australian network of environmental defender's

Submission on the Productivity Commission Issues Paper - *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*

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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.

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Executive Summary

The Australian Network of Environmental Defender's Offices Inc (ANEDO) is a network of 9 community legal centres in each state and territory, specialising in public interest environmental law and policy. ANEDO welcomes the opportunity to provide comment on the Productivity Commission Issues Paper, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments.*

EDO offices in each state and territory deal with planning, zoning and development assessment laws regularly on behalf of local communities. We engage in order to ensure: that legislative processes designed to require public participation and comprehensive environmental assessment are adhered to; and that plan-making and development is done in accordance with the principles of ecologically sustainable development (ESD).

The identification of planning, zoning and development assessment process as creating "unnecessary regulatory burden" is an overly simplistic conclusion. While there may be ways in which planning systems can be improved,[1] it is essential that any reforms appropriately balance environmental and social factors, and not just economic consideration.

ANEDO is therefore opposed to the 'streamlining' of planning and development assessment regimes on the basis that they restrict competition or impose 'unnecessary regulatory burdens'. These legislative processes are critical to the achievement of ecologically sustainable development and democratic governance, and ensure that local areas are developed in a strategic and sustainable manner. The focus of inquiries such as the present one must therefore be on the public benefits of such regulation and the long-term detrimental impacts that would flow if these systems were streamlined simply to increase productivity and hasten development approval times.

ANEDO supports measures to ensure that planning, zoning and development assessment contribute to greater efficiency and effectiveness in the functioning of cities. Measures to ensure 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 should be encouraged.

Our key comments and recommendations are:

- 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

[1] For example, for EDO submissions on planning reform in NSW see: http://www.edo.org.au/edonsw/site/policy.php#4.

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, is justified on 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 considered in a broad manner that encompasses 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 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;
- 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.
- 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.

Our comments relate to the following key issues.

- Efficiency and effectiveness in the functioning of cities
- Competition and planning processes
- Reducing regulatory burden
- Third party appeal rights
- Enforcement

1. Efficiency and effectiveness in the functioning of cities

ANEDO supports the consideration of efficiency and effectiveness in the functioning of cities as part of this process, but is concerned at the narrow approach taken in the Discussion Paper. As well as liveability and ease of doing business, sustainability is a key

indicator that must be considered. Sustainability must consider cities in a broader context – a city that uses water from external sources may be 'liveable' for its inhabitants, but is not sustainable.

Many studies have identified key features of sustainable cities – medium and high density mixed use development around transit corridors, orientation of lots to facilitate passive solar design, water sensitive urban design, limits on urban growth to preserve agricultural and bushland areas, street design to encourage walking and cycling – yet many planning systems do not encourage this type of development. Studies have shown health, economic, environmental and other benefits for this type of development, and real estate values in neighbourhoods with these features are consistently high. While other countries are developing measures such as density minima and parking maxima in accessible locations and development assessment based on proximity to transport (for example, Utrecht's ABC system) to encourage this type of cities, many Australian systems work against sustainable development.

Any benchmarking should therefore seek to identify planning, zoning and DA processes that encourage sustainable cities. Do planning, zoning and DA practices encourage strategic densification? Or do they build in automobile dependence? Do they protect bushland and urban agriculture? Do they require mixed use and medium-high density development to be of sufficient quality to avoid community opposition? Do they encourage affordable housing in accessible locations? Do they facilitate lower energy and water use? Do they provide meaningful community engagement on the tradeoffs necessary to achieve liveability, sustainability and business growth, or merely provide an opportunity to object at the end of the process?

2. Competition and planning processes

The Productivity Commission seeks comment on whether competition is restricted - more than is necessary - to achieve optimal community allocations and uses in relation to planning, zoning and development assessment processes. The Discussion Paper states that there is the potential for planning, zoning and development assessment systems to have a detrimental impact on competition between businesses using urban land as a result of the implementation of various requirements by regulators and the actions and decisions of existing or potential land users in response to the planning, zoning and development assessment systems.

ANEDO does not support the broad brush application of competition principles to planning assessment and approval processes across Australia. We are concerned that the wider implementation of competition principles would result in the removal of important development assessment processes, which in turn will lead to the erosion of public participation and environmental assessment processes on the basis that these processes restrict competition. Our primary view is that purported 'anti-competitive' legislative restrictions are justified where they are made in the public interest to achieve an environmental, social or economic good.

We submit that planning and development assessment systems are such an area, as they are crucial to the achievement of ecologically sustainable development, which integrates environmental, economic and social concerns, and also enshrine public participation and consultation processes. Thus, purported 'anti-competitiveness' within planning processes may well be justified in the public interest. The lack of a robust planning assessment

framework would detrimentally affect communities by forcing short-term and ill-considered decisions leading to long-term environmental degradation detrimentally affect communities and lead to rapid and ad hoc environmental degradation.

ANEDO notes that previous attempts to introduce competition principles into development assessment processes have proven problematic and have resulted in regulatory safeguards needing to be introduced. A good illustration of this is the private certification regime in NSW, which implemented National Competition Policy into the building certification process by allowing private accredited certifiers to compete against local government. The NSW Government and EDO NSW received numerous complaints from members of the public relating to the independence, performance and integrity of private certifiers. There is a perception that the private certification industry is neither impartial nor accountable, as they are essentially paid by the proponent.

To address these issues the government recently introduced a range of new accountability mechanisms. These include increased training, reporting and auditing requirements for private certifiers, enforcement powers for the Building Professionals Board and for local councils, and strong investigative powers. This example highlights that implementing competition principles within development assessment processes is problematic without regulatory processes and safeguards in place.

3. Unnecessary regulatory burden

ANEDO is very cautious about approaches seeking to remove 'unnecessary regulatory burdens'. The Discussion Paper identifies certain 'unnecessary' regulations relating to development processes that purportedly go beyond those necessary to achieve the objectives of planning systems. These include administrative and operational costs and institutional requirements for the application or approval process "that are unnecessarily complex or unwieldy".

ANEDO is of the opinion that the definition of 'unnecessary regulatory burden' needs to be considered in a broad manner that encompasses environmental and social considerations (including the public interest) in addition to economic considerations. For example, while financial and time costs are easy to quantify, it is very difficult to put a dollar figure on the public benefits of a regulation. These benefits may be long-term, or intangible in the short to medium term. The benefit may also, for example, be the absence of an outcome such as severe pollution, and thus assessing the benefit may require somehow valuing of the absence of environmental health problems. This is very difficult to quantify.

ANEDO is of the view that any 'costs' of development assessment processes are usually outweighed by the public interest benefits. These benefits 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. Hence, ANEDO does not support any attempts to 'streamline' or 'fast track' approval processes across Australia, as these processes are essential to ensuring that development applications are comprehensively assessed in terms of their economic, social and environmental impacts. The fact that such processes take time or impose administrative costs on proponents should not be used as a basis for removing or reducing such requirements. In our view, these processes cannot be viewed as 'unnecessary' but are in fact **essential** to ensuring

that decisions are made in the public interest and in line with the principles of ecologically sustainable development.

4. Enforcement

The Discussion Paper suggests that the inconsistent action of regulators in relation to enforcement activities is a possible source of 'unnecessary regulatory burden'.

ANEDO agrees that there is inconsistent enforcement of planning laws across Australia. In our view, the success of regulatory regimes largely depends on the extent to which these laws are complied with and whether those who breach them are appropriately penalised or prosecuted. In our experience, inadequate and inconsistent enforcement stems from a lack of political will and inadequate resourcing of regulatory bodies, which limits the deterrent value of offence provisions. As noted by Jacobs J of the High Court (*Griffiths* (1977) 137 CLR 293, 327):

> *The deterrent to an increased volume of serious crime is not so much heavier sentences as the impression on the minds of those who are persisting in a course of crime that detection is likely and punishment will be certain... Consistency and certainty of sentence must be the aim… Certainty of punishment is more important than increasingly heavy punishment."*

However, whilst ANEDO agrees with the Productivity Commission that enforcement action is inconsistent across Australia, we do not agree that this means that enforcement action is 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. We submit that 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.

5. Third party appeal rights

The Discussion Paper suggests that some established businesses 'game' the development approval process by automatically appealing an approval in order to delay or prevent the commencement of a potential competitor's operations. While individual EDO offices do not represent competing developers who may bring legal challenges, we do regularly represent community groups who wish to challenge the legal validity of a planning decision. We therefore submit that it is essential to retain appeal right processes, and that mechanisms exist to ensure those processes are not abused.

The Productivity Commission asks whether there are any effective ways of identifying and preventing court actions that contain no substantive complaint. Existing mechanisms allow courts to dismiss frivolous or vexatious proceedings. For example, in NSW, under clause 13.4 of the *Uniform Civil Procedure Rules 200:*

> *(1) If in any proceedings it appears to the court that in relation to the proceedings generally or in relation to any claim for relief in the proceedings:*
>
> *(a) the proceedings are frivolous or vexatious, or*
>
> *(b) no reasonable cause of action is disclosed, or*
>
> *(c) the proceedings are an abuse of the process of the court,*

the court may order that the proceedings be dismissed generally or in relation to that claim.

Similar rules exist across Australia. For example, the relevant provision regarding dismissal of frivolous or vexatious appeals in Tasmania is section 22A of the *Resource Management and Planning Appeal Tribunal Act 1993*:

> ***22A. Power of Appeal Tribunal to dismiss an appeal***
> *The Appeal Tribunal is to dismiss an appeal if it is satisfied that the appeal is frivolous or vexatious or may dismiss an appeal if the appellant fails to comply with its directions.*

Similarly, section 171 of the *Uniform Civil Procedure Rules 1999* (Queensland) states:

> ***171 Striking out pleadings***
> *(1) This rule applies if a pleading or part of a pleading--*
> *(a) discloses no reasonable cause of action or defence; or*
> *(b) has a tendency to prejudice or delay the fair trial of the proceeding; or*
> *(c) is unnecessary or scandalous; or*
> *(d) is frivolous or vexatious; or*
> *(e) is otherwise an abuse of the process of the court.*
> *(2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.*
> *(3) On the hearing of an application under subrule (2), the court is not limited to receiving evidence about the pleading.*

Thus, applicants need to demonstrate that there is a reasonable cause of action disclosed, such as a legal point of law that is in dispute, and will need to show that their proceedings are undertaken in good faith. Merely appealing to avoid competition from new businesses would make the proceedings liable to being struck out.

In relation to third party appeal rights, in ANEDO's experience, people do not take proceedings lightly and only take court action as a last resort. This is particularly the case for community groups and objectors who go to court to protect their amenity, the environment and the public interest, not to stifle competition. Moreover, it is important to note that there are very limited rights for third parties to appeal on the merits of decisions. That is, whether the decision was 'good' or 'bad'. Appeal rights are generally only available for judicial review or civil enforcement, where the applicant has to demonstrate a legal error or procedural flaw in the decision, which is often difficult. In addition, applicants expose themselves to significant costs if they are not successful. These practical hurdles also serve to filter out 'frivolous' challenges.

In summary, ANEDO believes that existing court mechanisms are sufficient to address 'anti-competitive' appeals. ANEDO strongly opposes any moves to eliminate or limit third party appeal rights generally. The community must be given a right to challenge planning decisions that are not in accordance with the law. Allowing third party objectors to challenge planning approvals leads to better decisions and promotes accountability of government decision making.

For more information relating to this submission please contact Rachel Walmsley, Policy Director of EDO(NSW) on (02) 9262 6989.