

Major Project Development Assessment Processes  
Productivity Commission  
Locked Bag 2, Collins St East  
Melbourne Vic 8003

25 March 2013

Dear Sir/Madam,

### **Major Project Development Assessment and Approval Processes**

The Nature Conservation Council of NSW (**NCC**) is the peak environment group for New South Wales. NCC represents more than 100 member societies from across the state. Many of NCC's members have a strong interest in planning and development issues, and are strongly committed to securing positive environmental outcomes in their local area. We welcome the opportunity to make this submission in response to the *Productivity Commission Issues Paper: Major Project Development Assessment Processes*.

Land use planning and development assessment is intrinsically linked with environmental protection, nature conservation and natural resource management. This is because actions that may affect the environment and our natural resources are regulated, either directly or indirectly, through the planning system. The impact of planning and development on the environment is therefore a key consideration for decision makers in preparing planning instruments and assessing and determining development applications.

The Productivity Commission has been asked to undertake a study to benchmark Australia's major project development assessment processes against international best practice. The impetus for the study comes from a Business Council of Australia request, presented to the Council of Australian Governments at its inaugural Business Advisory Forum meeting in April 2012. The Business Council of Australia has identified a number of priority areas for competition and regulatory reform including streamlining environmental assessments and approvals, and improving the efficiency of major project development approvals.

The Nature Conservation Council of NSW has significant concerns that streamlining environmental assessments and approvals in order to improve the efficiency of major project development approvals puts many of our fundamental environmental assessment processes at risk.

The efficacy of planning systems should not be judged solely on their ability to achieve assessment processing timeframes or development approval rates. More fundamental is the ability for a planning system to produce ecologically sustainable outcomes. This requires comprehensive environmental impact assessment and genuine public consultation. Fast approvals that deliver poor quality, high risk or unsustainable development are not in the public interest.<sup>1</sup>

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<sup>1</sup> See Nature Conservation Council of NSW, Total Environment Centre and EDO NSW *Our Environment, Our Communities – Integrating environmental outcomes and community engagement in the NSW planning system* (May 2012), available at <http://nccnsw.org.au/planningreport#attachments>

The Productivity Commission has noted in its own benchmarking report on Australian Planning Systems:

*...a combination of several benchmarks is often needed to reflect system performance. For example, while longer development approval times may seem to be less efficient, if they reflect more effective community engagement or integrated referrals, the end result may be greater community support and preferred overall outcome.<sup>2</sup>*

This is particularly pertinent at a time when Australia is facing many significant environmental challenges including, for example:

- loss and fragmentation of native vegetation and wildlife habitat,
- extinction of native species,
- conversion and loss of strategic agricultural land, and its implications on food security,
- degradation of rivers, wetlands and water catchments,
- urban sprawl, traffic congestion, air pollution and waste,
- carbon pollution and impacts of climate change.

By definition, major projects are those that are likely to have the most significant impact on the environment and communities. It therefore follows that major projects should be subject to the highest level of assessment and scrutiny.

In July 2011, the NSW Government announced a major review of the NSW planning system. NCC and its member groups have been actively engaged in the review process, and have given significant consideration to planning system processes and the development assessment and approval of major projects.

Our vision for planning processes that deliver a sustainable future is set out in our various submissions and reports to the NSW planning system review, which are **attached** as part of this submission to the Productivity Commission's review of major project development assessment and approval processes:

- *Planning for Ecologically Sustainable Development – Opportunities for improved environmental outcomes and community involvement in the planning system*
- *Planning for a Sustainable Future - Submission on the Green Paper - A new planning system for NSW*
- *Our Environment, Our Communities – Integrating environmental outcomes and community engagement in the NSW planning system*

By way of summary, NCC sees that following matters as being essential for major project development assessment and approval:

### **1) Development assessment must be underpinned by the principles of ESD**

All planning and development decisions, including the assessment and approval of major projects, must be underpinned by the principles of ESD.

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<sup>2</sup> Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (April 2011), Vol. 1, p xxviii.

**2) There must be a clear legislative framework for genuine and meaningful community participation in major project development assessment and approval**

Genuine and meaningful public participation has the benefit of empowering local communities, utilising local knowledge and improving decision making by assisting decision makers to identify public interest concerns. It also promotes community 'buy-in' of decisions which can reduce potential disputes and can help to ensure fairness, justice and accountability in decision making. The public interest value and benefit of public participation processes must not be sacrificed simply to increase the speed of development assessment.

**3) There must be clear and mandated requirements for environmental impact assessment**

In order to guarantee environmental outcomes and improve certainty and efficiency in the major projects assessment and approval processes, there should be clear and mandated requirements for environmental impact assessment. This should include an assessment of land capabilities including the identification of the most vulnerable areas for both protection and restoration. Further, the assessment should extend beyond the direct impacts of a project and include, for example, an assessment of cumulative impacts and climate change impacts.

**4) There must be sufficient processes that ensure environmental impact assessment is robust and reliable**

NCC members and supporters have expressed significant concerns about the reliability and validity of information contained in environmental impact statements and assessment reports provided by applicants as part of development applications.

NCC submits that best practice environmental impact assessment should remove the nexus between developers and environmental consultants by introducing a framework for the independent appointment of environmental consultants.

Additional measures could be implemented to ensure the integrity of environmental impact statements, including, for example:

- accreditation of environmental and planning consultants,
- ensuring assessment and scrutiny is commensurate with potential impacts,
- requirements to reject reports that are unsatisfactory,
- external auditing of environmental assessment reports, and
- annual reporting requirements.
- strengthen penalties for providing inaccurate information beyond false and misleading to include negligent or reckless inaccuracies

We note that there are additional benefits of ensuring that environmental impact assessments are reliable and accurate. For example, it may reduce the extent to which the consent authority would need to assess the adequacy of the information, saving both time and money. It may also provide an opportunity for reliable information provided in environmental assessment reports to be captured in an integrated data system and reused in other processes (for example, assessing cumulative impacts of proposed neighbouring development).

## 5) There must be clear and objective decision making criteria for determining major project development applications

In NSW, the *Environmental Planning and Assessment Act 1979* (EP&A Act) is heavy with discretionary decision making processes that have historically led to environmental considerations losing out to development and economic interests.<sup>3</sup> These discretionary processes have also contributed to inefficiencies in the system as a result of uncertainty and lack of transparency.

NCC submits that there is substantial benefit in implementing robust, objective decision making tools that ensure environmental standards are met at the approval stage, for example:

- requiring development to meet threshold tests (such as a rigorous ‘improve or maintain’ test) for key environmental values such as biodiversity, native vegetation, catchment health and water quality, energy and water use, climate change and pollution, and
- prescribing mandatory standards in codes or guidelines that reflect best practice.

This approach is consistent with an overarching objective of achieving ecologically sustainable development and ensures that development is undertaken within the physical capacity of the environment. Further, this objective approach has the benefit of reducing uncertainty, ensuring that decisions are transparent and that decision makers are accountable, and helping to restore the community’s confidence in the planning system.<sup>4</sup>

## 6) Interagency approach to development assessment

In order to effectively integrate environmental considerations at the decision making stage, an interagency approach is needed. Decision makers must be required to consider all potential impacts of a proposed development and seek advice from other Government agencies where appropriate. Further, any requirement to obtain permits or approvals under other legislation should be facilitated, not overridden.<sup>5</sup> An integrated interagency approach is important because it:

- draws on expertise from other agencies and assists to identify developments that are inappropriate on environmental and technical grounds,
- ensures that appropriate conditions are attached to any consent for development, and

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<sup>3</sup> For example, section 79C of the EP&A Act prescribes matters for consideration by the decision maker in determining a development application. Section 79C does not prescribe how the matter is to be considered by the decision maker (for example, it does not prescribe weight to be given to each matter, or any level of satisfaction that the decision maker must reach in considering a certain matter)

<sup>4</sup> In a similar vein, and consistent with the desire for more objectivity is the NSW Independent Commission Against Corruption’s recommendation that the NSW Government ensures that discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective – see for example, *Anti-Corruption Safeguards And The NSW Planning System* Independent Commission Against Corruption February 2012 (**enclosed**)

<sup>5</sup> See for example, section 91 of the EP&A Act, which sets out the permits and approvals that are required as part of the current integrated development process. Former Part 3A and the new State Significant Development and Infrastructure regime override a range of legislative authorisation and agency concurrence requirements. Acknowledging the need for efficient processes (including for significant public infrastructure), this is contrary to the principle that projects with the greatest potential impacts should be subject to the greatest scrutiny.

- streamlines the process for proponents who may otherwise have to approach each agency individually.

## **7) Mechanisms for accountability, compliance and enforcement**

It is important that development assessment and approval processes incorporate robust checks and balances to ensure that decisions are lawful, impartial and based on best practice planning principles; and that laws are properly enforced. There are well documented benefits of having court-based review rights in planning systems – including for example participatory democracy, executive accountability, institutional integrity, improved decision making and rational development of the law.<sup>6</sup>

Major project development assessment and approval processes have significant implications for the long-term sustainability of our environment and communities. Best practice must recognise the achievement of environmental outcomes as key benchmarks of these processes.

Kind regards,

Pepe Clarke  
Chief Executive Officer

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<sup>6</sup> See, for example, the Hon Justice B. Preston, Chief Judge of the NSW Land and Environment Court, “The role of public interest environmental litigation” (2006) 23 Environmental and Planning Law Journal (EPLJ) 337; The Hon Justice Paul Stein AM, “The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest and Environmental Law” 13 EPLJ 179.