



AUSTRALIAN LOCAL
GOVERNMENT ASSOCIATION

**Submission to the Productivity Commission on
the Draft Report - Major Project Development
Assessment Processes**

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The Australian Local Government Association (ALGA) appreciates the opportunity to present its submission to the Productivity Commission on the Draft Report - Major Project Development Assessment Processes, released for public comment on 5 August 2013.

Background

The Australian Local Government Association (ALGA) is the national voice of local voice of local government in Australia. It is a federated body of state and territory local government associations that represent 560 local government authorities across the country.

ALGA has consulted with its member associations in developing this submission, noting that some of our members will be making their own submissions based on the experiences of how major development projects are assessed within their state or territory.

Given the above, this submission should be read in conjunction with other local government submissions, including those from individual councils that can provide more specific comments on the draft findings, recommendations and general commentary on the draft report.

ALGA has a long-standing relationship with the Productivity Commission and has participated in several inquiries in recent years examining regulatory processes dealing with land use planning and local government matters, and looks forward to continuing this positive collaboration through this process.

ALGA notes that the Australian Government has requested that the Productivity Commission undertake a study to benchmark Australia's major project development assessment processes against international best practice and that the study has sought to consider the extent to which major project development assessment processes across all levels of government affect the costs incurred by business, deliver good regulatory outcomes for the public and provide transparency and certainty to promote business investment.

ALGA acknowledges that the Commission has attempted to consult widely with industry, non-government stakeholders and all governments in conducting the study to date.

Role of local government in major project development assessment

As the Productivity Commission has found in several recent studies into planning, development assessment and local government regulation, councils operate within a complex regulatory framework. The actual role of local government as a regulator is determined by their respective state and territory government.

Whilst local government is largely the 'gateway' to the regulatory system for planning and environment protection laws, it plays a minor role in how major developments are assessed and is rarely the final approval authority. Local government accepts that the regulations and assessment processes for major developments are predominantly the responsibility of the State and Commonwealth Governments. Planning legislation throughout the country provides opportunities for the state planning minister or delegate to determine certain classes of development activity. Local government acknowledges this practice, although not without certain reservations and qualifications.

Increasingly, councils throughout Australia are raising their concerns in how the State and at times Commonwealth governments administer their assessment and decision making authority when determining major development proposals. The concerns are based on the quality of decision making, lack of transparency of process, inability to adequately condition consent approvals, failure to enforce conditions, and an inability to appeal against a Ministers' decision.

Commentary on the Two Overarching Draft Findings

ALGA agrees in principle with the Commission's interim finding that the Australia's regulatory system for development assessment and approvals is not fundamentally broken, and that it can be substantially improved. However ALGA wishes to stress that the term 'improvement' should not necessarily imply that the current respective planning systems must be substantially reformed or that governments must reduce

the resources assigned to assessing and enforcing approval conditions attached with major development activity in this country.

ALGA considers that all jurisdictions can make improvements in how their communities can play a proactive and contributing role in the assessment process of major projects. It is important that local government is not excluded from participating in the planning processes involving major developments. Too often, state governments fail to fully appreciate either the cumulative impacts of major proposals or fail to ensure that the conditions attached to an approval are appropriate to mitigate the envisaged negative consequences of given developments. Communities are interested in good sustainable long time outcomes being achieved.

ALGA is on record endorsing the work that was undertaken by the former Local Government and Planning Ministerial Council in ensuring that planning regulation reform should closely be based on the principle of deciding where a proposal lies on the low impact/low risk and high impact/high risk continuum. Major developments, regardless of definition, will always fall at the higher end of the continuum and thus necessitate more stringent and transparent assessment processes. The planning process, particularly when considering major development activity, must always balance the need for efficiency with the need to provide confidence that the outcomes will benefit the broader community, both now and into the future.

Given the scale and propensity for major developments to impact the physical, social and economic environment, it is important that the community can make a contribution to determining if a development should be refused or approved. This includes the extent and nature of the final conditions of consent granted. The proponent will always have different perspectives to that of the broader public, as may the various levels of government. In a democratic society the broader public interest must always be paramount in the decision making process.

Given that local government is widely acknowledged as being the level of government closest to the community, it is understandable that councils will want to ensure that the ultimate decision maker, who in most instances is a State or Commonwealth Minister, is provided with all of the necessary information and advice to properly consider the merits of complex development proposals.

With respect to the draft report's second finding, ALGA accepts that the Commission believes that there a number of international leading practices that Australia could adopt to improve the manner in which major developments are assessed in Australia.

Comparing Australia with international jurisdictions and then attempting to benchmark processes is complex and challenging. Whilst it is true that Australia lives in a competitive global environment, many of the impacts of planning related decisions will be felt locally and many planning decisions will always have wide ranging implications. Given Australia's political structure, and the importance of both representative democracy and the rights and responsibilities of citizens, it is ALGA's view that local councils have the right to participate in the process designed to ensure that major development activity is properly assessed and that appropriate safeguards are attached to any final approvals granted.

In short, it is ALGA's opinion that the community has the right to participate in the planning process, regardless of whether if the proponent is a multinational, private company, individual developer or the Crown. Community engagement and active participation in decision making should never be seen as a negative. ALGA acknowledges that balancing efficiency and effectiveness is a difficult task, especially when it comes to assessing developments that are worth millions of dollars and have wide ranging consequences.

ALGA Response to the draft recommendations

ALGA supports the Commission's view that various improvements can be made in clarifying regulatory objectives, reducing regulatory overlap and duplication, improving timeframes and coordination, enhancing regulatory certainty, transparency and accountability, improving compliance and enforcement efforts, and adopting stronger strategic approaches to deal with major development proposals.

ALGA's response to the draft recommendations are as follows:

DRAFT RECOMMENDATION 5.1

Governments should review legislative and regulatory objectives across major development assessment and approval processes within their jurisdictions to ensure that they are clear and concise, with unnecessary objectives removed.

ALGA RESPONSE

ALGA supports this recommendation in principle. The Commission should recognise however that the planning legislation at the jurisdictional level has been under constant review over the past decade and that amending or introducing new legislation and policies regularly can lead to reform fatigue and confusion. Any reviews must be done after consulting widely with local government. Local communities support objectives that adequately balance and consider economic, environmental, social and cultural considerations.

DRAFT RECOMMENDATION 5.2

Where conflicting objectives are unavoidable, parliaments and governments should provide guidance to their regulators on the priority and weighting of different objectives. A range of approaches may be appropriate, from the inclusion of an overarching policy goal in objects clauses, to providing guidelines on how to make tradeoffs between objectives.

ALGA RESPONSE

ALGA supports this recommendation. It is important that the State and Commonwealth Governments provide clear guidance on the intent and weighting of objectives in order to facilitate improved decision making and provide confidence that decisions have been made in a consistent and justifiable manner.

DRAFT RECOMMENDATION 10.1

Governments should ensure that agency responsibility and strategies for monitoring of compliance and enforcement with project conditions are clearly specified and communicated to stakeholders.

ALGA RESPONSE

ALGA supports this recommendation. Local governments understand that making decisions on development applications is futile if the approval authority does not monitor or enforce the subsequent approval conditions. Given the life span and scale associated with major development projects, it is critical that both the State and Commonwealth Governments properly resource their monitoring and enforcement responsibilities. This includes regular liaising with local councils to ensure that major developments adhere to agreed environmental, social and economic approval conditions.

DRAFT RECOMMENDATION 11.1

Drawing on the lessons learnt from the use of Strategic Assessments to date, governments should use the tool in circumstances where it is likely to produce a reduction in the costs of project approval, while delivering regulatory outcomes equal or superior to those delivered under existing processes.

ALGA RESPONSE

ALGA supports this recommendation in principle. The use of integrated strategic planning frameworks is supported given that the process is based on a landscape scale assessment that considers a much broader set of issues rather than project-by-project assessments that are narrowing in scope. Many communities have raised concerns about the lack of proper decision making when it comes to deciding on major projects on an individual basis. Cumulative impacts are more likely to be understood within a strategic assessment planning context.

DRAFT RECOMMENDATION 11.2

State and Territory Governments should continue to improve the quality of their strategic planning by:

- making broad decisions about development at the strategic level so as to reduce the number of issues that need to be considered at the project level;
- using more effective public consultation techniques;
- ensuring thorough analysis of plan impacts through the collection of baseline environmental and heritage data and the use of Strategic Assessments.

ALGA RESPONSE

ALGA supports this recommendation. The purpose of strategic planning is to give due consideration to all of the relevant issues and gain some appreciation of the

likely consequences this may have on a locality's environmental, social and economic wellbeing. One can improve the quality of strategic planning by ensuring that such information is built upon by all levels of government, the planning reports produced are monitored and evaluated and that the community is able to evaluate the success or otherwise of implementation over time. Too often plans at the State and Commonwealth levels lack credibility because of either planning being done in isolation and/or no evaluation of the robustness of the strategic planning is undertaken to evaluate what the actual consequences have been on a community, post implementation.

Local governments have long argued the fundamental importance of engaging the community in the planning process and fully supports using more effective public consultation techniques. In a democratic society this is a key principle that should be adhered to and is especially relevant where development proposals are likely to produce major impacts due to the scale, nature, and geographic extent of the development proposed.

DRAFT RECOMMENDATION 7.6

Governments need to ensure that regulatory agencies have the resources, capacity and skills to efficiently administer major development assessment and approval processes.

ALGA RESPONSE

ALGA supports this recommendation. Local councils have raised this concern over many years when discussing the implications of changing any legislation that has regulatory responsibilities. Approval agencies must have the resources and skills to administer their statutory, assessment and enforcement responsibilities.

DRAFT RECOMMENDATION 7.1

The Australian and State and Territory Governments should strengthen and expand the scope of existing bilateral assessment agreements under the Environment Protection and Biodiversity Conservation Act 1999. Areas for improvement include agreements on standards and procedures for assessment and extending the number of regulatory processes accredited under current bilateral agreements.

ALGA RESPONSE

ALGA supports this recommendation. Developments that trigger the EPBC Act should be assessed comprehensively under bilateral agreements that provide for integrated development assessment.

DRAFT RECOMMENDATION 8.1

Governments should aim to establish a ‘one project, one assessment, one decision’ framework by restarting negotiations on bilateral approval agreements between the Australian Government and the States and Territories. Such agreements must ensure that rights of appeal are no less than those in the Environment Protection and Biodiversity Conservation 1999.

ALGA RESPONSE

ALGA supports this recommendation.

DRAFT RECOMMENDATION 8.2

To ensure the successful negotiation of bilateral assessment and approval agreements:

- the task of negotiating the agreements should be properly scoped, approved by COAG and published with a timetable of key milestones
- priority should be given to approval responsibilities for activities in urban areas (other than on Commonwealth land)
- the COAG Reform Council should monitor progress with developing the agreements, examine how well they are working and draw out implications for improving current and future agreements. To facilitate this, State and Territory Governments should prepare annual reports on their implementation of the agreements.

ALGA RESPONSE

This is a matter for the Commonwealth and state and territory jurisdictions.

DRAFT RECOMMENDATION 7.2

The Australian Government should undertake and publish a regulatory impact assessment of the ‘water trigger’ amendment to the Environment Protection and

Biodiversity Conservation Act 1999, including the exclusion of water trigger-related actions from bilateral approval arrangements.

ALGA RESPONSE

This is a matter for the Commonwealth and state and territory jurisdictions.

DRAFT RECOMMENDATION 7.3

Regulatory agencies at the state and territory level should establish cooperative arrangements (for example, memorandums of understanding) for joint or substitutable assessments to minimise unnecessary duplication between major project assessment processes within a jurisdiction.

ALGA RESPONSE

This is a matter for the Commonwealth and state and territory jurisdictions.

DRAFT RECOMMENDATION 7.4

Where they do not exist, State and Territory Governments should establish a major projects coordination office to:

- advise proponents on statutory requirements
- develop project agreements that document agreed working arrangements among regulators and timeframes for the completion of processes
- electronically track and report on progress against statutory and regulator-determined timeframes
- facilitate interactions with relevant Australian Government regulators and local governments.

These offices should be close to the centre of government and access should be limited to complex, large-scale projects of state or territory significance.

ALGA RESPONSE

Local governments would welcome improved interactions with Australian Government regulators. However such interactions should also involve the relevant state or territory agencies given the critical role played by this level of government in setting the overarching planning and environmental legislation as well as regulating the local government sector.

ALGA has previously argued that there is significant merit in promoting greater levels of e-planning in Australia. Commonwealth and jurisdictional investment in this area has the potential to both identify process blockages but more importantly provide proponents and the community with accurate and timely advice on how the approval process is travelling along the decision making path.

Over time e-planning systems would provide rich information on how the planning system is operating from a process perspective that in turn could lead to the Productivity Commission and other bodies making recommendations on a stronger evidence basis rather than anecdotal commentary from proponents or the regulators themselves.

DRAFT RECOMMENDATION 8.3

Governments should develop statutory timelines that specify the maximum time that may elapse between a proponent's assessment documentation being lodged and when the assessment agency provides its report and decision recommendation to the relevant decision maker.

Legislation should also set the maximum time for the decision maker to make the decision. If no decision is made within the time period specified, the recommendation (along with the reasons and any conditions) by the assessment agency should be deemed to be the decision by the decision maker.

ALGA RESPONSE

ALGA acknowledges the need to avoid unnecessary delays but reinforces the need for robust consultation and decision-making. Local governments and communities generally do not see rigid timeframes as an end in themselves. What is important is that decisions take into consideration all of relevant information and that the community at large has an appropriate and fair opportunity to participate in the process.

Major developments are by their nature significant developments and the community must have the confidence that decisions are based on what is the likely overall outcome that will arise from approving or refusing such proposals. Understanding the probable outcomes over time are more important than just focussing in on a limited but timely planning process.

DRAFT RECOMMENDATION 8.4

Governments should provide guidance, preferably in statute, for the use of the 'stop the clock' mechanism. Such arrangements should only be available to assessment agencies when matters emerge that were not contained in the terms of reference and could not have been reasonably anticipated. Decision makers should only be able to stop the clock once. Proponents should be allowed to stop assessment and decision processes at any time. Any party that stops the clock should be required to disclose when these triggers are activated and the reason(s) why.

ALGA RESPONSE

ALGA agrees that stop the clock provisions can become confusing to all parties concerned. However rigid timeframes and limited stop the clock provisions together could undermine the integrity of the process. What is critical is that the proponent provides all of the required information upfront and that these requirements are clear and concise.

This is another area where eplanning may prove valuable for all parties. It has the potential to guide the proponent to submit all of the necessary information upfront and clarify the current state of a planning process that potentially involves multiple parties.

DRAFT RECOMMENDATION 6.1

Governments should establish statutory criteria as to which projects have access to designated major project pathways. Limited ministerial discretion should be available to 'declare' or 'call-in' a project that does not meet the criteria (making it subject to a major project pathway). However, in exercising this power the Minister must:

- follow guidelines on when and how the power can be used
- publicly report the reasons for any declaration against the guidelines.

ALGA RESPONSE

Local governments generally accepts the need for limited ministerial discretion based on clear guidelines. To ensure consistency, trust in the process and reduce the potential for proponents to seek preferential treatment, it is critical for Ministerial guidelines to be developed and all interested parties to understand the reasons for decisions that are made.

DRAFT RECOMMENDATION 6.3

Regulators should ensure transparency in the processes used to set the terms of reference (TOR) of the environmental impact assessment for a major project by allowing for public consultation on draft TOR and by reporting the:

- advice provided to the assessment authority and used in setting the TOR
- referral agencies' rationale for their advice, including how risks were assessed
- assessment authority's rationale for setting the TOR, including how and why the TOR differ from the advice received and how risks were assessed.

ALGA RESPONSE

ALGA supports this recommendation. Establishing the terms of reference and understanding how risks were evaluated has the potential to minimise confusion and arguments arising in the latter half of the planning assessment phase.

DRAFT RECOMMENDATION 7.5

Where not already the case, the Australian and State and Territory Governments should institutionally separate regulatory assessment and enforcement functions from environmental policy functions, provided the expected benefits exceed the costs.

ALGA RESPONSE

No Comment. This is a matter for Commonwealth, state and territory jurisdictions.

DRAFT RECOMMENDATION 8.5

Ministers should be the decision makers for major project primary approvals. Governments should consider whether this is better achieved through administrative or legislative means. Guidelines should be established as to what types of decisions Ministers can delegate.

ALGA RESPONSE

ALGA supports this recommendation in principle. However local governments will always argue the right to be involved in such proposals. The concerns of local governments lie not with who is the ultimate decision maker, but with the process and what is considered when making a final decision. Local governments generally

accept that Ministers of the Crown should be able to delegate their powers subject to clear guidelines and the capacity of the delegate to professionally fulfil such responsibilities.

DRAFT RECOMMENDATION 8.6

Governments should publish the process that decision makers need to follow when making approval decisions, including:

- the factors that decision makers need to take into account when reaching decisions
- how to consult with other decision makers, agencies and interested parties and take account of community concerns.

ALGA RESPONSE

ALGA supports this recommendation.

DRAFT RECOMMENDATION 8.7

Decision makers should be required to publish statements of reasons (including identification of the risks being mitigated) for their approval decisions and conditions for all major projects.

ALGA RESPONSE

ALGA supports this recommendation on the basis of the need to ensure accountability and transparency.

DRAFT RECOMMENDATION 6.2

Governments should provide clear, upfront information and guidance on the development assessment and approval pathways that apply to major projects, including on the processes, generic information requirements, assessment criteria, standard and model conditions, and statutory timelines that apply under a given pathway.

ALGA RESPONSE

ALGA supports this recommendation. Once again an integrated eplanning system has the potential to deliver such objectives in a cost effective and efficient manner.

DRAFT RECOMMENDATION 9.1

Judicial review is appropriate for major project primary approval decisions where a Minister is the decision maker. For decisions not made by a Minister, including those that are deemed because a Minister has not made a decision, limited merits review is appropriate. Where necessary, jurisdictions should amend their legislation to allow judicial review of ministerial decisions.

ALGA RESPONSE

ALGA supports this recommendation.

DRAFT RECOMMENDATION 9.2

Standing to initiate judicial or merits reviews of approval decisions should be limited to:

- proponents
- those whose interests have been, are, or could potentially be directly affected by the project or proposed project, or
- those who have taken a substantive interest in the assessment process.

In exceptional circumstances, the review body should be able to grant leave to persons other than those mentioned above to bring a review application if a denial of natural justice would occur if they were not granted leave.

ALGA RESPONSE

ALGA supports this recommendation and acknowledges the difficult tradeoffs that arise when evaluating the costs arrangements and the need to ensure access to justice whilst addressing the potential for vexatious litigation, especially when considering those players involved when it comes to major developments.

DRAFT RECOMMENDATION 10.2

Regulators should produce an annual major projects compliance statement that reviews monitoring and compliance activities and identifies redundant or ineffective conditions on approvals.

ALGA RESPONSE

ALGA supports this recommendation.

DRAFT RECOMMENDATION 7.7

Where it is not already the case, regulators should establish a hierarchy of assessment methods for major projects that correspond to different levels of regulatory scrutiny. Criteria for determining the level of assessment should be identified and in the public domain.

ALGA RESPONSE

ALGA supports this recommendation.

DRAFT RECOMMENDATION 10.3

Governments should ensure that third parties can initiate legal action to enforce conditions on primary approvals. Consideration should be given to ensuring legal costs do not present a barrier to legitimate actions of this type by individuals or bona fide community groups.

ALGA RESPONSE

ALGA supports this recommendation.

DRAFT RECOMMENDATION 7.8

COAG should commission an independent national review of environmental offset policies and practices, to report by the end of 2014. The review should:

- consider the merit of a single national offsets framework
- survey the consistency of offset policy objectives against the principles of ecologically sustainable development
- critically assess the methodologies used for identifying offsets
- examine the role of market-based offset approaches.

ALGA RESPONSE

ALGA appreciates the value of proposing such action.

DRAFT RECOMMENDATION 7.9

Governments should ensure that regulatory agencies only set conditions and offsets that:

- are consistent with objectives and directed at the impacts of the development to be consented
- are outcome-based wherever possible
- can be amended by agreement, provided there is a strong case and the proponent is first consulted
- do not direct compliance, or the manner of compliance, with other legislation
- are public, and explain what impact the condition is seeking to address
- are enforceable, precise and reasonable in all other respects

ALGA RESPONSE

ALGA supports this recommendation with the exception of allowing conditions to be amended by agreement. Conditions and offsets must be well considered before they are issued. Allowing conditions to be amended post decision may encourage lobbying and the end of the process, hence undermining the role played by others, especially the community.

Conclusion

Whilst local government does not play a primary role in how major development activity in Australia is approved, councils and the communities do have a legitimate role in participating in the assessment process and ensuring that the state and Commonwealth governments are both accountable and transparent. The strategic work undertaken at the local level, based on extensive and long term community involvement should not be overridden by state governments on the grounds of short term economic or political expediency.

Local government and communities can be heavily impacted by major developments and it is reasonable that potential costs and benefits are properly discussed and resolved upfront and not during post construction phase. It should never be forgotten

that when it comes to major developments, poor planning and decision making may lead to considerable community cost.

The ALGA believes that the Commonwealth, state and territory jurisdictions have a responsibility to communities around Australia to work in partnership with local government in order to ensure a level of consistency and trust in managing major development activities is achieved.

Local government supports good and well located major developments that will generate significant and sustainable economic and employment benefits. As such, it argues that the corresponding decision making/community engagement/regulatory processes must be recognised as a "value -adding" proposition and not merely further additions of 'red or green' tape.