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Submission: Productivity Commission issues paper on Major Project Development Assessment Processes

Background

I am a Lecturer in the Faculty of Law at the University of New South Wales, where I research and teach planning and environmental law. My background includes work with the departments of planning, transport and housing in Western Australia, including on major projects such as *New Metro Rail* (then the largest public infrastructure project ever undertaken in WA). I have also worked with universities and non-government organisations in Australia and internationally on a range of issues related to sustainable development. My current research focuses on the way in which legal frameworks structure decision-making on urban development, and particularly on frameworks for public participation.

This submission focuses on public participation, and draws primarily on my experience in NSW. Major project assessment has a long history of controversy in NSW. The *Environmental Planning and Assessment Act (NSW)* has been subject to over 150 amendments since its passage in 1979, many related to frameworks for major project assessment. Despite considerable changes, these frameworks have consistently attracted criticism, and amendments have been increasingly unpopular.¹ Repeal of the notorious Part 3A was a key campaign promise made by the Opposition during the 2011 election, and legislation to this end was passed within 3 months of the change of government. Much of the content of Part 3A remains in force, however, and levels of concern regarding frameworks for major project assessment remain high.² Significantly, over 330 groups have united in the Better Planning Network calling, inter alia, for meaningful public participation in all stages of planning.³

Thorough attention to public participation will be crucial to effective benchmarking of major project development assessment processes.

Summary

¹ Lipman Z and Stokes R, "The Technocrat is Back: Environmental Land-use Planning Reform in New South Wales" (2008) 25 EPLJ 305; Ryan P, "Did We? Should We?: Revisiting the 70's

² Whitehouse J, *Development and Planning Law in New South Wales* (CCH, 2012).

³ <http://betterplanningnetwork.good.do/nsw>



1. The lack of quantitative analysis of planning processes, and particularly public participation in them, is a major problem for policy-making on development. Quantitative analysis should be a priority in this study, and should gather data on:

- who participates in the assessment of major projects;
- the objectives of various participants in such processes;
- who participates in strategic planning processes, and how this relates to participation in the assessment of major projects; and
- the relationship between participation and substantive planning outcomes.

2. “Appropriate opportunities for public participation and review of decisions” is not a useful criterion. This should be replaced with “meaningful public participation” and “opportunities for public review of decisions”. A new criterion of “ecologically sustainable development” should also be added.

3. Incentives should be provided for major projects which follow and are consistent with the results of strategic planning processes involving meaningful participation by a broad cross-section of the public.

4. Submissions are inappropriate as the primary method for public participation. To increase the potential for participation to bring benefits, frameworks for the assessment of major projects should mandate a range of methods to engage a broad cross-section of the public in a meaningful way.

Benchmarking

There is a lack of empirical research on public participation in planning. Much policy is made on the basis of untested assumptions. The *Green Paper – A New Planning System for NSW*, like many planning documents produced by the previous government, promises to make participation more effective and meaningful. However, it has been made without any empirical study of who currently participates or how participation relates to planning outcomes. This gap is significant, and may help to explain why successive governments have failed in their efforts to make participation more effective.

There is a need to gather quantitative data on:

- who participates in DA processes
- the objectives of various participants in DA processes
- who participates in strategic planning processes, and how this relates to participation in DA processes
- the relationship between participation and substantive planning outcomes.

Clear distinctions need to be made between “consultation” and “participation”, and “stakeholders” and “the public”. An understanding of the conditions in which different groups participate would offer important insights for the design of more appropriate frameworks for participation in the assessment of major projects, and in planning more generally. Submissions collected by local and state planning authorities as part of strategic planning and DA processes would offer a useful starting point for the collection of this data.



Assessment criteria

“Appropriate opportunities for public participation and review of decisions” is too subjective to be a useful criterion. There is a need to be more specific about what “appropriate” means, and to focus on participation itself, not just creating opportunities for participation. “Meaningful public participation” and “opportunities for public review of decisions” would be more useful for benchmarking. Meaningful public participation would require engagement with a broad cross-section of the public, not just stakeholders with vested interests.

Similarly, “regulatory outcomes consistent with objectives” offers limited guidance. This should be supplemented with a new criterion of “ecologically sustainable development”. Ecologically sustainable development (ESD) recognises that ecological integrity and environmental sustainability are fundamental to social and economic wellbeing, and requires consideration of the needs of both present and future generations. their long-term economic, environmental and economic significance for local communities and beyond, such a criterion is important in benchmarking assessment processes for major projects Given

Strategic planning

Strategic planning is the appropriate forum in which to balance social, economic and environmental objectives. It is the best place to manage the inevitable trade-offs involved in development, and in major projects in particular. A key failing in the development of Barangaroo in Sydney, for example, is that it has been approached in a reactive rather than a strategic manner. Discussions have focused narrowly on the impacts of the development, have focused on local stakeholders rather than the public more generally, and have allowed little space for consideration of the significance of the site for the city and the state.⁴

Strategic planning offers the potential for truly meaningful public engagement. Efforts undertaken in Western Australia under the leadership of Alannah MacTiernan as Minister for Planning and Infrastructure offer many valuable precedents. For example, *Dialogue with the City* used a wide range of techniques – including schools competitions, regular newspaper articles, TV broadcasts and listening sessions with targeted groups, culminating in a forum with 1,100 people – to engage the public in making decisions for the future of the Perth metropolitan area.⁵ Significantly, effort was made to engage the public beyond the groups that traditionally participate in planning, and participants were asked to participate in making trade-offs. The process was very successful in encouraging a positive planning culture, with 42% of participants reporting that they changed their position after participating. Such figures are very rare at the development assessment stage, where participation tends to be more conservative, less inclusive, and to focus much more narrowly on the impacts of development.

⁴ Thorpe A, [‘Bringing Plan-making Back into Planning’](#) (2010) 99 *Architecture Australia* 25

⁵ 21st Century Dialogue, *Dialogue with the City*, available online at:

<http://www.21stcenturydialogue.com/index.php?package=Initiatives&action=Link&file=dialogue_with_the_city.html>



Incentives need to be provided for major projects which follow strategic planning processes involving meaningful participation by a broad cross-section of the public. In such cases, public participation requirements at the development assessment stage could be more limited. Rather than assuming that limited opportunities for participation at the DA stage will encourage participation, as suggested in the NSW planning *Green Paper*,⁶ this approach would require extensive participation at the DA stage as the default. Provision should be made to vary this only where it could be demonstrated that:

- i) meaningful participation processes meeting prescribed standards had been undertaken at part of the strategic planning process (for example, engaging with a broad-cross section of the public and employing a variety of deliberative techniques), *and*
- ii) the proposal was consistent with the strategic plan.

Outcomes

As noted above, there is a lack of empirical research on the relationship between DA processes and substantive planning outcomes. There is a need to address this and to ensure that this relationship is monitored publicly on an ongoing basis. Frameworks for the assessment of major projects should be regularly reviewed in line with the results of this monitoring, and amended as necessary to ensure meaningful public participation.

Public participation

Notice and comment is the main technique used for public participation in the assessment of major projects at present. There is an extensive body of literature demonstrating the limitations of this consultative approach to public engagement.⁷ Relying on submissions means that participation is likely to be negative, and far less likely to add value to the planning process.

Public participation can offer many benefits, including improving the content of decision-making by providing decision-makers with information about potential benefits and impacts of projects, possible alternatives, and the different perspectives of the many groups that form the public. Participation can increase the legitimacy of decision-making, thus reducing opposition to projects and making implementation easier. Participation is also valuable for its educative potential, as a means to raise awareness among the public about the trade-offs involved in planning for the future.

⁶ NSW Government, *A New Planning System for NSW—Green Paper* (2012), p 51. I am not aware of any research supporting this assertion, and suggest that such an approach would be more likely to increase mistrust and delays in the planning system.

⁷ Thorpe A “Participation in planning: Lessons from the green bans” (2013) 30 *Environmental and Planning Law Journal* 93; Arnstein S, “A Ladder of Citizen Participation” (1969) 35 *Journal of the American Planning Association* 216; Fung A and Wright EO (eds.) *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (Verso Press, 2003); Forester J, *The Deliberative Practitioner: Encouraging Participatory Planning Processes* (MIT Press, 1999); Fischer F and Forester J (eds.) *The Argumentative Turn in Policy Analysis and Planning* (Duke University Press, 1993); Bourdreaux, *The Housing Bias: Rethinking Land Use Laws for a Diverse America* (Palgrave MacMillan, 2011).

Relying on submissions means that public participation is likely to be skewed towards groups or individuals that already influence decision-making because they have more time, are stronger organisations, or have more information. Many relevant interests are unlikely to participate in submissions processes, including young people, non-owners, people with disabilities, Indigenous people, migrants and 'ordinary' citizens.

Relying on submissions means that participation is likely to be skewed towards those who oppose project proposals. In the consultation on a proposal for a wind farm near the township of Collector, in the Southern Tablelands of NSW, for example, more than half the 140 submissions received objected to the proposal.⁸ This is in contrast to the findings of a survey of 400 community members in which more than two-thirds of the community supported the proposed wind farm, and only 14% opposed its development.⁹

The time and expertise required to make a submission means that those who feel they need to protect their interests are more likely to participate, and to do so in a negative way. Behavioural economists have demonstrated that most people fear losses more than they value gains. Since the benefits of development tend to be diffuse (increasing the supply of housing, generating employment opportunities or tax revenue) and the costs local and often hard to predict (particularly the impact on real estate values), submissions are far more likely to attract opposition than support for projects. Further, since submissions are not generally sought until project proposals are well-developed, it is much harder to incorporate public suggestions and thus much harder to provide meaningful opportunities for participation. The easiest way for the public to engage in such process is to criticise project proposals, or to focus discussions on superficial issues such as managing impacts during construction.

Research suggests that people are more likely to participate if:

- their input will have a real impact on decision-making, and this is clearly explained (as opposed to making a submission to an unknown reader to be used in an unknown way);
- they are given information, in a wide range of formats (particularly information prepared by the community itself, e.g. summaries of what other people have said) and including options, to help people understand consequences of various choices; and
- a variety of forums/techniques are used, e.g. visioning workshops, citizens juries, community forums and listening sessions. It is important that engagement go beyond traditional one-way processes such as formal hearings and written submissions.¹⁰

⁸ Tom Sebo, "Ill Wind blows over Collector" *Goulburn Post*, March 24, 2013. Available at: <<http://www.goulburnpost.com.au/story/1370377/ill-wind-blows-over-collector/>>

⁹ Community Attitudes Survey, July 2012, available at:

<http://www.windfarms.net.au/html/development_portfolio/collector.php>

¹⁰ S Brody, D Godschalk, R Burby, 'Mandating Citizen Participation in Plan Making: Six Strategic Planning Choices' (2003) 69(3) *Journal of the American Planning Association* 245.



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Ensuring full community engagement will also require direct government funding to support marginalised and under-resourced parts of the public to engage effectively in planning processes. To ensure that participation is meaningful, and thus more likely to improve the quality and legitimacy of decision-making, frameworks for major project assessment should mandate efforts to seek out, and even advocate for, groups not traditionally engaged in planning processes. As noted above, where participation in strategic planning has not been meaningful, or where major project proposals are not consistent with strategic plans, the need for meaningful public participation is particularly important.

There is a need for ongoing monitoring of participation in DA processes and how this relates to planning outcomes. Monitoring and publication of data on participation would provide a basis for robust discussion of and, if necessary, reform to frameworks for participation in the assessment of major projects.

Yours sincerely,

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