



Environmental Defenders Office

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South Australian Productivity Commission
Via email sapcc@sa.gov.au

Inquiry into reform of South Australia's regulatory framework Issues Paper

The Environmental Defenders Office (EDO) is the largest environmental legal centre in the Australia Pacific, dedicated to protecting our climate, communities and shared environment by providing legal advice and casework. Other activities include legal education and law reform advocacy. The EDO appreciates the opportunity to respond to the Issues Paper as commenting on all levels of regulation is integral to our law reform program. We have responded below to certain matters raised in the Issues Paper. Key issues include the failure of many regulators to properly involve the community in the formation of regulations and inherent conflicts of interest. An example is the Department of Energy and Mining (DEM). The DEM has an inherent conflict of interest as both a promoter of mining and energy projects and as a regulator.

3.2 b) Provide examples in the development of regulations or in regulator practice in South Australia where economic, environmental and social objectives have been balanced to achieve sustainable development outcomes? Are there any areas for improvement?

In our experience these matters are not balanced either in terms of the content of regulations nor regulator practice as the greatest weight in the vast majority of situations is given to economic considerations. Particularly in the area of planning, decision making emphasises economic benefits over negative impacts. Governments tend to unduly emphasise the economic benefits of for example major projects above the potential negative environmental and social impacts. At most, decision-making rules simply require 'regard to' or 'consideration of' the environment. Decisions can be highly discretionary, and authorities may only need to pay cursory attention to environmental matters with associated risks of long term environmental degradation. In relevant planning and other legislation there needs to be clear legal framework that aims to achieve sustainable development outcomes. Achieving sustainable development outcomes should be operationalised in decision making. Regulation should include additional guidance on fully integrating economic, social and environmental considerations and applying ESD principles in decision-making.

3.3 d) Do some regulators engage with stakeholders better than others? In what ways could stakeholder engagement be improved?

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In our law reform work the EDO seeks to provide comment where relevant on draft legislation, regulations and policies. In our experience these processes vary greatly in both extent and quality. In some cases there is an extensive consultation, for example an Issues Paper followed by a Discussion Paper, draft Bill, regulations, policies etc with an explanation of the impact of changes and later regular reviews. In other cases there is no consultation. Other best practice includes comprehensive feedback on public comments ie why or why not feedback was included. Many inquiries are poorly advertised. In our view there needs to be a uniform and comprehensive process for public comment on these matters which utilises a variety of platforms including social media and the YourSAY website.

Case study

Changes to the planning system

Proposals to change the planning system were developed in late 2014 and early 2015. Whilst the public was able to comment on initial discussion papers there was no consultation on the draft Bill nor any document which detailed it's regulatory impact. In late 2015 the Bill was the subject of a long process of Parliamentary debate and amendment in Parliament. The *Planning, Development and Infrastructure Act* was passed in 2016 but key aspects of it only became operational over time. A key element, the Planning and Design Code (the Code) became fully operational on the 19 March 2021.

A key feature of the new system was to focus the community's involvement in planning at the policy creation stage and less at the development assessment stage, in contrast to the previous system. To facilitate this objective a Community Engagement Charter was mandated within the Act. The Community Engagement Charter includes five mandatory 'Engagement Principles' namely, that:

1. Engagement is genuine.
2. Engagement is inclusive and respectful.
3. Engagement is fit for purpose.
4. Engagement is informed and transparent.
5. Engagement processes are reviewed and improved.

With less public engagement in future development assessment processes it was imperative that there be full compliance with the 5 Engagement Principles at the policy making stage. This did not occur with the development of the Code.

For the following 13 reasons community consultation was considerably inadequate;

1.1 The materials provided for community consultation were not fit for purpose, therefore depriving the community of a genuine opportunity to engage in policy development as the Act intended.

1.2 Materials were released in a piecemeal and fragmented way.

1.3 Materials were changed and added to in an ad hoc manner during consultation periods, creating a moving target for consideration and response.

1.4 The sheer volume of materials was overwhelming for people to consider and respond within the time allowed.

1.5 The unwieldy and confusing nature of the draft Code made it inaccessible to lay people.

1.6 The draft Code and supporting maps were in an unfit state for genuine public consultation.

1.7 The proliferation of errors in the draft Code made it impossible to tell what was an error and what represented changes in policy.

1.8 The brief duration of the consultation process on the deeply flawed draft Code and the untimely provision of further key materials was not fair, inclusive or respectful of the needs and expectations of the community.

1.9 Rather than providing a genuine opportunity for participation in the development of policy within the draft Code, the consultation period was characterised by confusion, frustration and misinformation.

1.10 The level of community dissatisfaction with the engagement process was downplayed by the State Planning Commission in its Engagement Reports.

1.11 Evaluation of the engagement process was undertaken by the same agency that conducted it, preventing a genuinely independent assessment of its effectiveness.

1.12 There is widespread and lingering community dissatisfaction with the consultation process which is demonstrative of a failure to genuinely engage the community.

1.13 The widespread concerns about the failures of the consultation process were not heeded by the State Planning Commission and implementation of the Code proceeded without properly acknowledging or addressing them.

Please contact the writer at Melissa.ballantyne@edo.org.au with any queries.

Yours sincerely,

Environmental Defenders Office

A handwritten signature in cursive script that reads "M Ballantyne".

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