24 February 2011

Commissioner Patricia Scott
Australia Productivity Commission
Level 2, 15 Moore Street
Canberra ACT 2600

Dear Commissioner Scott,

RE: Submission to the Report into the Impacts and Benefits of COAG Reforms

McKenzie Group Consulting Planning (NSW) Pty Ltd makes this submission in relation to the Report into the Impacts and Benefits of COAG Reforms currently being undertaken by the Productivity Commission. Specifically, this submission relates to the matters concerning Development Assessment and the National Construction Code.

It is anticipated that the content of this submission will assist the Commission in realising the realities and experiences of small to medium business operating within the context of the COAG Reforms relating to building and construction processes.

PART A – DEVELOPMENT ASSESSMENT

The specific COAG reforms identified within Chapter 14 of the Commission's Discussion Paper released 20 December 2011 identifies the following five reform streams relating to Development Assessment:

1. Roll-out of electronic development assessment (eDA) processing nationally
2. A system of national performance monitoring
3. Accelerated use of 'code assessment'
4. Establish a set of supporting national planning system principles
5. Assessment of benefits accruing from development assessment reforms

Reform stream No. 5 is clearly underway as evidenced by the engagement of the Productivity Commission to undertake the current report into Development Assessment reform streams 1 to 4. The following information is provided to assist in the assessment of benefits and impacts associated with Streams 1 to 4.

It is noted that the list of eDA tools in use in Australia (Box 14.5 of the Discussion Paper) include:

- DA tracking
- Smart forms of electronic submission of information
- Certified planning information
- Filtered planning controls
- On-line maps
- Electronic development activity gathering
- Centralisation of planning information

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It would appear that the practices and problems that have plagued the traditional development assessment processes have unfortunately been transferred to eDA tools. As such, while eDA can open access to information in the early stage of a project, the moment that government becomes involved in assessment, the opportunities offered by the correct implementation of eDA disappear and applicants are left sinking in the same quagmire.

Major issues that are restricting the development assessment process are outlined below:

1. *Reliability of Information*

The majority of eDA tools do provide great assistance in the preparatory stage of a development proposal in terms of gathering information for design and desktop analyses of applicable controls. However, the information provided cannot be relied upon as it does not have any legal standing should any action or proceeding be brought about in relation to a development that has relied on such information.

As a result of out of date information, irregular updates to systems, unreliability, incompleteness or incompatibility of programs providing data means that these systems cannot form the basis of reliable decision making and is not considered suitable practice particularly with the litigious nature of the industry.

In New South Wales, the only process to get information that can protect a stakeholder in the development process is to formally obtain a Planning Certificate under Section 149 of the *Environmental Planning and Assessment Act 1979* (the EP&A Act). Other states have a similar or equivalent framework. There is always a cost associated with obtaining this information (in NSW the average cost is $100.00 per certificate and additional cost may be provided to some Council's to have the Certificate issued more expediently). Where multiple allotments are involved in a development, a certificate for each lot will be required in most local government areas.

Regardless of the payment made and the time often taken to receive a Planning Certificate, the information contained on a certificate has previously been incorrect or inconsistent with policy that is displayed (at no charge) through an eDA Tool such as online mapping or centralised database of planning information. If the formal process of obtaining information can result in erroneous information, the eDA tools certainly cannot be relied upon.

Additionally, the content of Certificates issued under Section 149 of the EP&A Act are not subject to any formal review system where errors or omissions are identified, but are in fact protected by S149 (7) which states that for the purpose of any action or proceedings the Certificate shall "*conclusively presumed to be true and correct*."

The cost of design and developing in excess of required controls as a result of incorrect S149 Certificates must be considered. Alternatively, there will be a cost of engaging specialist consultants, as well as the time/cost nexus with stalling development, to prove to Council that an item in a Certificate is incorrect.

2. *Submission of Applications*

In terms of electronic submission of development applications, this system is not fully functional as only a small number of agencies or council's have developed such a system. The administration of these systems is also the cause for much frustration as they are normally established and/or operated by staff with no knowledge of the legal basis for accepting a development application. This also remains a significant issue when attempting to lodge a development application face-to-face, in person, at council chambers.

Part 1 of Schedule 1 of the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation) stipulates the minimum submission requirements for a development application. Despite this regulatory provision, and no legislative power of local government to advise otherwise, each individual local government area in NSW has prepared and implemented its own "submission requirements" on development application forms or checklists that always include matters well in excess of the regulations.

Even where an application is compliant with the regulations, council staff (usually non-planning or development trained or qualified) are simply rejecting to accept the development application if is not compliant with the individual councils application form or checklist.

As an example, a council may specify either through their electronic system or at the counter that a Contamination Assessment is required at the time of lodgement. However a Contamination Report is not a matter required under Part 1 of Schedule 1 of the EP&A Regulations and therefore cannot lawfully be used as a basis for refusing the accept the application. Rather, council can request such a report through a formal Request for Additional Information (clause 54 of Regulations) and only after the application has been accepted. Where the applicant fails to provide the requested information Council might use this as a basis to refuse the application on its merits.

The only way to challenge a Council refusing to accept an application the time of lodgement is a costly and timely exercise through the Land and Environment Court as demonstrated in *Parkes v Byron Shire Council*[2003] NSWLEC 104, Lloyd J.

3. *Code-based Assessment*

The introduction of code assessment has been a significant reform in NSW and is proving to be a significant cost and time saving to applicants. However, there is concern that simply meeting numerical requirements of a code will not result in the urban design, social, economic or environmental outcomes that assessment through the traditional development assessment process would deliver. In this regard, it is recommended that careful consideration is given to the range of activities or development that can be assessed under code assessment.

In addition, a significant issue concerning Code Assessment that is experienced on a regular basis is the advice issued to the development stakeholders by local government in relation to the ability undertaken certain development as code-assessable development. In NSW, code assessment can only be undertaken on sites that satisfy particular requirements. For example, where a site contains an item of environmental heritage, code assessment under complying development provisions cannot be used and a traditional development assessment process must be followed. The heritage matter would then form a matter for consideration under Section 79C of the EP&A Act. This framework applies even where the heritage item may be located well away from the intended works area. However, we have experienced many instances where advice has been issued by local government in direct contrast to this legislative requirement and illegal work has been occurring based on such advice.

As McKenzie Group Consulting is committed to operating within the established legal framework, we have often suffered client dissatisfaction and loss of business by continuing to apply the lawful process while other businesses and local government are complacent in conducting development in a manner inconsistent with the relevant provisions.

4. *Inconsistency Between Jurisdictions*

Although eDA tools have been implemented across a high proportion of authorities involved in the development process, there are significant inconsistencies between their terminology, implementation and content. The inconsistencies between the availability of eDA tools exist between:

- one local government area and another local government area;
- local government and state government;
- one state government department and another state government department; and
- one state government and another state government.

The eDA tools are a reflection on the wider inconsistency of all development provisions operating in Australia. This complex framework prevents any easy which can lead to stifling investment across imaginary borders and a feeling that professionals and businesses in the development industry are constrained to one or another jurisdiction in which they are experienced unless significant effort in education or human resources are made to get up to speed with an alternative system.

A very simple example would be a signage application for business identification sign for a small retail premises in Queensland having to proceed down a completely distinction approval pathway than a sign of exactly the same design and purpose as a sign in New south Wales.

5. *Timeframes*

Time would undoubtedly be the most controversial matter raised by applicants in relation to development assessment. Although the timeframes governing all types of assessment pathways are embedded in statutory instruments, these are generally always exceeded by authorities. This leads to high levels of uncertainty and the need for high contingency costs and/or contractual variations. The fact that timeframes are scattered between the different Acts, Regulations and Environmental Planning Instruments only increases the difficulty for non-legal trained persons to participate and understand the rights and obligations of stakeholders in the development assessment process.

As there is also no simple recourse to address extended timeframes without proceeding through a costly and time-consuming court process, most applicants remain silent and at the mercy of the determining authority. While in some cases the timeframe delays are caused by under-resourced departments, many instances are brought about by the casual use of the 'stop the clock' provision inherent in assessment timeframes.

While there would be numerous accounts of time and cost delays brought about by the unregulated and often nonchalant use of the 'stop the clock' provisions requesting irrelevant or onerous additional information, one recent example of significant time delay involves a major application that has stagnated as a result of NSW state government agencies failure to provide any submission required in relation to an major application being assessed by the NSW Department of Planning and Infrastructure (DoPI). The delay is severely impacting the productivity of the intended tenant who provides much needed services to all other major companies in Australia in order for those companies to operate successfully. Additionally, impacts associated with the land owners' holding costs, ongoing fees for consultants are increasing as is a hold on new employment opportunities associated with the development.

In response to ongoing requests to have the non-complying agencies provide submissions or continue to have the development assessment proceed, the DoPI advised that it must await the submissions before proceeding despite the length of time already lost. If the statutory timeframes relating to planning and development process cannot be enforced by the state agency responsible for planning and development then the legislation is a toothless tiger and would appear to be defunct.

From our experience, despite the introduction of eDA tools, it would not be unreasonable to assume this kind of delay occurs on at least 90% of all assessments (excluding code-assessments) whether at the local or state level. The impact to the economy from the total losses of delays at this proportion would certainly be extraordinary.

These eDA tools remain dependent on the human input who still have the ability to slow down a process as they deem appropriate and without penalty. Often, the lack of movement of a development application being tracked on an eDA tool leads to further frustration as the inactivity demonstrated on an assessment appears illogical, especially when there has been no communiqué from the agency that there are any outstanding items.

6. *Support from the State-Level Planning Departments*

Given that local government have no formal right to exist under the Australian Constitution and are simply manifestations of State Government in order to carry out the will of the State at the local level, the relationship between state-level planning departments and local government should be much more cohesive and provide an avenue to resolve matters where local government is not fulfilling is legal obligations.

It is the opinion of many in the industry that local Council's are simply out of control and when they choose not to comply with the relevant provisions, state planning departments have no developed procedures to allow staff that directly interact with applicants and councils to resolve matters.

McKenzie Group Planning has, on a number of occasions, sought clarification or remedy from a state-level planning department where a council has been applying requirements to development assessment that is contrary to a statutory instrument. No assistance has been provided under any instance and instead the advice is that a state-level department cannot interfere with local matters or is not sure whether they have the power to do so. This seems highly illogical and does not result in any benefit for the development assessment system.

PART B – NATIONAL CONSTRUCTION CODE

The primary concern relating to the National Construction Code is the impact that the incorporation of Codes that have normally been located outside the Building Code of Australia (for example the Plumbing Code) into a consolidated set of provisions has impacted the traditional roles and responsibilities of a Building Surveyor. The incorporation of Codes is therefore resulting in persons not qualified, experienced or trained in very specific disciplines being required to assess development against Codes relating to these specialised fields.

The time and costs associated with advanced training required or the human resource implications to do this work properly is having significant impact on small to medium-sized compliance businesses. There is also a significant risk resulting from insurance exposure where work is being undertaken by organisations that do not have the necessary skills to deal with such matters.

McKenzie Group Consulting Planning (NSW) Pty Ltd thanks the Productivity Commission for the opportunity to comment on the impacts and benefits of the COAG reforms relating to development assessment and the National Construction Code and hopes that the outcomes of the Commission's report will be beneficial to improving these important system and their outcomes.

Please do not hesitate to contact me should you require any additional information in relation to this submission. We would also be happy to be involved at any future stage of the Commissions investigations in relation to these matters.

Yours faithfully,

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