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Nature Conservation Saves for Tomorrow

SUBMISSION - MAJOR PROJECT DEVELOPMENT ASSESSMENT PROCESSES - PRODUCTIVITY COMMISSION DRAFT REPORT AUGUST 2013

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NATURE & SCOPE OF THE DRAFT REPORT

The Productivity Commission is the Australian Government's independent research and advisory body for economic, social and environmental issues. The Commission mandate it to be '*driven by concern for the wellbeing of the community as a whole*'. It is disappointing that this mandate has not been fulfilled in the present report.

The draft report notes its origin in concerns by the Business Council of Australia that '*one of the key factors impacting on successful investment in Australia is the efficiency of government development approvals processes [DAA], and the related impact of red tape imposed by permits and regulation*'.

The outcome of, amongst other things, the subsequent Business Advisory Forum (BAF) was the proposal for an investigation to '*measure Australia's performance [in DAA] relative to international best practice*'. In this context, the BAF refer to '*performance*' in the sense of ease of regulatory approval, rather than the delivery of social, economic or environmental goals.

According to the BAF's measure the performance of a planning system is measured by the ease of gaining approval for proposed developments. This dictates a minimal impact by the system on the nature of the proposal. A planning system which does direct, modify and where necessary reject proposals is one which does not deliver planning outcomes. The BAF's perverted measure of '*performance*' raises valid questions as to the purpose of a planning system; the BAF are ultimately advocating for an anarchistic system.

The BAF somewhat audaciously references '*the broader concerns in the community around the delivery of planned projects*'. The timing of the present report concurrent with innumerable community rallies across the nation highlights the level of community concerns regarding the planning system. However these are not concerns with performance according to the BAF's

definition, but contrary concerns regarding the methodical dismembering of planning controls benefiting big business to the detriment of local communities.

Irrespective of the BAF's definitions, more balanced parties ensured that the Commission's terms of reference released by the Hon. David Bradbury required the present review to consider the delivery of policy outcomes (ref. item 3 of the scope). We note with some alarm that contrary to this Scope, the present draft report relates only to efficiency of the planning system. The Planning Commission's mandate to be '*driven by concern for the wellbeing of the community as a whole*' has been neglected in favour of a limited scope of study in the BAFs favour. The failure to deliver a balanced apolitical assessment by the Commission is of grave community concern.

FAILURE TO ASSESS INTERNATIONAL BEST PRACTICE

Contrary to the scope of the study, International planning systems have been at best nominally considered. The closest to such an assessment is *Box 6.2 Pre-application meetings with the National Energy Board of Canada*.

It is ironic that Canada is the only International DAA process to receive any significant attention. At no point has a review been made by the Commission of Canada's DAA. We note that Canada's DAA process (the CEAA 2012 in particular) has been heavily criticised as an example of **worst practice** internationally.

FAILURE TO BALANCE CONSIDERATIONS

The report provides a lengthy section entitled '*The importance of major projects to Australia*' but there is no comparable consideration given regarding the importance of communities, heritage and environment to the nation. The Commission clearly and repeatedly highlight grave concerns for the future of major developments in Australia, however its own evidence demonstrates that such projects are in fact booming (*Figure 1*). It would be appropriate to insert a new *Figure 2* highlighting the **decline** of community, social and environmental indexes over the same time period. The Commission's report cannot be construed as independent, balanced or informed until this gross bias is rectified. The product delivered has been an openly political exercise and it is distressing that the Commission have conceded to playing this role.

The Commission makes a number of key findings through the report, in particular in relation to ESD. Distressingly none of these findings are repeated in the '*key points*' listing the '*common concerns raised in [the] study*'. Indeed, the Key Points list no concerns relating to planning outcomes or indeed to the Commission's mandate of community wellbeing. It is not possible to arrive at any alternative conclusion than that the community was not been genuinely involved in the present review, and the review has concerned itself only with its political mandate of recommending streamlined project approval.

The key points note:

‘Governments regulate major projects to facilitate their development and to manage the impacts that they may have on the environment, heritage and local amenity’

This wording is insightful. In the Commission’s view, major projects are not regulated to ensure satisfactory community outcomes are achieved but to manage negative outcomes and minimise these where expedient. The possibility of rejecting blatantly inappropriate development is clearly ruled out: the government’s mandate being to facilitate, not to plan.

SEPARATION OF ENVIRONMENTAL POLICY AND ENFORCEMENT

One of the most concerning recommendations of the Commission’s report is:

‘institutionally separating environmental policy from regulatory and enforcement functions in all jurisdictions’

This conclusion is not supported by review of international DAA process, or indeed any other considerations within the report.

Separating policy from enforcement cultivates a disconnect between object and delivery. In short the proposal would see one body producing admirable environmental goals, while a separate body continues the erosion of social and environmental wellbeing irrespectively.

STRATEGIC ASSESSMENTS & CUMULATIVE IMPACTS

The Commission correctly note the need to consider cumulative impacts:

‘Australia’s DAA regulations are largely organised around evaluating one project proposal at a time. This means governments consider the incremental impacts of a project but not the cumulative impacts of a series of developments. This limits the ability of the regulatory framework to meet policy objectives, as can be seen from the challenges developing in the Pilbara and around Gladstone’

Similarly the Hawke Review identified cumulative impact assessment as one of several areas where the EPBC Act should be strengthened.

Recent planning history in Australia has not demonstrated a capacity for Strategic Assessments to suitably manage cumulative impacts. Rather to date Strategic Assessment have largely been a tool to bypass social and environmental standard requirements. In many cases such as the Western Sydney Growth Centres the strategic assessment openly failed local, state, federal and international obligations, and case-specific legislation was required to avoid successful legal prosecution of the strategic assessments.

The Blue Mountains Conservation Society recommends that Cumulative Impacts be incorporated as a key consideration in all levels of DAA. Duplication of the planning system is at

present the only safeguard against increasing political interference in DAA and should be retained until a planning system robust against such interference can be delivered. The present Commission Report itself is not encouraging in this regard.

It is highly concerning that *Box 6 - Participants' views on regulatory overlap and duplication* fails to present any example of the dominant community view that under the present system duplication in the planning system should be retained to act as a safeguard against political interference in DAA. This was made clear in innumerable submissions.

ESD - CLARITY AND CONSISTENCY OF OBJECTIVES

The need to maintain ESD as the consistently core object of planning mechanisms is brought home by the apt example of the Queensland Department of State Development, Infrastructure and Planning (p 100), which sets a mandate of industry advocacy. The Commission wryly notes:

'It is not clear these are well aligned with its legislative object 'to achieve ecological sustainability''

The Report makes clear that ESD is the sensible consistent objective of DAA, however once again these findings are suspiciously absent in the recommendations. Might this be reflective of the political bias of the present report?

Equally concerning is the evidence that not only many submitters, but the Commission itself, has failed to understand ESD and the precautionary principle. In a classic case, Justice Paul Stein (1999) demonstrated a complete failure to understand the concept, noting:

'[The inclusion of ESD] principles in Australian legislation has been largely confined to objectives of statutes or agencies without any real guidance to decision makers as to whether and how to apply the core principles or what weight to give them.'

ESD does not 'weigh' principles. Rather it is a single benchmark – the question of if we can implement developments of the nature proposed with no loss to the ecology which sustains our existence. In a similar vein the *Commission Staff Research Note* quoted considered the principle:

'difficult to operationalise, mainly because it lacks an analytical basis to make decisions about any tradeoffs between pillars' (Markulev and Long 2013, p. 2).

How is it possible to consider a concept of absolute sustainability and yet develop conundrums regarding tradeoffs?

Similarly it is distressing to note that the Commission has failed to understand the very simple concept of the precautionary principle. The Commission note:

'The precautionary principle encounters similar issues... given the lack of definition of 'precaution' or how much precaution should be taken.'

The very nature of the principle is that where there is uncertainty of impact the worst must be assumed. It is philosophically impossible to get tied up in questions of 'how much' precaution is merited – such considerations are themselves a failure to adhere to the principle.

Box 5.6 2010 Intergenerational Report framework epitomises the failure by the Commission to understand ESD. It notes:

'For wellbeing to be maintained or increased, the current generation must bequeath future generations an equal or greater level of total capital stock' (i.e. 'economic, social, human and environmental capital').

This is founded on the premise of trade between these four capital spheres. However such trade is not possible. A coal mine which destroys a town (a common proposal) can potentially develop economic capital, however it causes permanent irreversible damage to social capital. While social and environmental capital are the foundation of all economic capital, the opposite is not true. However hard we may try economic capital can never restore social or environmental assets once they are lost. To borrow the analogy, the town is gone.

ENVIRONMENTAL ASSESSMENT OF PLANNING INSTRUMENTS

The Commission was engaged to assess international best practice; however this has not eventuated in a significant way.

A key example of International best-practice which has curiously been ignored is the application of DAA to planning instruments. We have the ironic situation in Australia that the majority of endangered species have the majority of their habitat zoned for development through local and state planning instruments. This creates a serious conflict between planning instruments and State and Federal environmental law. This conflict escalates by creating unrealistic expectations for development opportunities, and ultimately results in conflict.

This impossible situation would not develop if planning instruments were subject to the same DAA that their component actions are. Looking at International practice, the US National Environment Policy Act 1969 requires EAA for proposed legislation and policy which is likely to significantly impact certain elements of the environment.

The extension of DAA to regulatory instruments is the 'elephant in the room' of planning reform in Australia. The Commission needs to put aside the relatively minor politically motivated issue of planning approval times, and instead focus on matters such as this which are causing immense distress across this nation. This matter requires urgent consideration.