCG's checklist for such requests. Had either of Peregrine's letters concerning the proposed development been meaningfully assessed against this item (which requires that a call-in request identify, *inter alia*, '[c]onstruction and ongoing employment impact estimates') it is likely that the project would not have advanced further in its initial state.

85. I consider the OSCG's consideration of this information to be characteristic of a greater failing by the OSCG to appropriately distinguish between the proposed development and Peregrine's wider portfolio within the State.

86. While the OSCG could likely make certain assumptions as to the potential economic impact of the proposed development, it was a mistake to solely rely upon these assumptions in assessing the economic significance of the proposal.

87. In my view, the OSCG's failure to request and assess information specific to the economic impact of the proposed development and its decision to proceed on the information before it was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

88. In his response to my provisional report, Mr Hallion submitted:

> [I]t is the role of Team Leader, State Coordinator-General and Public Housing, DPTI to undertake an assessment of each "call-in" request under Clause 20 of Schedule 10 of the Development Regulations 2008 and provide formal advice to the State Coordinator-General.
>
> In reviewing this advice, consideration is given to the value of the project, creation of jobs as a result of direct employment outcomes in construction and flow on jobs from expenditure within the broader economy, and further employment created through the ongoing maintenance of the public real, buildings and servicing of the proposed development.
>
> That process was followed in the assessment of this proposal. I believe it is appropriate practice to rely upon standard job construction estimates and employment data provided by the proponent.

89. I accept that in assessing the economic significance of a given proposal the OSCG may properly consider both the direct and indirect benefits that might flow from the development. I do not consider the views expressed in my report to be inconsistent with this position.

90. I also do not consider it to be wholly inappropriate for the OSCG to presuppose certain information about the impact of a proposed development by reference to other, similar developments. The error, in my view, lies in the OSCG's apparent failure in the circumstances of this matter to seek any site-specific employment information or to otherwise consider whether and how the general employment figures provided by Peregrine were (or were not) consistent with the employment to be generated by the proposed development.

91. More worryingly, the correspondence supplied to my investigation suggests an element of pre-determination on the part of the OSCG and DPTI in assessing the economic significance of each OTR development. In this regard, I refer specifically to [Team Leader – Coordinator General and Public Housing (DPTI)'s] email to [Senior Engineer, Civil & Commercial (OSCG)] dated 30 June 2016:

> If their revised costing comes back at over 3 mil, we will prepare call in letters today for Jim to sign. If their numbers aren't over 3 million, we will not be in a position to recommend they be called in.

92. The records supplied to my Office do not disclose any discussion within the OSCG concerning the potential economic significance of the proposal prior to this date. Indeed, this requirement does not appear to have been discussed within the OSCG at all (at least in any recorded communications) prior to the 7 September 2016 briefing.

93. The OSCG's checklist concerning call-in requests suggests that proponents should provide estimates regarding the '[c]onstruction and ongoing employment impact' of a proposal for consideration by the OSCG in assessing its 'economic impact'.

94. I observe that the checklist does not provide any meaningful guidance as to the quantity or nature of jobs (that is, skilled or unskilled, full-time or casual) generated by a given proposal that will be considered sufficient to cause that proposal to be of 'economic significance to the State'. The checklist similarly does not identify whether or to what extent the OSCG considers the economic significance of a proposal may be demonstrated by additional or alternative considerations.

95. The Development Regulations and the Act itself are silent on what may amount to 'economic significance to the State'. The word 'significance' is quantitatively and qualitatively imprecise. I note that the *Macquarie Dictionary* defines the word to mean, *inter alia*, 'importance; consequence'.[20]

96. I have also had regard to the remarks of Foster J in *ACI Pet Operations Pty Ltd v Comptroller-General of Customs* (considering the word 'significant' rather than 'significance'):

> The word "significant" has acquired a number of shades of meaning in common parlance. For instance, it is not infrequently used as a substitute for "substantial". It is, however, clearly important that it be as given precise a meaning as possible in this legislative provision, as its use imports a major guiding consideration into the determination by the Comptroller of whether goods serve "similar functions". I turn, therefore, to the dictionaries for guidance and find that the Oxford English Dictionary (2nd Ed) defines the word (where relevant) as "full of meaning or import; important, notable; and having or conveying a meaning", and that the Macquarie Dictionary defines it as "important; of consequence; expressing a meaning; indicative".
>
> I derive assistance also from considering that the word is the opposite of "insignificant" which word is defined in the Macquarie Dictionary as meaning "unimportant, trifling or petty" and as "too small to be important". Looked at from this point of view "significant" may be regarded as meaning "not unimportant or trivial" or as "sufficiently large to be important".
>
> One could no doubt multiply meanings by recourse to other dictionaries. One thing is very clear, namely that there is necessarily a fair degree of value-judgment involved in attributing significance to something. Significance must also depend upon context. The very use of the term must frequently involve the subsidiary question "significant for what?".[21]

97. The answer to the 'subsidiary question' posed by His Honour is at least clear in the present circumstances: the development must be of 'economic significance' to the State of South Australia. In my view, this necessarily entails something more than mere economic significance to a 'local area' or 'region' (although considerations of this kind could of course inform an assessment as to the overall significance of a given proposal to the State).

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[20] *Macquarie Dictionary* (3rd ed.) at p. 1974.
[21] ACI Pet Operations Pty Ltd v Comptroller-General of Customs (1990) 26 FCR 531.

98. It is also of import, in my view, that clause 20(1) is constructed in such a way as to contemplate the possibility that a project may not be of economic significance to the State despite exceeding the $3 million threshold.

99. Although I am prepared to accept that the proposed development may be of some economic impact to the local area, I have real trouble in accepting that it is of economic significance to the State of South Australia.

100. Even if one accepts the employment figures considered by the OSCG at their absolute highest (i.e. 50 ongoing positions, of which, surely, only a fraction could ever be full-time or skilled, in addition to the jobs generated by construction), I simply do not consider the employment generated to be so considerable as to mean the project is of 'economic significance' to a State with an estimated workforce of approximately 1.4 million persons.[22] Any commercial development will create employment; what is envisaged by clause 20(1)(b)(i) is in my view something on a broader scale.

101. I can also see nothing in the description or nature of the proposed development itself that would otherwise support the OSCG's determination.

102. Even taking into account the imprecision of the phrase 'economic significance' and the value-judgement required, I do not consider it was reasonably open to the OSCG in the circumstances to determine that the project was of economic significance to the State.

103. In his response to my provisional report, Mr Hallion took issue with my interpretation of clause 20(1)(b)(i) and the meaning of the phrase 'economic significance to the State'. Mr Hallion submitted:

> Given that the Development Act and Regulations do not (as you point out) define economic significance to the State it is then potentially open to interpretation as to the intent of this clause. In these circumstances, it is important to understand the State Government's intentions at the time of development of the regulations and to any discussion in Parliament concerning the regulation.
>
> The Premier's press release of 8 July 2014, which announced a package of reforms to support private sector development […] did not refer to projects needed to be of large State wide [sic] scale, but specifically referred to projects over $3 million.
>
> Parliamentary debate on the regulation in November 2014 also provides support for the intention of the Government in its view of how this regulation would work. The Hon G A Kandelaars set out in some detail how this regulation was intended to work[.] […] He made very [sic] important point that this regulation was not intended to replace the major development process under the Development Act. He rightly indicated that significant projects will continue to be assessed under the major development provisions of the Act.
>
> Your contention that the regulations were intended only for larger projects of State wide [sic] impact is not correct. The Government already had an effective provision under the Development Act (the major development declaration) to deal with larger projects. What the Government was seeking was an effective means to deal with smaller projects which did not warrant major development declaration, but which were nevertheless blocked from proceeding (not by planning issues but by red tape).
>
> The Hon G A Kandelaar's [sic] summed up the Government's intention in the regulation stating "we need jobs now and we need investment now, and we have acted not to make this happen". Further support to this intention relates to the first test, that of construction cost. The threshold was set relatively low in value at $3 million to pick up on smaller but important projects which create jobs. Had the Government intended only State wide [sic] or large projects to be the subject of the regulation, they would have set the threshold at a much higher value. For a project to have State wide [sic] impact, it would have probably

[22] Australian Bureau of Statistics, Labour Force, pub. 6202.0, April 2017.

needed to be set at an order of magnitude much [sic] higher than the current threshold. Despite debate in Parliament at the time regarding the threshold, it ultimately stood at $3 million.

In my view the clear intention of the State Government, ultimately backed by Parliament, was to consider projects of construction value above $3 million (at each site) and [sic] the project had to be of an economic nature (as opposed to environmental or social projects) hence the economic test was also applied to avoid private resources with a value over $3 million being able to utilise the new regulation The focus of the regulation is on breaking down roadblocks to business investment in this State.

I should also point out while the focus is on business investment and job creation (both during construction and ongoing), economic significance can also be gained by projects that improve the State's economic performance through increased competition or through gains in economic efficiency. Increases in retail offerings by companies such as OTR and ALDI for instance result in increased competition in the sector and this lowers prices to consumers, giving the community more disposable income. This is an economic gain to the State.

Economic significance may also be achieved by projects with larger construction costs, but with few (if any) ongoing jobs, as the construction sector is a significant component of the State's economy and can provide a boost to economic growth, particularly in times of low jobs growth in other sectors. In the property sector much of the construction expenditure is spent on locally produced goods and services, so such projects tend to have substantial multiplier effects into the State economy.

In this context, I refer you to a study undertaken by Property Insights on behalf of the Urban Development Institute of Australia (UDIA) in March 2010 which examined the economic impact of investing in property development.

According to Property Insights, every one million dollars of development industry investment in South Australia generates 6.9 full time equivalent industry jobs. Development industry investment also indirectly supports jobs in a range of other industries. For every one million dollars of development industry investment, the combined direct and indirect employment impact is claimed by Property Insights to be fourteen (14) full time equivalent jobs.

Development industry activity attracts a range of State and Federal taxes. The industry contributes around 4.8% of the State tax base. Property Insights estimates that for every million dollars of development industry investment, direct taxes of $62.921 are generated. When indirect taxation impacts are considered, total taxes generated by one million dollars of development industry investment is estimated at $143,281.

104. Mr Hallion in these submissions has sought to draw my attention to remarks of the Hon Gerry Kandelaars MLC during debate within the Legislative Council of a motion of the Hon Mark Parnell MLC seeking to disallow the relevant amendments to the Development Regulations establishing the 'call in' process.

105. I set out these remarks in full below:

> **The Hon. G.A. KANDELAARS (20:00):** It will not surprise the Hon. Mark Parnell that the government does not support this motion. It supports economic growth and a future for our children. Since the regulations were introduced in August this year, the Coordinator-General has called in significant projects that were suffering from administrative delay rather than major issues with planning policy.
>
> The Coordinator-General's role builds on the successful delivery of commonwealth Nation Building and Affordable Housing Stimulus housing programs. As an example, Building the Education Revolution alone saw projects built at over 500 schools across the state, creating improved facilities for students and teachers, jobs for local builders and benefits for the building and construction industry of our state which, at the time, was facing dire consequences.

South Australia is not alone in introducing a significant role for the Coordinator-General. In fact, other states have far stronger powers for their coordinator-general roles. Projects identified by the Coordinator-General are still assessed against current planning policies in the system. They go through the same assessment process just as any other application does. They still include the same statutory referrals, including a six-week referral to council, and they still include the same public notification and appeal processes. Quite simply, these projects are not bypassing the planning system. This power is being used by exception and as a last resort option.

The first priority is to work with local councils and state referral agencies to assist them working through issues. The vast majority of projects discussed will remain with local councils for assessment. Often, the inclusion of a third party can help work through long-running blockages. This approach has already been successful. However, this process takes time and is difficult. It would be easier just to call in projects, but this is not the approach that has been taken. The government has publicly acknowledged that it is not just council development assessment panels blocking the process but also state referral agencies.

It is for this reason the Coordinator-General has established a task force to work through longstanding cultural issues within regulatory agencies to move towards can-do, solution-oriented bodies. Evidence is mounting that there are real blockages and legitimate concerns. The Coordinator-General has met with over 40 significant investors in this state and new investors looking to come here and invest. Councils and agencies are on notice to find solutions and work through often longstanding blockages.

Secondly, the government is not bypassing the excellent work of the expert panel. It is the government's view that we cannot sit idly by until reforms are introduced. Our intent in establishing this process was as an interim measure pending the final report of the expert panel to be provided in December this year. Of course, as the Hon. Mark Parnell would know, significant legislative reform takes time and we need economic growth now. We need jobs now and we need investment now, and we have acted now to make this happen.

The government has been overwhelmed by interest in this process, so it has extended the appointment of Mr Hallion as Coordinator-General. The Coordinator-General powers do not undermine the planning system and its existing processes. Rather, it provides another tool in the toolkit to help facilitate the right development in the right location, again, I stress, by exception.

This leads to the third point: this process is not intended to replace major development process. This notion is nonsense. Significant projects will continue to be assessed under the major development provisions of the act. The government strongly disputes the Hon. Mark Parnell's remark that potentially every development in the state worth more than $3 million has now been taken out of the hands of local councils.

The Hon. Mark Parnell's comments that these projects do not individually meet the $3 million threshold is simply not true. The tests in the regulations require that each project exceeds $3 million in value and to be of economic significance to the state. The individual project costs must exceed $3 million and they do include construction, fit-out, professional fees and must be verified by a quantity surveyor.

One of the big issues that this whole process has highlighted, particularly in relation to councils, is that large organisations wishing to undertake multiple developments have found that they do not get consistent planning advice given to them through councils. It is not uncommon to have the same development put to two different councils and get two different answers. This is hellishly—

The Hon. M.C. Parnell interjecting:

The PRESIDENT: Order!

> **The Hon. G.A. KANDELAARS:** –frustrating for the business community. The lack of consistency when we are talking about the same zone and the same development in a different council area getting a different outcome is quite annoying for the business community. I encourage all members to oppose the motion before you.

106. I consider these remarks to be of only limited assistance in the present matter.

107. Firstly, I observe that the remarks were not delivered by a Minister as part of any relevant second reading speech;[23] they in fact appear to have been delivered after the relevant amendments entered into force. A considerable portion of what was said appears to have been directed at the manner in which the relevant amendments were being implemented, although, as submitted by Mr Hallion, there are some comments purporting to identify the object and purpose of the amendments themselves.

108. I need only point to the manner in which they were introduced by the Hon Kandelaars MLC to observe that the comments also appear to have been highly politicised.[24]

109. I observe the remarks of the Full Court of the Supreme Court of South Australia in *Palace Gallery Pty Ltd v Liquor and Gambling Commissioner & Ors*, which I consider to be apposite to the matter at hand:

> In this State, the use of extrinsic material of this kind in the construction of a statutory provision is governed by the common law. Such materials can be considered to determine the mischief to which an Act is directed or to identify the purpose of a statutory provision. It is not permissible to resort to such materials as an aid to the interpretation of a law in force at the time of the statement. The statement upon which the plaintiff seeks to rely is not made by a Minister on the second reading of the bill. Further it constitutes a statement about the effect of the proposed amendment rather than identifying the mischief to which the amendment was directed or the object and purpose of the provision. While courts can have recourse to second reading speeches for the purpose of ascertaining the mischief to which a provision is directed or the purpose of that provision, it is for the court to determine the operation and effect of a statutory provision once enacted.[25]

110. To the extent that it may have been appropriate for the OSCG to have had regard to the Hon Kandelaars MLC's remarks in its assessment of the proposed development (a proposition that causes me some unease), I am not persuaded that they necessarily further Mr Hallion's proffered construction of clause 20(1)(b)(i).

111. The suggestion that the conferral of jurisdiction to the State Coordinator-General under clause 20(1) 'was not intended to replace the major development process' does not in my view undermine the construction of clause 20(1)(b)(i) advanced by my Office.

112. The major development process established by Division 2 of Part 4 of the Development Act empowers the Minister for Planning to issue a 'major development' declaration with respect to a development (or class of developments) considered to be 'of major environmental, social or economic importance' in circumstances where the Minister is satisfied that such a declaration is 'appropriate or necessary for the proper assessment' of that development or class of developments.

113. A major development declaration of this kind serves to exempt the development or class of developments from the general development assessment scheme established under the Development Act, substituting instead a process by which it ultimately falls upon the Governor to grant or refuse development approval.

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[23] There is in fact no second reading speech of assistance in this matter; there being no corresponding amendments to the Development Act.

[24] 'It will not surprise the Hon. Mark Parnell that the government does not support this motion. It supports economic growth and a future for our children…'

[25] *Palace Gallery Pty Ltd v Liquor and Gambling Commissioner & Ors* [2014] SASCFC 26 at [49] (citations omitted).

114. As I have observed earlier in this report, the major development designation invites the consideration of a range of factors that may not also amount to relevant considerations for the purposes of the OSCG's assessment of a proposal under clause 20(1)(b)(i).[26]

115. I do not consider my construction of clause 20(1)(b)(i) to mean that the State Coordinator-General would only be empowered to call in projects already capable of meeting 'major development' status under section 46 of the Development Act. Even if one assumes a degree of equivalence between the terms 'significance' and 'importance' within the respective provisions, the inclusion of the qualifier 'major' within section 46 in my view serves to establish a clear and meaningful distinction between the two thresholds.

116. In light of this, and owing to the manner and form of delivery, I do not consider it possible to derive any real guidance from the Hon Kandelaars MLC's statement to the effect that 'significant' projects would continue to be assessed under the major development provisions. To determine otherwise would in my view require the consideration of these comments in a manner far beyond their intended purpose and in a manner inconsistent with the established principles of statutory interpretation.

117. By its nature and content, I am similarly not persuaded that the press release of the Premier on 8 July 2014 is capable of furthering Mr Hallion's proffered construction of clause 20(1).[27]

118. Mr Hallion has submitted that 'the clear intention of the State Government' in establishing clause 20(1)(b)(i) was to ensure that the discretion to call in a proposal will only be enlivened when a project is of an 'economic nature', 'as opposed to environmental or social projects'.

119. I simply do not consider this to be the plain reading of clause 20(1)(b)(i). Had the Government intended to establish a regime delineating between 'economic projects' on the one hand, and 'social' and 'environmental' projects on the other, I consider there would have been far more intuitive ways for it to do so.[28]

120. I am similarly unable to agree with Mr Hallion's submission that the 'relatively low' $3 million threshold in some way reinforces his construction of the 'economic significance' test. Such a reading in my view serves to conflate the cost in establishing a project with its ultimate economic impact. While there may often be a direct relationship between the two estimates, a project requiring relatively little development capital may nevertheless present significant ongoing economic benefits to the State through, for example, increased tourism, establishing or furthering a local industry or, as the OSCG appears to readily accept, generating significant employment.

121. In my view, the $3 million threshold may not be intended to be overly proscriptive for this very reason. At the same time, it would appear to prevent the OSCG from being inundated with call-in requests lodged in relation to minor or inconsequential developments.

122. I accept, as submitted by Mr Hallion, and subject to my comments above, that the economic significance of a given proposal may be wholly or partly demonstrated by

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[26] Development Act, section 46(1a).

[27] 'Premier Jay Weatherill has announced a package of reforms to support private sector development[.] […] Department of the Premier and Cabinet Chief Executive Jim Hallion will take on a new private sector development coordination role to assist lodged projects valued over $3 million to clear bureaucratic hurdles. […] "Developers with projects valued over $3 million across the State will be invited to contact Mr Hallion so he may assist them through any blockages they might have in front of them across all levels of Government." [Mr Weatherill said]').

[28] The proffered construction would also appear to be somewhat at odds with the OSCG's checklist, which suggests that proponents provide construction and ongoing employment impact estimates 'to assess economic impact'.

anticipated construction costs, the prospect of increased competition or increased economic efficiency.

123. In my provisional report I expressed the view that the OSCG's determination that the proposed development was of economic significance to the State was unreasonable in the circumstances.

124. While providing me with greater insight into the OSCG's assessment of this and other developments, Mr Hallion's submissions in response to my provisional report have not caused me to reach a different conclusion.

125. Even if I were to accept that the OSCG's interpretation of the 'economic significance' requirement, while wrong, was reasonably open to it in the circumstances (a finding that I do not necessarily make), I do not consider this would be capable of curing the various other defects with respect to its assessment of the proposed development so as to render the determination reasonable in all the circumstances.

126. Viewed in totality, I do not consider that a reasonable decision-maker, having appropriate regard to the clause 20(1) criteria and all the relevant circumstances, and setting aside the factors erroneously considered by the OSCG, could have made such a determination on the information available.

127. In light of the various errors I have identified in its consideration of the proposal, the OSCG's determination in the circumstances that the proposed development was of economic significance to the State was in my view unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act.

128. The council in its response to my provisional report took issue with my foreshadowed recommendation, submitting that I should instead recommend 'that any future Development Application that is submitted by the applicant at this site, be referred to the Council, as the relevant planning authority.'

129. I do not have the power to issue recommendations to Peregrine under the Ombudsman Act. I have therefore interpreted the council's request to mean that I should recommend that the OSCG decline to 'call in' any further proposals from Peregrine in relation to the Kensington Road site.

130. While the council's priorities in this matter are somewhat understandable, I consider the proposed recommendation to be unduly proscriptive upon the OSCG and not capable of addressing the wider issues raised by my investigation. That said, my expectation is that the OSCG will be mindful of the views I have expressed in this report in its consideration of any future developments of a nature and scale similar to the proposed development.

Summary and Recommendations

In light of the above, my final view is that:

- the OSCG's determination that the proposed development was of economic significance to the State was based on an irrelevant consideration (namely, the perceived benefit of a 'single assessment authority' to Peregrine) within the meaning of section 25(1)(d) of the Ombudsman Act
- the OSCG's failure to request and assess information specific to the economic impact of the proposed development and its decision to proceed on the information before it was wrong within the meaning of section 25(1)(g) of the Ombudsman Act

- the OSCG's determination that the proposed development was of economic significance to the State was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act.

To remedy these errors, I make a recommendation under section 25(2) of the Ombudsman Act that the OSCG develop internal guidelines as to how projects are to be assessed in accordance with the clause 20(1) criteria, that:

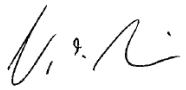
- clearly identify the considerations deemed to be relevant and irrelevant when assessing proposals against the clause 20(1) criteria
- clarify that the perceived benefit to the applicant of a 'single assessment authority' may only be considered at a stage when the OSCG is satisfied that the clause 20(1) criteria have been met and the discretion to 'call in' a proposal has been enlivened
- refer to the need to obtain clear, site-specific employment estimates in connection with each proposal
- clarify that a proposal that satisfies the $3 million threshold will not by this fact alone be of economic significance to the State.

Final comment

In accordance with section 25(4) of the Ombudsman Act the principal officer of the Department of the Premier and Cabinet should report to my Office by **28 September 2017** on what steps have been taken to give effect to the recommendation above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to my Office.



Wayne Lines
SA OMBUDSMAN

27 June 2017