



AUSTRALIAN LOCAL
GOVERNMENT ASSOCIATION

The Role of Local Government as Regulator

**Performance Benchmarking of
Australian Business Regulation**

FINAL SUBMISSION

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Introduction

The Australian Local Government Association (ALGA) welcomes the opportunity to provide this submission to the Productivity Commission's inquiry into the role of local government as regulator.

ALGA is the national voice of Australia's 565 local councils. Its membership is comprised of the state and territory local government associations across the country, with the Government of the ACT also being a member of ALGA, reflecting its unique combination of municipal and territory functions. ALGA has consulted its member associations and the comments made in this submission should be read in conjunction with submissions from state and territory associations and individual councils.

ALGA would like to congratulate the Commission on the quality of the draft report and supports many of the overarching conclusions identified under the key points section on page to 2 of the report. The Commission has correctly identified a number of issues that largely reinforce the supporting role played by local government "in the hierarchy and its relations with the other two levels of government". In particular ALGA full endorses the finding that "implementing and enforcing state and territory laws, rather than local laws, predominates local governments (LG) regulatory activities. While the Commonwealth cannot delegate regulatory responsibilities directly to LG, it influences them via national frameworks, such as food safety, where LG play a role in implementing them".

Equally valid is the view that unnecessary business burdens will be minimised when LGs regulate well and that central to this happening is when the state (and Northern Territory) provide the requisite resources and expertise to fill such gaps as providing:

- the necessary guidance on how to administer, inspect and enforce regulations;
- a clear indication and appreciation of state regulatory priorities;
- proper consideration of LG capacity to administer and enforce regulation;
- a comprehensive and easily accessible central register of the state laws for which LG has a role in administration, enforcement and/or referral.

All of the above are important and relevant observations that ALGA would argue reinforces the need for state and territory governments to do more in relieving the pressure and need for local government to introduce additional regulations and providing the necessary resources for efficient administration and enforcement of regulatory responsibilities.

ALGA notes the leading practices identified by the Commission including the facilitation of collaboration among local government to build capacity including such measures as strengthened regional collaboration and partnering and mentoring

between large and small and urban and rural councils. Councils have a long track record of collaboration and mentoring but the costs of such activities have been borne by the councils themselves. Such collaboration and mentoring should not be seen as a substitute for appropriate resourcing and support by the state governments in the regulatory area as this is only placing additional burdens on those ratepayers of larger councils when the broader regulatory responsibility rests with the overarching jurisdictions.

The imposition and cost of introducing business related regulations and their enforcement also burdens local government, particularly where resources are constrained and additional multiple policy pressures (such as dealing with climate change, impacts of natural hazards, housing affordability) are demanding urgent attention. Having said this, ALGA is of the view that it is an over generalisation that “most costs incurred (by business) are due to delays, requirements, restrictions, fees and penalties”. It is incorrect to associate proper and considered assessment as merely a delay. This is equally the case when determining authorities impose reasonable requirements such as conditions and or restrictions on development applications.

It should be noted that in a majority of instances the actual regulatory fees and penalties imposed by local governments do not cover the costs of undertaking these tasks. Whilst business will always argue that these are unnecessary or excessive costs, local governments are left with little option when faced with dealing with “unfunded mandates” given to them by other levels of government.

ALGA would also argue that it is not possible to effectively benchmark and evaluate regulatory controls without also understanding the benefits provided to society from having such regulations. Society is increasingly sophisticated and there has been a growth in citizens and other interested stakeholders (including business themselves) demanding governments do more in ‘better’ managing the economy and community at large through the use of regulatory mechanisms.

ALGA is equally pleased that the Commission acknowledges the challenging methodological issues which arise when trying to ascertain the actual regulatory impacts local government regulations have on the costs experienced by businesses and the overall difficulty in benchmarking. Local government is a creature of state and territory governments and given the differing legislative controls that exist, it is difficult to make relevant comparisons between councils and therefore detailed recommendations on how to reduce the regulatory costs impacts on businesses.

Nevertheless the draft report provides a starting point for this benchmarking project and highlights some of the complex issues relating to the variety and impact various regulations have on businesses in Australia. In principle the promotion and adoption of leading practice is welcomed by local government. However the respective State

government departments of local government should appropriately resource such a business improvement activity.

This submission focuses on those aspects of the Commission's Draft report on which ALGA is able to provide comments reflecting the collective concerns of state and territory local government associations. To this extent, ALGA's comments reflect an overarching concern that an examination of regulatory impacts arising from the operations of local government must take account of the context in which councils operate.

Councils are more than just a provider of services and approval institutions. Local government today seeks to respond to the diverse needs and desires of the community it represents as well as playing its role in undertaking long term planning, assessing developments, sustainably managing the environment, contributing to community education, as well as being a direct provider of diverse range of social and physical services. It should also be acknowledged that many councils are also active participants in strengthening economic development in their local or regional communities and as such are equally impacted, directly and indirectly by regulations impacting businesses.

Business Regulation in Context

Any evaluation of the impacts of regulation on business must start with a thorough understanding and appreciation of why specific regulations were introduced.. It is too simple to just associate regulation with 'red tape' and consider it purely a process that makes life difficult and expensive for those affected.

Removing emotion from the discussion and focusing on the outcomes sought to be achieved by introducing regulation into the system of decision making provides a more balanced view. For instance, few if any individuals or organizations would support the introduction of more regulations to manage the growth and development of our cities, be this for housing or employment purposes. But if asked whether there is a public role to be played in protecting the broader community interest, ensuring basic standards of public health and safety, maintaining the quality of public realm, responsibly managing the negative and positive externalities of private and public actions, protecting the natural environment or seeking to strengthen opportunities for social inclusion and access; the responses are likely to be more favourable and generate further discussion on the how to consolidate, introduce better or improve the implementation of regulation rather than just eliminating it.

In practice, regulations today are competing in a complex policy environment and the balancing of competing interests is often felt more intensively at the local level. Local government were established to meet the needs of local communities and over time the role they play and have been given by other levels of government, particularly state government, has evolved to cover a range of services, activity

controls and placed based management. As such, identifying the variety and number of regulations at the local government level will do little other than confirm the expansive nature of regulations that now exist. Such an analysis will not assist with evaluating the benefits or otherwise that arise from having such regulations or the broader benefits that the business sector or community at large have realised.

Democratically elected and answerable to State and territory Government

In Australia, local government is established under state/territory legislation and its structures, powers and functions are determined by such legislation. In all jurisdictions in the last 10-15 years, the legislation creating and regulating local government has been reviewed and significantly amended or replaced with new legislation that gives local councils greater general competence powers. In most jurisdictions this has been the first time that the legislation creating and regulating local government had been substantially reviewed and modernised in the past fifty years. These changes have generally enabled local governments to provide a wider range of services and undertake functions that better meet the needs of their local communities.

Local government is an elected sphere of government, representative of and directly accountable to local communities. Since it is democratically elected and responsible for a broad range of services in a clearly defined geographic area, local government is well placed to understand and meet local needs and to respond to those needs in ways that are appropriate to local conditions. These circumstances have supported the need and justification for introducing appropriate local laws. As such, the key consideration when examining the value of local regulations is its appropriateness in regards to the value proposition it delivers when compared with costs.

Nevertheless, a contributor to the growth in local laws has been a combination of cost shifting responsibilities handed down to the local level and minimal regulatory making guidance by the state or Commonwealth governments. There has also been little evaluation of the real impacts such regulations have on business and the broader community.

Local governments are often treated as the 'servants' by the other levels of government, particularly by the state/territory governments. This has created tensions over direction setting and accountability. The fact that local governments have a measure of choice over the range of non-statutory functions they may exercise, as well as the manner in which they interpret their statutory functions, results in a considerable range of differences across local councils within and between jurisdictions. These differences reflect the geographic, historic and socio-economic variability that exists in Australia.

The diversity of local government is reflected in differing powers and functions, the level of financial resources, population size, geographic area, location and availability of human resources. Any consideration of local governments' role as a regulator must be cognisant of the diversity of roles and functions of local government, the wide range of issues confronting councils, and the differing communities and interests they represent throughout Australia.

Roles and Responsibilities of Local Government

The draft report is correct in saying that the roles and responsibilities of local government have significantly increased over recent decades. Demands upon local government include not only the provision of core local government services but also significantly increased liability for the maintenance and renewal of ageing infrastructure, as well as a growing range of new services. Some of the new roles, functions and powers have occurred as a result of policy choice and increased community expectations; others have been handed down by the other levels of government.

In 2008, the Productivity Commission found that the majority of local government spending was no longer exclusively in the areas of property-related services and roads' but also in the areas of recreation, health and welfare services. The more recent Henry Tax Review found that local governments have come to play an important role in the delivery of government services in Australia and concluded that given the expertise that local governments have in the delivery of some goods and services, (payments to local government for specific purposes) can represent value for money for higher levels of government.

There are many reasons why local government's role and responsibilities, as well as the range of services and infrastructure provided by it, have been evolving and expanding more into human services over recent decades. The impact of changing community demands and expectations prompted by demographic change (such as ageing populations), changing settlement patterns (sea' and tree' changers, as well as the growth of mining communities) and different economic conditions explains why local government has often chosen to expand its service types and levels within its general powers.

In some areas, functions have been devolved to local government by other levels of government. Sometimes this has been done in a transparent manner with appropriate funding support. In other cases, another level of government has raised the requirements associated with the services being delivered by local government, or has changed the operating environment in which local government services are delivered. On many occasions, devolution of responsibilities to local government is the product of 'unfunded' responsibility and/or cost shifting.

ALGA has argued that the increase in the provision of local government services that has occurred as a result of policy choice and increased community expectations is consistent with the local government's legislative responsibilities under state/territory local government acts that now reflect general competency principles. What remains outstanding is ensuring that local government receives adequate resourcing to properly carry out the services and functions it performs. Proper resourcing also includes sufficient funds for training and business improvement schemes, which would include opportunities to develop better regulatory practices.

Cost Shifting

Evidence before a previous House of Representatives Standing Committee Economic, Finance and Public Administration Inquiry into Local Government and Cost Shifting (the Hawker Committee 2003) clearly indicated that many of the new roles and responsibilities councils provide are largely a consequence of the practice of cost-shifting. That is, the burden of the cost of provision of a Commonwealth and or state/territory service (including services provided via a Commonwealth-State Specific Purpose Payment Agreement) that has been arbitrarily transferred to local government without a supporting revenue stream.

Transferring responsibility for the delivery of public services, including enforcement of regulation, from one sphere of government to another can encourage innovation and efficiency in the delivery of services to the community. However, the majority of such transfers have simply been a means for the Commonwealth, states and the Government of the Northern Territory to devolve responsibility and activity in order to improve their own fiscal positions. This transfer of responsibilities has also contributed to costs imposed on local government in administering regulation and stretched the ability of some councils to meet responsibilities in the face of resourcing constraints.

The public interest is not served when services are devolved without appropriate funding as this:

- leads to a distortion in the allocation of local government resources, causing inefficiencies within local government;
- reduces fiscal transparency within the overall public sector;
- leaves local government fiscally vulnerable, leading to financial instability;
- makes difficult the clear attribution of the costs of service delivery, leading to uninformed decision making within government;
- reduces the ability to assess performance, leading to a lack of accountability in the public sector;
- generates greater levels of regional inequality;
- reduces accountability of governments to their electors; and
- reduces the effectiveness of local democracy.

With the exception of NSW, the current evidence on the true extent of cost-shifting in Australia remains poor. This lack of detailed and comprehensive data allows cost-shifting governments to continue to avoid public scrutiny and unfairly places criticism on the role and responsibilities of Australia's 565 councils.

ALGA has argued consistently that a comprehensive study and assessment of cost-shifting to local government should be undertaken by the Productivity Commission in conjunction with state local government grants commissions, which hold comprehensive and relevant data. The lack of comprehensive, objective data quantifying the problem of cost-shifting leads to ambiguity.

In short ALGA believes the Commonwealth, as the major taxing level of government, must take responsibility for addressing the revenue sharing problems that leave local government seriously disadvantaged. This disadvantage is referenced in the draft report, but insufficient weight is given by the Commission to the need to address this issue.

Planning and development assessment systems

Under State legislation, local governments in all jurisdictions (except for the Northern Territory) are required to prepare a range of statutory planning documents that are legally binding. At the local level, these include planning schemes, codes and regulations within which the operational rules and criteria for development are set out. There is considerable variation in the format and content of these instruments within and between jurisdictions and the level of authority and autonomy given to local government to regulate. Regulations exist to control and manage the use and development of private and public lands in order to achieve agreed local, regional, state and sometimes national objectives and are an integral part of contemporary development approval processes in advanced economies.

Planning, especially as practiced at the local level, is often criticised for its regulatory impact on business, but governments have introduced a range of public policies and regulation that seek to address and deliver on wide range of community and business expectations. These complementary legislative requirements are extensive and range from Commonwealth requirements concerning telecommunications, native title, biodiversity and disability access, to more extensive and overlapping state legislation that deals with liquor licensing, and the protection of matters of heritage, threatened species, mineral resources, major road access and general flooding and bushfire management.

These additional and separate legislative requirements that deal with planning related matters, have significantly contributed to the complexity and confusion surrounding the operation of planning in Australia. It is regrettable that critics of the planning system often attribute this complexity only to local government when in reality local government provides a portal for the majority of planning and

development at the local level. The complexity of the planning system and the role of transactions between levels of government needs to be recognised and understood when attempting to measure the efficiency of the planning system and the costs and benefits of the corresponding regulatory frameworks.

As previously advised in the submissions ALGA has made to other Commission investigations (namely - Planning, Zoning and Development Assessment in 2011) it should be noted that not all development activity is subject to planning regulations. Advice from local government associations and some of the jurisdictional planning agencies annual DA performance reports (such as Victoria's Planning Permit Activity Report), indicates the vast majority of development proposals either do not require consent approval or if they do, are dealt with efficiently and within the existing jurisdictional statutory timeframes.

When delays are encountered there are usually a number of contributing factors at play including the submitting of incomplete or poor development applications. There is also a problem with the number of experienced planning officers able to be employed by local authorities and the extent of external referral advice that is required when assessing certain types of development proposals. The latter two factors are significant given the professional staffing constraints experienced by many local councils, highlighted by a review undertaken by the Planning Institute of Australia into the planning profession in Australia in 2004, and from anecdotal evidence in more recent times.

ALGA would strongly question the proposition that the use of development assessment panels is either a leading practice or desirable alternative assessment pathway. Panels are simply an additional decision making entity that potentially adds yet a further layer in the planning process. The overarching aim of the planning system is to deliver on tangible benefits to the broader community, within an efficient and accountable system. Not to simply rubber stamp as quickly as possible all development proposals, regardless of the wider and longer term ramifications for society. Many of the participant views on local governments administration of planning and zoning are generalisations that appear to have little supporting evidence to justify the criticisms.

Having said this, local government has long supported the need for improved government coordination and cooperation in the planning process and in the area of regulation more generally. This can be seen in the requests that local government has made over the years supporting greater degrees of integrated and strategic planning and regulatory management that must be undertaken at the state, regional and local levels.

Government Coordination, Cooperation and Leadership

Good coordination and cooperation across all levels of government is critical to delivering a range of social, environmental and economic outcomes desired by communities (and business).

Local government is often heavily reliant on state government and to a lesser extent the Commonwealth, for resources and policy directions that impact on the timing, sequencing and the coordination of public infrastructure to service the needs of local and regional communities.

Better government coordination and cooperation can deliver a variety of benefits to many stakeholders. It can facilitate new and desired development, increase the marketability of projects; reduce holding costs; increase the liveability experience of residents and minimise community concern and the negative impacts which arise when government departments work at cross-purposes. Increasingly it may also lead to less litigation and thereby improve overall time frames for developers. Conversely, poor government coordination leads to unnecessary delays, confusion and significant inefficiencies.

ALGA reiterates the earlier argument that whilst processes should always be as efficient as possible, (commensurate with a reasonable level of professional and administrative resources), it is also important to adequately capture the resulting outcomes from decision making processes. The input costs for business need to be weighed against the broader and longer term benefits that derive from planning decisions, both for the business in question and society more generally.

It should not be forgotten that the overall purpose of planning is to ensure land use and development activities are able to meet the present and future needs of the broader community and can be undertaken in the most appropriate spatial context. Without a planning framework and supporting regulatory mandate, development activity would be unregulated and haphazard, minimum community standards of health, safety and amenity would not be achieved and society, especially business, would be susceptible to a range of other externality costs including additional traffic congestion, environmental degradation, loss of amenity, and increased risks associated with a range of natural hazards. The land use planning system also plays a major role in providing a stable property market and substantive benefits to business, both large and small.

Without strong Commonwealth and state leadership in urban and related policies policy, government coordination and cooperation will hard to achieve and the result will be underperformance in the sustainable development of Australia's cities, towns. and regions.

Planning and development for the betterment of local communities

Added regulatory complexity to the planning system has arisen as a consequence of the jurisdictional pre-occupation with amending planning regulations on an ad-hoc and frequent basis.

Rather than constantly amending planning regulations or introducing time consuming monitoring systems, local government believes that states, and to a lesser extent the Commonwealth, should place more emphasis on improving the existing planning processes. In short, it is often not the planning system that is at fault but how the system is actually used. This has recently been the focus of attention in Victoria, where the Municipal Association of Victoria, with support from the Victorian Growth Area Authority and the Victorian Department of Planning and Community Development, has worked with selected Victorian councils in conducting a planning process improvement project.

ALGA's current advocacy in support of local government's role in the planning process was initiated in response to the DAF Leading Practice Model for Development Assessment. The Leading Practice Model remains highly contentious in that it proposes a separation of roles for elected representatives (who would take responsibility for the development of planning policies) and independent bodies responsible for assessing applications against these policies. This approach has subsequently been introduced in certain circumstances in South Australia, N.S.W. and is proposed to be introduced in Queensland and Western Australia.

This intervention fails to recognise the essential role of elected representatives in determining controversial or sensitive DAs that are not able to be appropriately decided by officials or 'independent' bodies. The argument supporting the proposed separation of roles suggests that it is inappropriate for elected councillors to both set policy standards and oversee their application. In contrast, ALGA believes that planning and development assessment processing must be seen in the context of a *community partnership* in which the community, elected councillors and professional staff work together to identify and achieve community goals for the future urban and natural environment.

ALGA's position in relation to town planning and DA decision making is to support the importance of elected representatives and local government in being able to effectively implement the wishes of the local community. In this context it is equally important that local governments are able to respond to their communities' needs through setting and maintaining minimum standards for the health, safety and amenity of the built environment within state agreed planning directions.

The planning system is complex and highly political, but critically important in the functioning of democratic society. Strong strategic guidance and leadership from the state and Commonwealth governments is important. The focus on micro process

issues that has recently seen state governments remove particular developments from requiring planning assessment or worse, introducing yet more levels of regulation or bureaucracy in the form of 'independent DA panels' or land development agencies, has done little to improve the planning systems operating in Australia. Both the NSW and South Australian local government associations would be able to provide localised examples to support such a view.

Excessive and confusing legislation

In essence local government carries out the requirements of State Government legislation. The regulatory environment at the jurisdictional level has been impacted by the pressures of population growth, more intensive development activity, higher urban densities, growing environmental concerns, international obligations, and increasingly calls for public accountability and open government.

It is therefore not surprising that all jurisdictions have subsequently experienced a growth in legislative controls that local governments have to abide by and in many cases implement. As such, any real regulatory improvements to the delivery of these local government services can only be achieved by reforming the relevant state legislation.

Resources to fully undertake regulatory responsibilities

The Productivity Commission study, *Assessing Local Government Revenue Raising Capacity*, April 2008, found that local government in Australia:

- maintains over 80 per cent of the nation's road network;
- provides, operates and maintains a vast range of community infrastructure;
- plans communities, keeps them clean, safe and healthy;
- cares for the environment through waste management, natural resource management,
- administers community education and local environmental programs;
- provides an array of regulatory services often on behalf of other levels of government, for example, environmental health and food inspection services;
- promotes regional development, tourism and economic and social advancement;
- supports emergency services activities; and
- provides an increasing array of human services, from services for the young and the elderly (such as Home and Community Care) to the promotion of public health and public safety).

The fact that it is elected by the community and responsible for a broad range of services in a clearly defined geographic area means that local government is well placed to understand and meet local needs and respond to those needs in ways that are most appropriate to local conditions. Within its jurisdiction of general

competence, local government is multifunctional and, unlike other spheres of government, is able to combine and integrate services to best satisfy community expectations.

Given the above, the provision of additional resource capacity for councils to effectively respond to significant regulatory reform should underpin proposals for change.

Delivering on Community expectations

As previously argued, local government is a democratically elected sphere of government and is directly accountable to the local communities it serves. Local government is also required to meet numerous legal and financial reporting obligations stipulated under state legislation.

Given that councils have multiple competing objectives, it is to be expected that there will be complaints from the business community that their interests are not being given enough weight. Any benchmarking analysis of costs to businesses is, however of little value without an identification of the benefits created by the regulation in question. Regulation should be evaluated by its net benefit or cost to the community as a whole.

Benchmarking anomalies

Attempts to 'benchmark', 'harmonise' or 'streamline' council services must acknowledge the fundamental reasons behind the disparity in local laws, whether that is differing community priorities, or variation in local circumstances such as the level of business activity, or population density. ALGA therefore agrees that the Commission's draft report is correct in highlighting that comparisons can only be made between 'like councils' in any benchmarking study.

Process Improvement

The Commission's Report should strongly argue for the benefits that may be derived from introducing substantive process improvements. Delivering on electronic - technology such as e-planning, e-invoicing or e-procurement can deliver major efficiency gains whilst preserving the principle of subsidiarity.

Local governments have a good track record of business improvement and many of the deficiencies of over or poor regulatory behaviour can be addressed through such interventions. However, as argued in the introduction, there is a role to be played by the state governments in assisting in delivering such work and not expecting all councils to have the capability or resources to deliver this without external support or guidance.

Whole of Government approach

The collaboration between all levels of government remains a critical key to improving the impact of regulatory controls at the local level. A collaborative approach towards policy development, implementation and funding is critical to identifying opportunities to make real improvements to business regulation and ensuring councils have adequate capacity and resources to implement them.

Additional Leading Practice

There would appear to be considerable benefits in re-introducing a previous Commonwealth initiative known as the Local Approvals Review Program (LARP). LARP as it was commonly known sought to research and recommend practical suggestions for better assessment/approval processes. In essence it sought to attempt to change the overall culture of regulation so that the process could be more integrated, had less duplication and confusion, was applied consistently in context, was less costly and resource intensive to administer and would therefore lead to the removal of unnecessary regulations and better decisions and outcomes for all those concerned.

There is also value in strengthening the role of e-Government and thereby making the access to regulations and the process of getting approvals easier to understand and simpler to use.

Promoting stronger participatory strategic planning which reflects community concerns and allows greater stakeholder engagement and understanding of the complex trade-offs facing development activity may help to build a level of community trust and lead to a reduction on the reliance of multiple planning and building regulations.

Again, resources should be made available to properly explain and train those involved in regulatory activity.

Concluding comments

Local government is committed to regulatory and institutional reforms that will deliver more sustainable social, environmental and economic outcomes to their local communities. Through ALGA, local government continues to work closely with other spheres of government, best practice institutions and, the community and industry groups to examine ways in which the regulatory processes at the local level may be improved.

Local government is in a unique position to shape the built and natural environments to reflect the aspirations of their local and regional communities. In this context, it is important to ensure that local government has a continued strong and effective

capacity to address community expectations, both through improved regulation and through adequate resourcing to undertake strategic planning, community education and implementation, enforcement and evaluation of regulatory responsibilities it has.

Local government is concerned by the continuous political pressure and blame it receives in the role it plays in implementing regulations at the local level, in particular in the areas of planning, development assessment and zoning. The assertion that the planning process itself is simply a regulatory burden cannot be accepted.

Australia's planning systems have delivered considerable value for society but all levels of governments put little resources into evaluating the benefits of past planning decisions, or communicating how the planning system operates in practice.

Likewise, poor planning and regulatory controls can in fact be blamed to have caused serious damage to the Australian economy, when evaluating the true costs that have impacted Australia in recent years from the impacts of multiple natural disasters.

Today's regulatory environment is not solely the product of local government.

Councils operate in a wider and complex institutional framework of diverse state and Commonwealth legislative responsibilities. This fact must be recognised and any proposed future improvements must include the other levels of government.