



Australian Network of Environmental
Defender's Offices Inc

**Submission on the Productivity Commission's
Draft Research Report – *Performance Benchmarking of
Australian Business Regulation: Planning, Zoning and
Development Assessments***

1 April 2011

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

EDO ACT (tel. 02 6247 9420)
edoact@edo.org.au

EDO NSW (tel. 02 9262 6989)
edonsw@edo.org.au

EDO NQ (tel. 07 4031 4766)
edonq@edo.org.au

EDO NT (tel. 08 8982 1182)
edont@edo.org.au

EDO QLD (tel. 07 3211 4466)
edoqld@edo.org.au

EDO SA (tel. 08 8410 3833)
edosa@edo.org.au

EDO TAS (tel. 03 6223 2770)
edotas@edo.org.au

EDOVIC (tel. 03 9328 4811)
edovic@edo.org.au

EDO WA (tel. 08 9221 3030)
edowa@edowa.org.au

Submitted to: **Productivity Commission, Canberra** (planning@pc.gov.au)

For further information, please contact nari.sahukar@edo.org.au

Executive Summary

The Australian Network of Environmental Defender's Offices Inc (ANEDO) is a network of nine community legal centres in each state and territory, specialising in public interest environmental law and policy. ANEDO welcomes the Productivity Commission's invitation for comment on its Draft Research Report, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (the Draft Report). ANEDO previously made a submission to the Productivity Commission's Issues Paper in July 2010.¹

The Productivity Commission has been asked to undertake a benchmarking study of planning and zoning systems across Australia in terms of impacts on business compliance costs, competition and the overall efficient and effective functioning of cities (p.v). The state and territory EDO offices that make up ANEDO have extensive experience of working with, and analysing the strengths and weaknesses of, planning systems in each jurisdiction. EDO offices in each state and territory deal with planning, zoning and development assessment (DA) laws regularly on behalf of local communities.²

We submit that the efficacy of planning processes should not be judged solely on assessment processing timeframes or DA approval rates, rather on whether the process incorporates comprehensive environmental impact assessment, genuine public consultation and produces ecologically sustainable outcomes.

Ongoing, effective public participation is central to democratic governance and the delivery of good public policy in planning, zoning and DA processes. In particular, opportunities for public participation allow residents to influence the way their communities develop, and build an environment they want to live in. This benefits individual and community wellbeing as well as long-term economic and ecological wealth. Public participation is also a key principle of ESD.³

Placing the principles of ESD at the forefront of planning and development processes is important because, as the Draft Report notes (p xxiv), planning decisions can have long-lasting impacts. Processes that prioritise ESD provide an agreed framework for good decisions that consider the whole community's short-term and long-term interests. ESD principles also maintain flexibility for future Australians to shape planning and development priorities to their own needs. Commentators including Dovers and Hawke have noted that, despite the challenges of ESD, there is "no other credible candidate for an integrative policy framework."⁴

ANEDO notes that all Australian jurisdictions' (except WA) include public participation in decision making and ESD principles as objectives in their planning laws.⁵ The acceptance of

¹ Available at: http://www.edo.org.au/edonsw/site/pdf/subs/100716productivity_commission.pdf.

² For example, in 2010, of over 800 public enquiries to the EDO NSW community legal advice line, approximately 70% related to planning issues (including local government, merits advice, judicial review and civil enforcement). If mining and public land management are included, the proportion of calls rises to 79%.

³ See, eg, Agenda 21 – the international plan of action for sustainable development, at http://www.un.org/esa/dsd/agenda21/res_agenda21_01.shtml.

⁴ Hawke, A. (2009), *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, Final Report*, October 2009. See also Dovers, S. (2008) 'Policy and Institutional Reforms', in D. Linenmayer, S. Dovers, M. Harriss Olson & S. Morton (Eds.), *Ten Commitments: Reshaping the Lucky Country's Environment*, p 216.

⁵ See *Environmental Planning & Assessment Act (NSW) 1979*, s 5; *Planning & Environment Act (VIC) 1987*, s 4; *Sustainable Planning Act (Qld) 2009*, ss 3 & 5; *Development Act (SA) 1993*, s 3; *Land Use Planning & Approvals Act*

ESD is further demonstrated in Australia's agreement to international obligations⁶ and the Productivity Commission's overarching policy guidelines.⁷

Accordingly, ANEDO submits that any 'streamlining' of planning, zoning and DA regimes to promote competition or reduce 'unnecessary regulatory burdens' must not compromise the achievement of ecologically sustainable planning outcomes by reducing requirements for comprehensive environmental impact assessment and public participation. ANEDO opposes measures that may seek to streamline processes or remove regulatory 'burdens' that in fact are important checks and balances for community participation and sound planning and development decisions. Examples of those important elements include third party appeal rights exercisable by the general community; adequate notification and timeframes for public participation; and meaningful environmental assessment processes.

ANEDO supports measures to ensure that planning, zoning and DA processes contribute to greater efficiency and effectiveness in the functioning of cities. Those processes should encourage measures for broader and more meaningful public participation, reduced water and energy use, greater integration between transport and land use planning (encouraging walking, cycling and public transport use), limits on urban expansion (strategic densification, urban growth boundaries) and affordable housing in accessible locations. The Draft Report could be greatly enhanced by giving additional coverage and priority to these issues, in recognition that effective and efficient cities must be sustainable cities.

The Final Report should therefore: acknowledge and emphasise the need to prioritise community participation and ESD principles, in any reforms for greater efficiency in planning, zoning and DA processes; and identify benchmarks and leading practices that promote ESD, including for effective community participation in decision-making.⁸ Overall, the Final Report should be framed so that the pursuit of greater efficiency in Australian business regulation will not compromise the need for strategic and sustainable planning, zoning and DA processes – processes that reflect ESD principles and improve community participation in decision making at all levels.

(Tas) 1993, Schedule 1; *Planning Act (NT) 2009*, s 2A; *Planning & Development Act (ACT) 2007*, s 6; *Planning & Development Act (WA) 2005*, s 3 (which mentions 'sustainable use and development of land', though not public participation). See also Productivity Commission, Draft Report, p 50-51.

⁶ In 1992, Australia endorsed the *Rio Declaration on Environment and Development*, a worldwide commitment on 27 principles to guide future sustainable development (see www.worldsummit2002.org; and www.unep.org/Documents/Multilingual/Default.asp?documentid=78&articleid=1163). In order to implement commitments in the Rio Declaration, and the accompanying 'Agenda 21', Australian governments negotiated the *National Strategy on Ecologically Sustainable Development* (see www.environment.gov.au/about/esd/index.html).

⁷ Which include requiring the Commission to "ensure Australian industry develops in ecologically sustainable ways." (<http://www.pc.gov.au/about-us/principles>)

⁸ It is not clear how broadly or narrowly the Commission is interpreting its terms of reference, in order to include benchmarks for how planning, zoning and DA processes achieve good environmental and community participation outcomes. The benchmarks proposed in the Draft Report do not focus on these outcomes, with some limited exceptions (governance benchmarks and identification of community consultation 'best practices'). To address this gap, ANEDO would support the inclusion of benchmarks for 'effective promotion of sustainability', and the identification of 'best practices' that promote sustainable development. For example, such benchmarks could assess whether planning, zoning and DA processes adopt successful mechanisms to achieve their objective of ecologically sustainable development (ESD); and create incentives for green developments, such as 'fast tracking' or reduced costs.

In summary, our key recommendations remain as follows:

- Public participation and environmental assessment processes are fundamental elements of good planning legislation, and are essential for ensuring good long-term sustainable planning outcomes. The public interest value and benefits of these processes mean that they must not be dispensed with on the basis that some sectors perceive them to restrict competition;
- Any attempt to globally ‘streamline’ or ‘fast track’ approval processes simply to increase the speed of development assessment across Australia is therefore opposed, as these processes are essential to ensuring that development applications are comprehensively assessed in terms of their economic, social and environmental impacts;
- Any perceived ‘anti-competitiveness’ of planning systems across Australia, such as the use of restrictions in particular zones, should be evaluated against triple bottom line criteria, ie, public interest grounds to achieve environmental, social and economic goods;
- Instating global benchmarks, for example for development application processing times, puts the focus on speed of the decision rather than quality of the decision, and would detrimentally affect communities by forcing short-term and ill-considered decisions leading to long-term environmental degradation;
- The definition of an ‘unnecessary regulatory burden’ needs to be more clearly defined and include environmental and social considerations (including the public interest) in addition to economic considerations;
- Any ‘costs’ of development assessment processes must be balanced by the public interest benefits. These benefits, although often difficult to quantify with a dollar value, are fundamentally important and include environmental protection, ensuring transparency and accountability of decision-making and providing opportunities for the public to have a say on development in their area;
- Enforcement action by regulatory bodies is not an “unnecessary regulatory burden” on businesses. ANEDO agrees that ad hoc or inconsistent enforcement should be addressed to create certainty for both developers and local communities;
- It is critical that robust enforcement mechanisms remain in place to ensure that the objectives of planning regimes, which include protecting the environment and the social values of communities, are met;
- Existing court mechanisms allow courts to dismiss frivolous or vexatious proceedings taken to prevent competition from new businesses (as the Draft Report acknowledges);
- Any move to eliminate or limit third party appeal rights generally that would affect the rights of concerned community members to challenge decisions is strongly opposed. Allowing third party objectors to challenge planning approvals leads to better decisions and promotes accountability of government decision making; and
- Any attempts at benchmarking must recognise the critical importance of planning, zoning and development assessment for a broad range of pressing issues, including climate change, public health, social and economic development.

In this submission, ANEDO has not canvassed the entire Draft Report. We have focused on selected parts of several chapters, with an emphasis on Chapter 9 on *Transparency, accountability and community involvement*. We comment on the following sections and issues:

1. Transparency, accountability and community involvement (Chapter 9)

Access to planning rules and information

Access to decision-making processes

Development instruments should remain flexible to local needs and best practice

Public provision of information on performance

Integrity

Government involvement with community and business

Benchmarking the extent and effectiveness of community interaction?

2. Efficiency and effectiveness in the functioning of cities (Chapter 2)

Poor results on sustainability underline the need for more consideration in the Report

Recognising the link between cities' effectiveness and greater public participation

3. Regulatory objectives and framework (Chapter 3)

Third party appeals

Regulatory burden or appropriate checks and balances?

4. Governance (Chapter 8)

5. Impact of the Commonwealth on Planning (Chapter 11)

The Environment Protection and Biodiversity Conservation Act (1999)

Coordination role for the Australian Government in planning matters

1. Transparency, accountability and community involvement (Chapter 9)

ANEDO welcomes the inclusion of “engaging the community fully and early” and “better transparency and accountability” as two of the leading practices to improve planning, zoning and assessment (Draft Report, Overview, p xxviii). EDO offices have extensive experience working at the community/planning system interface and can provide numerous case studies illustrating where a lack of transparency, accountability and community involvement has yielded poor planning outcomes. Using NSW as an example jurisdiction, in 2009-10 the NSW EDO conducted analysis of community feedback on the current planning system and prepared a report - *Reconnecting the Community with the Planning System*. The broad conclusion was that there is a significant disconnect between the community and the planning system and the report made a number of recommendations for reform (see **Attachment A**). Following on from this identification of the significant problems with the NSW planning system, the EDO NSW prepared a report recommending broader reforms – *The State of Planning in NSW* (see **Attachment B**). In addition to providing these reports to the Commission as background detail supporting our recommendations in this submission, we comment below on specific issues in Chapter 9.

Access to planning rules and information

ANEDO agrees with the Draft Report’s statement that some stakeholders (such as developers and peak bodies) have the resources and frequent contact to be well informed about planning systems, whereas others (including members of the public) have less contact and familiarity (p 346). For example, the community’s limited understanding and resourcing to deal with planning and development issues is reflected in the proportion of submissions to

this inquiry from community groups – approximately one in seven – compared with councils, government agencies, developers, retailers and their peak bodies.⁹

ANEDO therefore supports principles of open government, the provision of clear and simple information and notification to create a more level playing field to navigate these systems.

Lack of understanding or engagement should underline the need for governments, agencies and developers to adopt proactive approaches and be genuinely receptive to community input, whether in relation to strategic plans or specific developments. This includes information about long-term development trends that will assist sustainability if implemented correctly, such as strategic plans for increased urban density.¹⁰

Access to decision-making processes

ANEDO agrees that “meetings of public bodies – where contentious and discretionary decisions are being made – are more transparent when open to the public.” (Draft Report, p 349) Although Table 9.3 of the Draft Report “shows that most bodies listed have public meetings when considering development applications” (p 349), views on the purpose of such meetings, and the practical degree of openness involved, could be considered further. For example, we note an illustrative case study on ‘PACs and hearings’ in *The State of Planning in NSW* report, which suggests the value of such access can vary significantly.¹¹ Direct community feedback on the variable quality and utility of public meetings is also canvassed in the *Reconnecting the Community with the Planning System* Report (see Attachment A).

Development instruments should remain flexible to local needs and best practice

The Draft Report notes the benefits of simplified planning and zoning, such as the NSW standard planning instrument.¹² The Final Report should also note that the simplification or ‘streamlining’ of planning instruments should not compromise the overall objectives of planning and DA laws, including ESD – such as removing the flexibility of planning instruments to suit local conditions, or improve on minimum requirements for environmental protection. For example, ANEDO is aware of community concerns and difficulties in applying the NSW standard instrument to sensitive areas such as coastal environments in the Byron Shire and ecological communities in the Blue Mountains.¹³ While setting consistent minimum standards is appropriate, maintaining flexibility for local conditions, innovations and changing priorities is a key to good planning outcomes and governance.¹⁴

⁹ That is, approximately 10 out of 70 initial submissions to the Productivity Commission’s inquiry, available at <http://www.pc.gov.au/projects/study/regulationbenchmarking/planning/submissions>, accessed 29/3/2011.

¹⁰ See *ADC Cities Report – Enhancing Liveability*

(http://www.adcforum.org/assets/files/City%20Summit/ADC_Cities_Report_part_1.pdf), cited in ANEDO Submission on *Our Cities – building a productive, sustainable and liveable future* Discussion Paper (p 13), March 2011. Submission available at: http://www.edo.org.au/policy/110304our_cities.pdf.

¹¹ *The State of Planning in NSW – with reference to social and environmental impacts and public participation* (Dec. 2010), p 22. Report prepared by the Environmental Defender’s Office NSW, commissioned by the NSW Nature Conservation Council and the Total Environment Centre. Available at: www.tec.org.au/recent-tec-reports.

¹² See, eg, Box 9.1, pp 349. This refers to the *Standard Instrument – Principal Local Environmental Plan*.

¹³ See *The State of Planning in NSW* report (Dec. 2010), ‘Case study: Standard Instrument’, box pp 22-23. Available at: <http://www.tec.org.au/recent-tec-reports>.

¹⁴ See OECD principles for metropolitan governance, under ‘Governance’ above (footnote 31).

Chapter 9 of the Draft Report notes that one way to promote accountability in planning decisions is to publish comparable data on council outcomes and other decisions. The Draft Report found inconsistencies in the type and amount of information that governments publish on planning and DA processes, including submissions and outcomes. However, it states that releasing data on “time and costs” of development assessment activities provides “high transparency” and enables “evidentiary analysis” (p 350). Even in jurisdictions that the Draft Report lists as ‘high-performing’ in this area (NSW, Victoria and Queensland), ANEDO is concerned where the information provided is weighted towards economic indicators, rather than involving a qualitative assessment of outcomes based on economic, social and environmental factors.

The recent *State of Planning in NSW* report notes the limitations of current government reporting on planning and DA matters:

Reports on planning reforms – such as the Major Development Monitor – have tended to focus on the numbers (such as the economic bottom-line of large developments, jobs created, the number of days taken to assess a development, or the percent of development types that can be streamlined) rather than a qualitative ‘triple bottom line’ assessment of the environmental and social impacts of decisions made and outcomes achieved. To prioritise the economic over the social and environmental impacts is clearly out of balance.¹⁵

In this context, ANEDO supports the Productivity Commission’s qualifications elsewhere in its Draft Report (p xxvii), that:

While a lengthier DA approval time may at face value seem to be less efficient, where this reflects a more effective community engagement process or comprehensive referral process, the end result may be greater community support and preferred overall outcome (notwithstanding the higher consultation costs).

ANEDO recommends that the Final Report emphasise that, although some states perform better than others in publishing comparable data on planning and DA outcomes, such information should not be limited to factors such as average timeframes or costs – including for the reasons advanced in the Draft Report. Without additional contextual information, there is a risk that ‘increased efficiency’ (a means to achieving appropriate outcomes) may be pursued at the expense of overarching planning objectives such as community wellbeing and ESD. In making this recommendation, ANEDO recognises that some social and environmental factors can be more difficult to quantify (for example, increased subjective wellbeing; absence of pollution). This is not always the case, however. For example, publishing submissions, reporting the number of submissions that oppose or support a proposal, conducting compliance audits and providing ongoing community feedback mechanisms would all support a ‘triple bottom line’ approach.¹⁶

¹⁵ *The State of Planning in NSW* report (Dec. 2010). See: <http://www.tec.org.au/recent-tec-reports>.

¹⁶ For example, ANEDO notes the NSW ICAC’s recommendation that the Department of Planning expedite the publication of all submissions in relation to Part 3A project declarations.

Integrity

ANEDO agrees that corruption and other improper action, as well as allegations or perceptions of these, ‘destroy community and business confidence’ in decision-making (Draft Report, p 351). Confidence can be similarly shaken where planning laws and procedures confer too much discretion on decision-makers, with insufficient oversight. The Draft Report (p 353) cites findings from the NSW ICAC that “...the loose criteria for calling in projects via Ministerial Order create a broad discretion that is potentially open to perceptions of undue influence”. That report underlines the importance of mechanisms for rigorous oversight, community input at various stages (including public exhibition of proposals), and mechanisms to challenge decisions that may have been made incorrectly (such as third party merits appeal rights). The Final Report could pursue this point further.

ANEDO agrees with the Draft Report’s interim conclusion that “The significantly greater number of projects called-in for those states [where there is broader discretion and more media interest] may be fuelling perceptions of a lack of transparency.”¹⁷ For example, in 2008, the then NSW Planning Minister estimated that 80% of ministerial approvals under Part 3A of the EP&A Act 1979 would be delegated to the Planning Assessment Commission.¹⁸ In 2009-10, the actual figure was less than 10% of decisions under Part 3A¹⁹ – with the other 93% being made by the Minister or the Department.

Under *Other measures to improve integrity* (Draft Report, p 354), ANEDO recommends that the Commission include a reference to greater independence and oversight in planning and DA decision-making. The Draft Report’s conclusion that the current process of approvals by the NSW Planning Assessment Commission (PAC) “would seem to be a practice likely to enhance the transparency and accountability of planning system outcomes” is undermined by the small proportion of decisions actually remitted to the PAC, and recent ICAC recommendations for reform to Ministerial discretion and the PAC’s role. The Final Report could address this by acknowledging the recommendations in ICAC’s Part 3A planning report (December 2010) – in particular, recommendations 3, 5, 16 and 18.²⁰

Government involvement with community and business

The Draft Report notes that interaction based on active participation helps the community to shape planning options and development outcomes (p 358), and has flow-through benefits (pp 361, 364). While these references are welcome, the Final Report could demonstrate more forthright support for community engagement in improving Australian planning systems,

¹⁷ See, eg, The Land, “Yes Minister”, Bronwyn Farr, 25/3/2011, <http://theland.farmonline.com.au/news/state/agribusiness-and-general/political/yes-minister/2112887.aspx?storypage=1>, accessed 29/3/2011.

¹⁸ Hansard, NSW Parliament, 15 May 2008.

¹⁹ As the Draft Report acknowledges, Table 9.6, p 355.

²⁰ Selected recommendations from ICAC Report, December 2010 (paraphrased by ANEDO):

- 3 – That the NSW Planning Minister’s ability to dismiss PAC members be subject to independent scrutiny;
- 5 – Legislate to provide that the PAC will be the determining body for the three classes of applications contained in the general delegation to the PAC in December 2008 (classes noted in Draft Report, p 354);
- 16 – Give the PAC a gateway role (oversight) to review proposals for Ministerial ‘call-in’ (in the *EP&A Act 1979*);
- 18 – Amend the *EP&A Act 1979* to require the Minister to refer private sector Part 3A applications to the PAC where an application exceeds development standards by more than 25%.

Full report available via: <http://www.icac.nsw.gov.au/media-centre/media-releases/article/3802>.

and that jurisdictions could do better – especially as “engaging the community fully and early” is a leading practice identified in the Draft Report (Overview, p xviii).

To give two examples: locally, the Grattan Institute study, *Cities: Who Decides*, is one source of support for significantly increased community engagement; and internationally, a 2010 report on 13 US case studies shows how the US *National Environmental Policy Act (1970)* (NEPA) vastly helped improve government decision-making through public comment and vetting ideas with other agencies.²¹

We note however, that early engagement alone is insufficient, and that government involvement with the community should be iterative throughout planning processes. We are particularly concerned with current processes whereby early engagement results in removal of subsequent opportunities for consultation or review.²²

Benchmarking the extent and effectiveness of community interaction?

ANEDO supports the intention to include, in the Final Report, community survey results on the level and effectiveness of public consultation on planning, zoning and DA decision-making.²³ This is an important supplement to “Motivations of governments for community interaction” (Draft Report, Table 9.7). It could also lead to new options for benchmarking.

Noting the limited indicators in the Draft Report on the comparative success of community consultation, the Commission should consider benchmarking jurisdictions’ planning systems against the community consultation principles agreed by the Local Government and Planning Ministers’ Council (LGPMC, 2009).²⁴ For example, the Draft Report later notes that only Queensland has legislated to require community consultation in developing state-level planning instruments.

ANEDO notes the feedback from various governments, which imply a ‘disconnect’ between community engagement at the strategic level; and community opposition to specific, local projects that affect them – which often generate stronger interest (Draft Report, pp 360-361). If councils and departments were to adopt additional, ongoing reporting and feedback mechanisms, they may be able to demonstrate the view that, through “[mitigation] post-completion... initial community concerns are not realised”²⁵ At present however, the limited amount of ongoing reporting, feedback and review in relation to DA decisions may make this view more difficult to assess, and difficult for authorities to rely upon.

²¹ See *NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government, August 2010*, published by The Partnership Project, the Grand Canyon Trust, and the Environmental Law Institute. Available at www.elistore.org/reports_detail.asp?ID=11405. See also NEPA case study, *State of Planning in NSW* report (Dec. 2010), pp 31-2.

²² For example, consultation on “concept plans” under Part 3A of the NSW EP&A Act 1979 provides for consultation on minimal vague detail and reduced review rights.

²³ Draft Report, pp 360 and 370.

²⁴ These principles are noted in the Draft Report, pp 358-9. They include that legislative and governance arrangements facilitate active community engagement; legislative guarantees for community engagement; early commencement of that engagement; and that strategic outcomes in planning instruments are positively expressed to engage stakeholders to achieve them.

²⁵ VicUrban response to Productivity Commission survey, Draft Report, p 360.

2. Efficiency and effectiveness in the functioning of cities (Chapter 2)

The Final Report could place greater emphasis on the *impacts and benefits* of ecologically sustainable development (ESD) in the efficiency and effectiveness in the functioning of Australian cities. The Report should also consider the extent to which current planning, zoning and DA processes are *applying, facilitating and achieving* ESD. ANEDO believes that many of the challenges and opportunities for increasing Australian cities' efficiency and effectiveness²⁶ will only be addressed if ESD is the overarching objective of planning laws.

In its July 2010 submission, ANEDO was concerned that the factors considered in the Issues Paper regarding the efficiency and effectiveness of the functioning of cities were limited (eg, liveability and ease of doing business). The Draft Report now contains some reference to sustainability and other factors. For example, ANEDO welcome the Draft Report's inclusion of aggregate indicators of liveability *and sustainability*. ANEDO believes this aspect of the Report could be strengthened, including by using international cities as points of comparison. Examples that lead the way include Freiburg, Germany; and Copenhagen, Denmark.

Poor results on sustainability underline the need for more consideration in the Report

In the Liveability index (Table 2.5) in the Draft Report, the four lowest ratings for Australia's capital cities relate to affordable housing (31%), good approach to environmental sustainability and climate change (33%); good public transport (36%) and good infrastructure/low congestion (39%). Although a 'good approach to sustainability and climate change' has the second lowest ranking (in terms of achievement), there seems to be less emphasis on this area in the Draft Report than the other (also important but poorly-ranked) measures listed above. For example, Chapters 2, 4 and 5 extensively analyse housing affordability, supply of land and infrastructure, and best practices for each.

In contrast, as ANEDO understands it, the Draft Report does not include overarching consideration, benchmarking or comparison of the way that planning systems apply, facilitate or achieve sustainability/ESD. ANEDO recommends the Final Report explore these issues further, given the recognised importance of ESD in planning law objectives, and its ability to improve the long-term efficiency and effectiveness in the functioning of cities.

To ensure the sustainability, health, amenity and efficiency of Australia's cities, as ANEDO's previous submission suggests, any benchmarking should "seek to identify planning, zoning and DA processes that encourage sustainable cities." Our previous submission provides a number of specific examples (p 4). A range of further sustainability indicators are outlined in ANEDO's March 2011 submission to the Department of Infrastructure and Transport's 2010 Discussion Paper, *Our Cities – building a productive, sustainable and liveable future*.²⁷

Recognising the link between cities' effectiveness and greater public participation

Chapter 2 (and Chapter 9) of the Draft Report could also note the correlation between enhancing efficiency, effectiveness and liveability – and "[giving] city-dwellers a real say" in decision-making through "deep public engagement". This is the Grattan Institute's

²⁶ Eg, Productivity Commission, Draft Report, Table 1, p xxi-xxiii.

²⁷ Available at: http://www.edo.org.au/policy/110304our_cities.pdf. See, eg, 'B) Productivity', p 4-5; 'C) Advancing our Sustainability', pp 5-8; 'Transport Development', p 10.

conclusion from its recent study on eight of the world's successful cities relevant to Australia.²⁸

3. Regulatory objectives and framework (Chapter 3)

Third party appeals

This part of the submission focuses on third party appeal rights (Draft Report, pp 73-74). ANEDO reiterates that it is essential to retain appeal right processes, and that mechanisms that already exist to ensure those processes are not abused. These are important mechanisms for community groups and objectors to protect local amenity and the environment, and ensure accountable decision-making in the public interest.

ANEDO notes there is a strong relationship between maintaining robust rights to challenge inappropriate or non-compliant planning and development decisions; and maintaining good governance, public trust, certainty and consistency of outcomes. Although Chapter 9 of the Draft Report emphasises that the availability of 'appropriate third party appeals' promotes accountability, this could also be noted where third party appeals are considered elsewhere (for example, Chapters 3 and 7).

The Draft Report notes a recent reduction in the extent of third party appeal rights, and the existing strict limitations on the types of appeal rights available in different circumstances across most Australian jurisdictions. ANEDO's July 2010 submission also notes the existence of safeguards, such as court rules and cost orders, to prevent inappropriate use of the court system to challenge decisions (pp 6-7). ANEDO believes these safeguards are sufficient to address 'anti-competitive' appeals. For all of these reasons, ANEDO strongly opposes any moves to eliminate or limit third party appeal rights generally.

In NSW, ANEDO also draws attention to the recommendation of the NSW Independent Commission Against Corruption (ICAC, December 2010) to "expand the availability of third party merit appeals under Part 3A of the *[EP&A Act 1979]* to private sector projects [that propose] a major departure from existing development standards." Alongside this expansion, ICAC recommends introducing controls on the abuse of merit appeals.²⁹

Regulatory burden – or appropriate checks and balances?

Consistent with our previous submission, we reiterate that the definition of 'unnecessary regulatory burden' needs to be more clearly defined to include environmental and social considerations, including outcomes in the public interest, in addition to economic considerations (p 5). For example, ANEDO believes that mechanisms for environmental impact assessment and community participation in Australia's planning and development regimes need *strengthening* in order to pursue ESD. The Grattan Institute states that public

²⁸ Grattan Institute, *Cities: Who Decides*, 2010. Eg, see media release available at: http://www.grattan.edu.au/news/20101018_media_release_cities_who_decides.pdf.

²⁹ "That is, appeals made for "frivolous, obstructive, commercial or coercive reasons." (ICAC Report, December 2010, *The Exercise of Discretion under Part 3A of the Environmental Planning and Assessment Act 1979 and the State Environmental Planning Policy (Major Development) 2005*. Available at: <http://www.icac.nsw.gov.au/media-centre/media-releases/article/3802>.

engagement “needs to be an order of magnitude different from what we have seen in Australia” in order for city planning to be effective.³⁰

4. Governance (Chapter 8)

ANEDO draws the Commission’s attention to the Organisation for Economic Co-operation and Development’s (OECD) principles to ensure adequate metropolitan governance, some of which are described in the box below.

Selected OECD principles for metropolitan governance³¹

- **Cities for Citizens** – governance should meet the needs and aspirations of people who live in them
- **Coherence** – ‘who does what’ should be clear to the electorate
- **Coordination** – local authorities and regional agencies should work together, particularly on strategy planning
- **Effective financial management** – the costs of measures should reflect the benefits received
- **Flexibility** – institutions should be able to adapt as necessary to changing economic, social, and technological change
- **Participation** – community representation should be open to a diverse range of groups
- **Social cohesion** – institutions should promote non-segregated areas, public safety, and opportunity
- **Subsidiarity** – services should be delivered by the most local level that has sufficient scale to reasonably do so
- **Sustainability** – economic, social, and environmental objectives should be integrated and reconciled.

ANEDO suggests the Final Report could refer to these principles in the Governance chapter, and consider whether they provide a useful basis for benchmarking or best practice.

5. Impact of the Commonwealth on Planning (Chapter 11)

The Environment Protection and Biodiversity Conservation Act (1999) (EPBC Act)

ANEDO is concerned at the characterisation of the Commonwealth impact on planning as a primarily negative one, as summarised in the Draft Report Overview, based on:

- “data supplied by developers [regarding] the cost of the environment studies and flora and fauna assessments necessary for an EPBC Act referral...”,³²
- average timeframes from lodgement of *EPBC Act* referral to the Minister’s final decision;
- “The need for all developers to consult two lists of threatened species (one Commonwealth list and one state/territory list) for each jurisdiction...”.

³⁰ Grattan Institute, media release on *Cities: Who Decides* report, 18/10/2010, available at: http://www.grattan.edu.au/news/20101018_media_release_cities_who_decides.pdf.

³¹ Kelly, J., 2010, *Cities: Who Decides?*, Grattan Institute, Melbourne.

³² Draft Report, Overview, p xxxvii.

This view presents only certain developers' concerns, and does not reflect a 'triple bottom line' approach, noting the objectives of planning laws include promoting and achieving ESD. ANEDO submits that the Commission's starting point should be that environmental assessments under the *EPBC Act 1999* are an example of important processes – and necessary costs – to ensure the long-term protection of matters of national environmental significance and amenity for Australian communities.

ANEDO also believes the Final Report should acknowledge the shortcomings of existing agreements under the *EPBC Act 1999* to approve state-based environmental assessment processes, in order to 'streamline' such processes and avoid duplication.³³ Consistent approaches may improve efficiency, but this must not result in a lowest common denominator approach to planning process standards. The *EPBC Act 1999*, for example, must set the best practice standards for other jurisdictions to meet.

Coordination role for the Australian Government in planning matters

In addition to its important role under the *EPBC Act 1999*, ANEDO submits that the Australian Government has key roles to play in the coordination and funding of strategic approaches to planning and ESD across Australia (acknowledging that planning occurs primarily on a state or regional level). Several examples are outlined in ANEDO's March 2011 submission on the Discussion Paper, *Our Cities – building a productive, sustainable and liveable future*³⁴ – including interstate transport planning and strategic environmental impact assessments.

That submission noted that a strong and clearly defined role for the Australian Government in developing a National Urban Policy would benefit the development of consistent planning objectives across states and territories (this is relevant given the Draft Report's finding of 'objectives overload', p xxii). Key components of a National Urban Policy framework driven at the Commonwealth level could include:

- coordinating and resourcing a national planning advisory body made up of representatives from all levels of government, and representatives of academia and peak industry and conservation groups;
- developing nationally consistent best practice guidelines for integrated development;
- accrediting various best practice assessment mechanisms (according to sustainability criteria) that could be implemented where appropriate around Australia; and
- funding or co-funding essential programs, such as obtaining the necessary baseline data (such as risk and vulnerability mapping needed to underpin adaptation planning in response to climate change).

For further information please contact nari.sahukar@edo.org.au

³³ For example, there are a number of problems with the current approach to strategic assessment, for example in relation to the Sydney Growth Centres. See EDO NSW *Submission on the proposed Sydney Growth Centres Strategic Assessment*, 25 June 2010, available at: <http://www.edo.org.au/edonsw/site/policy.php#4>.

³⁴ ANEDO Submission to the Australian Government Department of Infrastructure and Transport, available at: http://www.edo.org.au/policy/110304our_cities.pdf. See, eg, Executive Summary, 'B) Productivity' and 'C) Advancing our Sustainability'.

Attachments

Attachment A – *Reconnecting the Community with the Planning System* (August 2010), report prepared by the Environmental Defender’s Office NSW and the Total Environment Centre: www.planning.nsw.gov.au/LinkClick.aspx?fileticket=flsozHVCRQo%3D&tabid=490&language=en-US

Attachment B – *The State of Planning in NSW – with reference to social and environmental impacts and public participation* (December 2010), report prepared by the Environmental Defender’s Office NSW, commissioned by the NSW Nature Conservation Council and the Total Environment Centre: www.edo.org.au/edonsw/site/publications.php#stateofplanning