The technocrat is back: Environmental land-use planning reform in New South Wales

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Thirty years ago, environmental land-use planning in New South Wales was characterised by strong technocratic influences, with plans determined by technical experts employed by central government, leaving few opportunities for community participation. In contrast, the commencement of the Environmental Planning and Assessment Act 1979 (NSW) was hailed as the start of a new era in environmental land-use planning which emphasised environmental protection, power sharing between State and local government, and public participation. A return to technocratic approaches to planning is clearly discerned. Thirty years ago, environmental land-use planning in New South Wales was characterised by strong technocratic influences, with plans determined by technical experts employed by central government, leaving few opportunities for community participation. In contrast, the commencement of the Environmental Planning and Assessment Act 1979 (NSW) was hailed as the start of a new era in environmental land-use planning which emphasised environmental protection, power sharing between State and local government, and public participation. A return to technocratic approaches to planning is clearly discerned. Thirty years ago, environmental land-use planning in New South Wales was characterised by strong technocratic influences, with plans determined by technical experts employed by central government, leaving few opportunities for community participation. In contrast, the commencement of the Environmental Planning and Assessment Act 1979 (NSW) was hailed as the start of a new era in environmental land-use planning which emphasised environmental protection, power sharing between State and local government, and public participation. A return to technocratic approaches to planning is clearly discerned.

INTRODUCTION

Before the commencement of the Environmental Planning and Assessment Act 1979 (NSW) (EPAA), environmental land-use planning in New South Wales was characterised by strong technocratic influences, with strategic land-use planning dominated by central government, assisted by technical experts. Ordinary citizens had few opportunities to be involved in the planning system or to have a role in the assessment of development proposals. The introduction of the EPAA in 1979 heralded a new direction in environmental land-use planning which emphasised environmental protection, power sharing between State and local government, and public participation. Comprehensive planning systems with similar objectives have subsequently been introduced in other Australian jurisdictions.

However, the past few years have seen a period of dramatic reform in environmental land-use planning. Independent panels of technical experts have increasingly been introduced to determine planning matters, and there has been a trend towards consolidating and centralising the assessment and determination of major projects. A return to technocratic approaches to planning can be clearly discerned.

New South Wales has been no exception. The Environmental Planning and Assessment (Infrastructure and Other Planning Reform) Act 2005 (NSW) inserted Pt 3A into the EPAA to consolidate the system of assessment for all major projects requiring the approval of the Minister for Planning. The Environmental Planning and Assessment Amendment Act 2006 (NSW) has also been recently introduced to empower the Minister for Planning to appoint planning administrators or panels to take over the planning role of local councils, and to give the Minister new powers over the creation of programs.

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1 These objectives were summarised in the Second Reading Speech for the introduction of the Environmental Planning and Assessment Bill: New South Wales, Legislative Assembly, Debates (1979) p 3049 (Haigh, Minister for Corrective Services, and Representative of the Minister for Planning in the Legislative Assembly). See, for example, Planning and Environment Act 1987 (Vic), s 4(1).

2 For example, the Development (Panel) Amendment Act 2006 (SA), and the Iconic Queensland Places Act 2008 (Qld) both establish independent panels with powers to determine applications for development in certain circumstances. Williams refers to a "trend towards the 'panelisation' of decisions at a local government level in Australia": See Williams P, "Government, People and Politics" in Thompson S (ed), Planning Australia (Cambridge University Press, 2007) p 41.

3 See, for example, Planning Bill 2007 (UK); Development (Development Plans) Amendment Act 2006 (SA).
and content of Development Control Plans. These amendments have recently been followed by the introduction of the Environmental Planning and Assessment Amendment Act 2008 (NSW) (planning reform legislation), which represents the most significant change to the legislative framework for environmental land-use planning in New South Wales for more than a decade.

This article will evaluate the effectiveness of the 2008 planning reforms by assessing their consistency with the objects of the principal statute. The first part of the article will outline the key features of the planning reform legislation, and the main reasons for their introduction. The article will then identify and discuss the main objectives that the EPAA was established to meet when the current New South Wales planning system was introduced in 1979, and assess the extent to which the planning reform legislation facilitates these objectives. Following this analysis, the authors will briefly outline some recommendations for future legislative reform.

**KEY PROVISIONS OF THE PLANNING REFORM LEGISLATION**

The planning reform legislation was driven by a desire to improve the efficiency of the planning and development assessment system, following criticisms from government bodies and industry groups about unnecessary costs and delays generated by weak processes in the current system. Following a forum on planning reform in August 2007, the Department of Planning issued a Discussion Paper in November 2007. After a period of public consultation, an Exposure Draft of the planning reform legislation was tabled in the New South Wales Legislative Assembly in early April 2008. Elements of the Exposure Draft attracted strong criticism, particularly the proposed s 9A, which aimed to facilitate compulsory acquisition of private property in connection with an urban renewal proposal or land release provided that the Minister for Planning considered that “the proposal or release will result in a new public benefit.” The government resisted the criticism by deleting some contentious elements of the Exposure Draft from the final Bill, including s 9A.

The draft Bill was introduced into the Legislative Assembly on 14 May 2008, and passed through both Houses of Parliament on 18 June 2008, following some minor amendments in the Legislative Council. The main elements of the planning reform legislation include changes to the following parts of the planning system.

**Environmental planning**

The EPAA established a tripartite system of Environmental Planning Instruments (EPIs), to facilitate strategic land-use planning. The reforms have significantly changed the existing system by removing Regional Environmental Plans (REPs) as a category of EPI, and by streamlining the process for the remaining two categories: State Environmental Planning Policies (SEPPs), and Local Environmental Plans (LEPs).

The reforms introduce a “gateway” process to empower the Minister for Planning to determine whether a planning proposal can proceed, and, if so, to prescribe the process by which the planning proposal is to be assessed before an EPI is made. This replaces the current process outlining how EPIs are created, including mandatory requirements for public exhibition of LEPs.

**Development assessment**

The planning reform legislation establishes a range of new entities with responsibilities for the assessment of applications for development, including:

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6 See NSW Department of Planning, n 6.

7 See, for example, Greenman H, “State Can Sell Your Home” (Sydney Morning Herald, 19 April 2008) p 1.

9 Environmental Planning and Assessment Amendment Bill 2008 (NSW), Exposure Draft, Sch 5 at [3].

10 Environmental Planning and Assessment Act 1979 (NSW), s 56.
A Planning Assessment Commission (PAC), to which the Minister for Planning may delegate planning and approval functions for projects under Pt 3A of the EPAA, and other advisory and review functions.11

Joint Regional Planning Panels (JRPPs), to which the Minister for Planning may give planning and approval functions for certain projects of regional importance. This extends to the planning functions of a local council where the Minister has assumed the planning functions of the council.12

Independent Hearing and Assessment Panels (IHAPs), which may be appointed by local councils to provide advice on development applications and other planning issues.13

Planning Arbitrators, which can provide a review to an applicant for development consent from a local council where the applicant is dissatisfied with the council’s determination.14 The legislation also restricts appeals against a decision by a Planning Arbitrator to the Land and Environment Court (LEC).

Development contributions
The existing provisions providing for local government to levy contributions from developers for local infrastructure (commonly referred to as s 94 contributions) have been replaced by provisions permitting the collection of “community infrastructure contributions”. Contributions can only be required for community infrastructure as prescribed in the regulations, or approved by the Minister upon application by the relevant local council.15

Certification of development
The legislation reforms the existing system of certification of development by clarifying the obligations of entities empowered to issue a range of certificates, and includes a new obligation to obtain a design certificate for certain developments.16 The legislation also strengthens the powers available to consent authorities to prosecute illegal development by:

- enabling the issue of orders to cease building work or subdivision work;17
- enabling authorised persons to ask questions of accredited certifiers and others involved in development;18
- enabling consent authorities to require security to ensure compliance with development consents in the carrying out of building work and subdivision work;19 and
- empowering the Minister for Planning to suspend a council’s certification functions following an adverse report from the Building Professionals Board on the results of an investigation.20

In order to assess the efficacy of these reforms it is necessary to briefly consider the reasons for the introduction of the EPAA in 1979.

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11 Environmental Planning and Assessment Act 1979 (NSW), s 23B and Sch 3.
12 Environmental Planning and Assessment Act 1979 (NSW), s 23G and Sch 4.
13 Environmental Planning and Assessment Act 1979 (NSW), s 23L.
14 Environmental Planning and Assessment Act 1979 (NSW), s 23K.
15 See Environmental Planning and Assessment Act 1979 (NSW), s 116H.
16 Environmental Planning and Assessment Act 1979 (NSW), s 109IA.
17 Environmental Planning and Assessment Act 1979 (NSW), s 121B(1).
18 Environmental Planning and Assessment Act 1979 (NSW), s 118BA.
19 Environmental Planning and Assessment Act 1979 (NSW), s 80A(10)-(10AC).
20 Environmental Planning and Assessment Act 1979 (NSW), s 117B.
WHAT WAS THE EPAA ESTABLISHED TO DO?

Prior to 1979, the planning system in New South Wales dated back to measures adopted in 1945 that were modelled on 1932 British legislation. Planning schemes made under the legislation focused on infrastructure and technical issues. They did not incorporate environmental assessment. Further, there was no transparency in planning matters and no community involvement in the process. Planning appeals were dealt with by a complex and diversified structure of courts and tribunals.

The deficiencies of the existing legislation were succinctly expressed by the Minister when introducing the new legislation:

[The concept of land-use planning is too narrow; its relationship and orientation to local government stifle initiatives for State and regional planning and inevitably involves the State unnecessarily in local planning issues; its failure to demarcate respective responsibilities for State and local government in environmental planning decision making; its concept of planning instruments is too rigid; its failure to integrate techniques for land-use planning with environmental assessment and protection; its failure to give members of the public any meaningful opportunity to participate in planning decision making; its failure to co-ordinate activities of the public and private sectors involved in the development industry; its failure to provide a uniform and rationalized code for development control causing unnecessary delays and costs in the development process; and its failure to provide the most appropriate organizational and administrative support at State level.]

The EPAA sought to overcome all of the deficiencies in previous legislation. It transformed the traditional town planning scheme by incorporating a new value system—"environmental planning". The concept of environmental planning involved "decision making for planned development and conservation to achieve economic and social growth within the tolerable limits and capacities of the physical environment". This innovation was very advanced for its time and bore marked similarities to the concept of ecologically sustainable development (ESD) which was only introduced into the objectives of the Act in 1998. The EPAA introduced a more flexible plan-making process which was predicated on a prior environmental study and assessment. A clear distinction was drawn in plan-making between issues of State or regional significance and those of local significance. The former two categories were the preserve of State government with local government having autonomy for local planning.

Part IV of the EPAA was intended to provide a uniform code for processing all development applications in accordance with EPAs. The community was given an unprecedented opportunity to participate in decision-making. The EPAA provided an opportunity for community input in relation to: the contents of environmental studies; the aims, objectives and contents of EPAs; development applications requiring advertisement; designated development; and environmental impact statements. Objectors to applications for designated development were given a full merit appeal to the LEC. Third parties were also given legal standing to bring proceedings in the court to enforce compliance with the new legislation and to remedy any breaches thereof. The LEC provided a "one-stop shop" to deal with planning and environmental matters.

DO THE REFORMS MEET THE OBJECTIVES OF THE ACT?

The EPAA had, and still has, three distinct objectives. These are set out in s 5 of the Act and can be summarised as follows:

1. To encourage the social and economic welfare of the community and a better environment.
2. To promote the sharing of the responsibility for environmental planning between the different levels of government in the State.

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22 Town and Country Planning Act 1932 (UK).
23 NSW Legislative Assembly, n 1, pp 3047-3048.
24 NSW Legislative Assembly, n 1, p 3048.
25 Environmental Planning and Assessment Amendment Act 1997 (NSW) (commenced 1 July 1998).
3. To provide increased opportunity for public involvement and participation in environmental planning and assessment.

The principal means of giving effect to the objects of the Act is through the preparation, making, and implementation of EPIs. Section 25 of the EPAA requires every EPI to state the aims, objectives, policies and strategies whereby it is proposed to achieve the objects of the Act. The Minister made it clear when introducing the EPAA that "plans are not an end in themselves – they are a means to an end – the achievement of the express objects of the [Act]." 36

Since 1979 the EPAA has been radically amended on several occasions. In making these amendments, little thought has been given to ensuring that they are consistent with the objectives of the Act. The Environmental Planning and Assessment Amendment Act 2008 is the most comprehensive overhaul of the Act to date, and in many respects moves even further from its original objectives than previous amendments. The following section will consider the planning reform legislation in the light of the continuing objects of the EPAA to examine their consistency with the principal Act.

1. To promote the social and economic welfare of the community and a better environment

The first objective of promoting the "social and economic welfare of the community and a better environment" was described by the Minister, when introducing the EPAA, as "the essence of environmental planning", to be achieved through the "orderly and economic use and development of land." 27 This objective is set out in s 5(a), which enumerates a number of objectives designed to achieve the orderly use of land and the management and conservation of natural resources. It seeks to provide for strategic environmental planning by balancing competing social, economic and environmental interests in land-use. Section 5(a) has been subject to a number of amendments, the majority of which are designed to promote the protection of the environment. These include: the protection and conservation of native animals and plants, threatened species, populations and ecological communities and their habitat; 28 and ecologically sustainable development. 29 The addition of environmental factors is consistent with the value system of the EPAA, which requires environmental assessment at all stages of the planning process – in preparing an EPI and assessing a proposal for land-use, whether or not consent is required. However, the environmental aspects of the objective in s 5(a) have been progressively eroded by substantive amendments to the EPAA that are inconsistent with this objective. 30 This is particularly the case with the Environmental Planning and Assessment Amendment Act 2008, which seems to place far more emphasis on facilitating and fast-tracking development than on broader principles of strategic environmental land-use planning. 31

Social, economic and environmental objectives and plan-making

The principal means of achieving the objective in s 5(a) is through the preparation, making and implementation of EPIs. The planning reform legislation subsumes SEPPs into SEPPs leaving just two categories of EPI: SEPPs and LEPS. A SEPP can now be made about any matter of State or regional environmental planning significance. 32

26 NSW Legislative Assembly, n 1, p 3049.
27 NSW Legislative Assembly, n 1, p 3048.
28 Environmental Planning and Assessment Act 1979 (NSW), s 5(a)(vi).
29 Environmental Planning and Assessment Act 1979 (NSW), s 5(a)(vii).
30 For example, Gleeson and Low argue that environmental planning regimes such as the EPAA that "reflected green democratic reform aspirations" were overtaken during the 1990s by a neoliberal agenda which focused on deregulation at the cost of democratic participation and ecological sustainability: Gleeson B and Low N, "Unfinished business": Neoliberal Planning Reform in Australia" (2000) 18(1) Urban Policy and Research 7.
31 Letter from National Trust of Australia (NSW) on Draft Legislation, Environmental Planning and Assessment Amendment Act 2008 (23 April 2008).
32 Environmental Planning and Assessment Act 1979 (NSW), s 37.
Environmental studies

A fundamental tenet of strategic environmental planning is the need for environmental assessment at the plan-making stage. Since SEPPs were traditionally regarded as broad-based policy plans they did not have any mandatory requirements for environmental assessment. REP's and LEP's, on the other hand, included a provision for an environmental study to be undertaken prior to the preparation of the plan. These studies were exhibited with the draft REP/LEP. Environmental studies were only required where the plan was the first to be made for the area, but could be ordered by the Minister (in the case of a REP) and by the Director of Planning. Since in most cases a deemed EPI was in existence, it meant that in practice environmental studies were only required for a small percentage of proposals.

The amalgamation of SEPPs and REP's in the Act means that environmental assessment will no longer be an essential feature of the REP making process. In the case of a LEP, the need for environmental assessment, if any, will be determined at the "gateway" stage. This has the advantage of identifying impacts at the strategic planning stage before a final determination to proceed with the plan has been made. Regrettably, however, an environmental study is no longer mandatory. Section 54(5) of the Act provides that the Minister can direct a council to provide studies or other information in its possession (authors' emphasis) to the planning authority preparing the LEP. This suggests that if no studies are in existence, none may need to be prepared. It is unlikely that any environmental assessment requirements imposed at the "gateway" stage will be as detailed as an environmental study, which was the equivalent, at the planning stage, of an environmental impact statement. These studies were often prepared for larger areas and did not have the site-specific limitations of an environmental impact statement. They generally provided detailed information about the environment of the land, including an analysis of social, economic and environmental issues. The environmental study also had the advantage of being prepared by an independent consultant on behalf of the council. This meant that the study was likely to be more objective than might be expected from a "proponent" prepared environmental impact statement. Although relatively few new studies were prepared, they were a valuable tool to make strategic decisions about the objectives and policies to include in plans. They could be particularly useful in identifying areas that are likely to be impacted by climate change.

It is interesting to note that the amending legislation continues the right of a council (or planning authority) to require a study as a condition of a "spot rezoning" proposal. It also retains the requirement that the proponent should bear the cost of any such study prepared. However, even if a study is prepared, the Act no longer requires it to be exhibited with the LEP.

Heritage

Schedule 1.3 of the amending legislation repeals Pt 5 (Environmental planning instruments affecting certain land) of the Heritage Act 1977 (NSW). This removes the ability of the Heritage Council to effect planning controls for a heritage place or site. The Heritage Council can also no longer issue guidelines to councils to prepare a LEP to assist them in identifying and conserving items of local environmental heritage significance. Today, relatively few interim protection orders are made under the Heritage Act, and the EPAA has become the most significant and frequently used vehicle for

33 Environmental Planning and Assessment Act 1979 (NSW), ss 41 – REP, 57 – LEP.
34 Environmental Planning and Assessment Act 1979 (NSW), ss 47 – REP, 66 – LEP.
35 Environmental Planning and Assessment Act 1979 (NSW), s 74(2)(a) – REP, 74(2)(b) – LEP.
36 Environmental Planning and Assessment Act 1979 (NSW), ss 55-56.
38 Burns Philip Trustees Co Ltd v Wollongong City Council (1983) 49 LGRA 420.
39 Environmental Planning and Assessment Act 1979 (NSW), s 54(3).
40 Environmental Planning and Assessment Act 1979 (NSW), ss 54(3), 57(5).
41 It is estimated that an average of 20 a year are made, see "Protection under Threat" (The Manly Daily, 7 June 2008) p 8.
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Heritage protection. This makes the repeal of Pt 5 of the Heritage Act of even greater concern. A Ministerial Directive under s 117 of the EPAA requires councils to include provisions for the conservation of items or precincts of heritage significance, including Aboriginal heritage, in the LEP for their respective area.42 Councils have followed this Directive by incorporating standard heritage provisions in a LEP frequently specifying greater detail in a Development Control Plan. The repeal of Pt 5 of the Heritage Act means that councils no longer need to comply with Heritage Council guidelines or include model provisions prepared by the Heritage Council. Consideration of heritage matters will now be included as part of the gateway determination for proposed LEPs along with other relevant planning issues. No detail is provided as to how heritage issues will be dealt with in the gateway process. However, it is unlikely that this process will afford the same protection for heritage items and land as that which is provided under the current system and there is potential for a significant reduction in heritage protection.

Social, economic and environmental objectives and development assessment

The Act continues the reform agenda of the late 1990s, which was geared to promote competition and efficiency.43 In 1997 the EPAA was amended to introduce new categories of exempt and complying development.44 As the name suggests, the exempt category does not require development consent (unless it is located on critical habitat or a wilderness area). Likewise, the complying development category does not require development consent but is assessed according to pre-determined development standards. Complying development can be assessed by accredited private certifiers or by the council. Exempt and complying development detracts from strategic environmental planning since it is not subject to the assessment procedures in the Act. The EPAA, as originally enacted, provided for all planning proposals to be subject to environmental assessment, even those that did not require consent.

In practice, the formal introduction of categories of exempt and complying development has not had a great impact on the environment, as most councils kept these categories of development to the minimum level possible. It has been estimated that only 11% of development proposals in New South Wales are dealt with as complying development.45 This is contrary to government intention, and the Act seeks to clarify this by providing that the target for development categorised as complying development is to be increased to 30% in three years and 50% in five years.46 This means that at least half of development proposals will bypass the environmental assessment procedures in the EPAA. The Minister has indicated that the requirements for environmental assessment of exempt and complying development will be set out in mandatory codes, which will be given effect through the proposed SEPP (Exempt and Complying Development Codes) 2008.47 These codes have yet to be finalised and are likely to be far less rigorous than the procedures provided in the EPAA.

Prior to the introduction of the planning reform legislation, there were restrictions on land where complying development could be approved. These were enumerated in s 76A(6) of the EPAA and excluded designated development, heritage land and items, critical habitat, wilderness land, and environmentally sensitive land. Section 76A(6) has now been repealed and although the detail is not yet available, and the Minister stated that only certain types of minor development will be permitted, there are serious questions as to the potential ecological impact of a series of small developments. As the Environmental Defenders' Office noted in their submission on the amendment, the repeal of s 76A(6) ignores the "cumulative impact of a succession of 'minor developments', which, when

43See Gleeson and Low, n 30.
44Environmental Planning and Assessment Amendment Act 1997 (NSW).
45NSW Legislative Assembly, n 5, p 6.
46NSW Legislative Assembly, n 5, p 6.
considered holistically, may have a significant impact. The removal of these restrictions would seem counter to the objective in s 5(a)(vi) to ensure the "protection of the environment, including the protection and conservation of native animal and plants, including threatened species, populations and ecological communities, and their habitats". The repeal of s 76A(6) also has the potential to severely undermine heritage protection in New South Wales.

2. To promote the sharing of the responsibility for environmental planning between the different levels of government in the State

A second objective of the EPAA is to promote the sharing of responsibility for environmental planning between the different levels of government in the State. The delineation of appropriate division of responsibilities between State and local government has been a significant issue since the introduction in 1945 of Pt XIIA of the Local Government Act 1919 (NSW). Local government has always played a crucial role in town planning but, prior to 1979, did not have full autonomy for local decision-making. Moreover, the respective roles of State and local government in planning had not been clearly articulated.

The EPAA sought to devolve responsibility for local environmental planning issues to local authorities and to clearly delineate the respective powers of State and local government. The then State government saw its main concern as responsibility for matters of State and regional significance with local government having responsibility for local matters. Sharing of governmental planning powers in this context required that the State government be "relieved of involvement in local planning decisions and detail" in order to discharge its "heavy responsibility" for State and regional planning. The rationale for this division of responsibility was the long experience of local government in planning practice and administration, and its closeness to the community. It was therefore seen to be more in touch with local issues than State government.

However, despite the power sharing objective of the EPAA, there have been a plethora of amendments to the Act which have increased the ambit of State responsibility at the expense of local government. Of these, the Environmental Planning and Assessment Amendment Act 2008 is the most radical encroachment on local government independence to date. As will be seen below, the amendments reverse the process initiated by the EPAA in 1979 by diminishing the powers of councils and creating a number of new bodies with functions currently exercised by councils. This is unlikely to result in coherent and effective planning, and undermines the objective of power sharing in environmental land-use planning.

Power sharing and plan-making

Since 1979 local plan-making has largely been the responsibility of local government. Plans were initiated by the council or by two or more councils jointly. The Minister also had power to direct council/s to prepare a LEP. The planning reform legislation drastically erodes the power of local councils by widening the list of those who can initiate an LEP to include the Director, and any other body identified by Regulation,

- relates to matters that, in the opinion of the Minister, are of State or regional significance;

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49 Environmental Planning and Assessment Act 1979 (NSW), s 5(b).
51 NSW Legislative Assembly, n 1, p 3049.
52 NSW Legislative Assembly, n 1, p 3050.
53 Environmental Planning and Assessment Act 1979 (NSW), s 54.
54 Environmental Planning and Assessment Act 1979 (NSW), s 55.
55 It is intended that bodies such as the Growth Centres Commission, Redfern-Waterloo Authority, Sydney Olympic Park Authority, Sydney Harbour Foreshore Authority and other relevant planning agencies may be prescribed in the principal Regulation: see Explanatory Note on the Environmental Planning and Assessment Amendment Act 2008 (NSW), p 3.
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- makes provisions consequential to the approval of a concept plan for a Pt 3 project, the making of another EPI or changes to the Standard Instrument;
- where the PAC or a JRPP has recommended that the LEP be made;
- where, in the opinion of the Minister, the council has failed to comply with its obligations with respect to the LEP or not discharged them satisfactorily;
- it is not in a local government area.\textsuperscript{56}

These criteria are extremely wide and give the Minister an unfettered discretion to initiate a LEP and make whatever changes he or she sees fit. Any attempt to challenge the discretion of the Minister in the LEC is highly unlikely to succeed. There have been a number of challenges to the Minister's "opinion" that a matter is of State or regional significance and all have failed. For example, in \textit{Leichhardt Municipal Council v Minister for Planning} (1992) 78 LGRA 306, a challenge to SEPP 32 - Urban Consolidation, failed on the ground that the subject matter involving the identification of urban land suitable for rezoning for medium density housing, could not reasonably be regarded as being of significance for State or regional environmental planning.\textsuperscript{57} It would be equally difficult to challenge a Ministerial opinion that a council has failed to comply with its obligations, or not discharged them satisfactorily.

These amendments are contrary to the original intention of the EPAA, where councils had full responsibility for initiating a LEP. Although the Minister could previously direct a council to prepare a LEP, no other planning bodies could do so. The proposed amendment could result in a number of "spot rezoning" LEPs at the initiative of the Director or other planning bodies which are inconsistent with an existing LEP and community values.

**Power sharing and development control**

The Act establishes a hierarchy of new planning bodies to consider development applications and related matters. It continues the process of centralisation of planning power in the Minister and Ministerial appointed panels.

**Planning Assessment Commission**

The main body is the Planning Assessment Commission. Its principal functions are set out in s 23D of the amending Act. The Minister can now delegate decision-making powers to the PAC for Pt 3A projects other than for critical infrastructure. It is likely that approximately 80% of Pt 3A projects will be delegated to the PAC although the actual assessments will be undertaken by the Department of Planning.\textsuperscript{58} The Minister will also retain discretion over which projects, or elements of projects, are referred to the PAC, and the projects over which he or she will retain control, as well as retaining absolute discretion over the remuneration and term of office of individual members of the PAC.\textsuperscript{59} The objective of power sharing between State and local government is undermined by the fact that the PAC will be able to assume the planning powers of any local council if the Minister so determines.\textsuperscript{60}

**Joint Regional Planning Panels**

The establishment of Joint Regional Planning Panels will further reduce the number of development applications for which a council is the consent authority and, when taken in combination with a projected 50% target of complying development, will result in a drastic reduction in council responsibility for development control. The functions of the JRPPs are set out in s 23G of the Act. The JRPPs will act as a consent authority if required to do so by an EPI. A JRPP will be able to exercise any functions that have been removed from a council under s 118 of the Act. Under the pre-existing legislation, these powers were exercised by a planning administrator or planning assessment panel but have been made far wider under the amending legislation, extending, for example, to the functions of

\textsuperscript{56} Environmental Planning and Assessment Act 1979 (NSW), s 54.

\textsuperscript{57} See also, for example, \textit{IDA Safe Constructions Pty Ltd v Woolahra Municipal Council} (1981) 48 LGRA 62.

\textsuperscript{58} NSW Legislative Assembly, n 5.

\textsuperscript{59} Environmental Planning and Assessment Act 1979 (NSW), Sch 3 at [5] and [7].

\textsuperscript{60} Environmental Planning and Assessment Act 1979 (NSW), s 23D(1)(e).
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a council relating to classification of council land. A JRPP will advise the Minister on planning or
development matters and EPAs in relation to its area, and may also operate as a planning review
body. As currently proposed, a SEPP will identify the matters for which a JRPP will be the consent
authority and will include the following classes of development:

- designated development;
- nominated development over $5 million, including Crown development, private infrastructure or
development where council is the proponent or has a significant financial interest;
- residential, commercial or retail development over $50 million; and
- nominated subdivisions and other development in coastal zones currently dealt with under
Pt 3A.

Designated development has traditionally been dealt with by councils except where the matter
was dealt with under Pt 3A. Councils have considerable experience in assessing environmental impact
statements and the associated impacts on the community. In fact, since they operate at the local level
and have greater communication with constituents, they are far better placed to do so than a regional
panel. The introduction and implementation of Pt 3A by the 2005 amendments to the EPAA has
already made serious inroads into councils’ autonomy, especially where it is applied to approve
smaller developments that councils have rejected. There seems no reason why developers with
relatively small development applications should be able to circumvent a council. The removal of
nominated development over $5 million is also a new feature and will have the effect that no major
development of any kind will come before council for assessment.

The establishment of JRPPs as an additional level of planning authority is not only unnecessary
but makes the planning system even more ad hoc and fragmented than is currently the case. Although
it is conceded that matters in which council are financially involved should be independently assessed,
there is no reason why this function should not be undertaken by the PAC. Councils with an IHAP
could consider major development decisions and local developments in the coastal zone.

IHAPS

Independent Hearing and Assessment Panels have been used by a number of local councils in order to
obtain independent expert advice on certain development proposals. The planning reform legislation
regulates the manner in which IHAPs are composed and appointed. While local councils retain the
option whether or not to constitute an IHAP, councils lose their discretion to determine the manner in
which IHAPs operate. Consequently, the Local Government Association has criticised the regulation
of IHAPs as a “vehicle for Ministerial intervention in council’s operations.”

Power sharing and penalty provisions

A further impact of these new planning bodies on councils arises from the obligations set out in
$ 23M-23P of the planning reform legislation. The PAC, a JRPP or Planning Arbitrator is entitled to
access council’s records, use council facilities, and require assistance from council. The General
Manager of a council must carry out reasonable directions of these bodies relating to the functions of
the council being exercised by them. Failure to do so carries a penalty of 10 penalty units ($1,100). A
similar penalty applies for council members, council staff or the General Manager of a council who
obstructs these bodies in the exercise of their functions under the Act. A council is required to pay the
Director the remuneration, cost and expenses of the PAC, JRPP, IHAP and Planning Arbitrators within
the council area, and to indemnify Planning Arbitrators for liability for costs relating to certain

63 Environmental Planning and Assessment Act 1979 (NSW), s 23Q(2).
64 Environmental Planning and Assessment Bill 2008 (NSW), Explanatory Note, p 8.
65 Environmental Planning and Assessment (Infrastructure and Other Planning Reform) Act 2005 (NSW).
66 This was suggested by the Local Government and Shires Association of NSW in their submission, Planning – Draft Exposure
67 See Environmental Planning and Assessment Act 1979 (NSW), s 23I.
68 Local Government and Shires Association of NSW, n 64, p 5.
appeals. These provisions serve to further marginalise local councils in the planning process by rendering local councils subservient to unelected panels chosen by, and accountable to, the Minister for Planning.

**Power sharing and development contributions**

The amending legislation inserts a new Pt 5B into the EPAA which replaces the previous provisions dealing with development contributions. It introduces two main types of development contributions: State Infrastructure Contributions and Community Infrastructure Contributions. Development contributions levied by councils are now known as Community Infrastructure Contributions and comprise "direct" and "indirect" contributions.

The new provisions make considerable inroads into the powers of local councils to levy and spend development contributions. Although they preserve the existing right of councils to levy local contributions, now known as Community Infrastructure Contributions, only "Key Community Infrastructure Contributions" can be levied without Ministerial approval. Key community infrastructure includes local roads, bus facilities, parks, sporting facilities, cark parking, drainage and stormwater management. It can also be extended to district infrastructure if there is a direct connection with the development that is the subject of the contribution. Although this list is fairly extensive, and can be extended by regulation, it gives the Minister wide and discretionary power to determine the types of projects for which local levies can be used. The Local Government and Shires Association of NSW have expressed concern that these amendments will pose a threat to many local facilities, including funding of local parks, playgrounds and roads. The Minister has justified the changes by referring to the disparity in developer levies between councils and the lack of a clear definition of the kinds of infrastructure that contributions should fund. He points out:

> Some councils are using contributions to fund things such as council administration buildings, cat and dog pounds, and computer upgrades. Many councils are also retaining funds and not spending an increasing amount of levied money.

To counteract this type of spending the planning reform legislation provides that any additional community infrastructure contributions require Ministerial approval. To obtain such approval council is required to provide the Minister with a business plan and independent additional contributions cannot include land for riparian corridors. The same principles apply when councils use a voluntary planning agreement to get the extra contribution.

The amending legislation continues the wide-ranging discretion of the Minister to issue directions to councils. This includes directions in relation to the type of community infrastructure that can be levied, the means for determining contribution levels, the maximum amount of any direct contribution, and the maximum percentage of an indirect contribution. In addition, the Minister can now direct a

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60 Community infrastructure is defined as public amenities and public services, but not including water supply and sewerage services; Environmental Planning and Assessment Amendment Act 2008 (NSW), s 116C.
61 "Direct contributions" were formerly s 94 contributions (provision of amenities or services) while "indirect" were formerly s 94A (fixed development consent levies).
62 Community infrastructure is defined as public amenities and public services, but not including water supply and sewerage services; Environmental Planning and Assessment Amendment Act 2008 (NSW), s 116C.
63 Environmental Planning and Assessment Act 1997 (NSW), s 21A.
65 NSW Legislative Assembly, n 5, p 7.
66 Environmental Planning and Assessment Act 1979 (NSW), s 110I.
67 Environmental Planning and Assessment Act 1979 (NSW), s 116V.
68 These provisions, formerly in s 94E of the Environmental Planning and Assessment Amendment Act 1979 (NSW), have now been incorporated into s 115L of the amended legislation.
council as to the time within which community infrastructure contributions in the form of monetary contributions are to be applied, including a direction as to what constitutes a reasonable time for the provision of community infrastructure.\textsuperscript{76}

The planning reform legislation empowers the Minister for Planning to levy State infrastructure contributions in precincts designated as "State contribution areas".\textsuperscript{77} State infrastructure contributions have not been well integrated with community infrastructure contributions. There is no formal mechanism in the amending legislation for coordinating the setting of State and community levies. This could potentially result in State levies "crowding out" local levies, particularly if the State levies are set prior to local levies being determined.\textsuperscript{78}

Councils in the north-west and south-west growth centres of Sydney will lose the power to manage and spend community infrastructure contributions, as these will now be collected and held in trust by Treasury.\textsuperscript{79} This provision is to ensure that councils do not use these contributions to prioritise the delivery of community infrastructure in their own areas outside the growth centres.\textsuperscript{80} It shows a clear lack of confidence in council management and assumes that State control will ensure better management and provision of services. Indeed, a lack of confidence in councils can be said to characterise most of the new amendments to the planning legislation. This is clearly inconsistent with the object of the EPAA to promote the sharing of the responsibility for environmental planning between the different levels of government in the State.

3. Increased opportunities for public participation

Before the introduction of the EPAA, there were no general rights for public participation in environmental land-use planning. The only way in which the general public, such as a neighbourhood or environmental groups, could participate in planning was through indirect means, such as lobbying State and local politicians. As Colman suggested in the early 1970s, "the only way that the community at large can effectively change a plan is to change the Council that prepared the plan".\textsuperscript{81} However, from the early 1970s onwards, there were increasing calls for direct participation in planning by a wider range of public interests.\textsuperscript{82}

Responding to such calls, the New South Wales government determined that increasing opportunities for public participation in environmental land-use planning should be a fundamental objective of the new Environmental Planning and Assessment Bill 1979 (NSW). As the Minister stated in the Second Reading of this Bill, the intention of the legislation was to overcome the deficiencies of earlier local government and town planning laws by "conferring equal opportunity on all members of the community to participate in decision making under the new legislation".\textsuperscript{83} Another government member asserted that the "opportunity for people to be involved in the planning process is most significant" and that "[p]lans should not be made for people, but should be made by people, that is, reflecting their desires, needs and aspirations".\textsuperscript{84}

\textsuperscript{76} Environmental Planning and Assessment Act 1979 (NSW), s 116L(1).

\textsuperscript{77} These areas include urban growth centres and part of the City of Wollongong, and were previously designated as "special contributions areas"; see Environmental Planning and Assessment Act 1979 (NSW), Sch 5A.

\textsuperscript{78} Local Government and Shires Association of NSW, n 64, p 8.

\textsuperscript{79} The Environmental Planning and Assessment Amendment Act 2008 (NSW) amends the Growth Centres (Development Corporational) Act 1974 (NSW) to establish a Community Infrastructure Trust Fund to be managed by Treasury: Sch 1, Pt 1, s 11. The Minister can also declare other areas to come within the ambit of the Trust Fund by order in the Government Gazette.

\textsuperscript{80} NSW Legislative Assembly, n 5, p 7.

\textsuperscript{81} Colman J, Land-use and Planning Schemes (Paper presented at the Lawyer in the Environment Conference, University of New South Wales, 1972) p 92.

\textsuperscript{82} For a reflective analysis of the general awakening of activism in environmental and planning law, see Ryan P, "Did We? Should We? Revisiting the 70's Environmental Law Challenge in New South Wales" (2001) 18(6) Environmental and Planning Law Journal 561.

\textsuperscript{83} New South Wales, Legislative Council, Debates (1979) p 3352 (David Lands).

\textsuperscript{84} NSW Legislative Council, n 83, p 3378 (Kathleen Anderton).
Public participation in planning and environmental decision-making is recognised by the international community through Agenda 21, which asserts that the “process of consultation would increase peoples’ awareness of sustainable development issues.” As Ch 23 of Agenda 21 asserts:

Individuals ... need to know about and participate in environment and development decisions, particularly those which affect their communities. For people to make informed decisions ... governments should give them access to all relevant information on environment and development issues.

The importance of public participation in planning law has been emphasised in parliamentary debates since the introduction of the EPAA. However, the rhetoric of the government has gradually moved from the promotion of public participation, to the maintenance of existing opportunities for public participation. For example, in the Second Reading Speech for the Environmental Planning and Assessment (Amendment) Bill 1993 (NSW), the Minister stated that there “is still a full and open public participation”. Similarly, in the Second Reading Speech for the Environmental Planning and Assessment (Amendment) Bill 1997 (NSW), the Minister asserted that “we are maintaining public participation”. Again, in the Second Reading Speech for the Environmental Planning and Assessment (Amendment) Bill 1999 (NSW), the Minister assures the Parliament that there “will be no changes in the safeguards that continue to ensure public participation”. As well as adopting a defensive, rather than expansionary, approach towards public participation in planning law, the government has also begun to de-emphasise the role of public participation. In debates on the Environmental Planning and Assessment (Infrastructure and Other Planning Reform) Bill 2005 (NSW), one parliamentarian noted that “community participation barely rates a mention”.

By the time of the introduction of the Environmental Planning and Assessment Amendment Bill 2006 (NSW), the Minister’s Second Reading Speech makes no reference to principles of public participation at all. Similarly, the Minister’s Second Reading Speech on the latest planning reform legislation summarises the objectives of the EPAA as being “the management and conservation of natural resources, the promotion and coordination of the orderly and economic use and development of land, and the social and economic welfare of the community and a better environment”. No mention is made of the objective of increasing opportunities for public participation.

The following analysis of the impacts of the planning reform legislation on the stated objective of the EPAA to increase opportunities for public participation in planning and environmental decision-making is recognised by the international community through Agenda 21. However, the rhetoric of the government has gradually moved from the promotion of public participation, to the maintenance of existing opportunities for public participation. For example, in the Second Reading Speech for the Environmental Planning and Assessment (Amendment) Bill 1993 (NSW), the Minister stated that there “is still a full and open public participation”. Similarly, in the Second Reading Speech for the Environmental Planning and Assessment (Amendment) Bill 1997 (NSW), the Minister asserted that “we are maintaining public participation”. Again, in the Second Reading Speech for the Environmental Planning and Assessment (Amendment) Bill 1999 (NSW), the Minister assures the Parliament that there “will be no changes in the safeguards that continue to ensure public participation”.

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The following analysis of the impacts of the planning reform legislation on the stated objective of the EPAA to increase opportunities for public participation in each of the areas of plan-making, development assessment and planning appeals clearly indicates that this objective has become subordinate to the interests of increasing efficiency and reducing red tape in the planning system.

**Public participation in plan-making**

The planning reform legislation has abolished REPs, with matters of “regional” planning significance to be covered by SEPPs. Yet, while the preparation of REPs was subject to a mandatory process of public consultation, there is no requirement for public consultation in the preparation of SEPPs. This effectively diminishes legal rights for community consultation in matters of regional environmental planning significance.

The proposed planning “gateway” for LEPs is more complex and uncertain than the existing system. The Minister will have discretion to determine the most suitable method for preparing

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87 New South Wales, Legislative Assembly, Debates (1993) p 3986 (Craig Knowles).
88 New South Wales, Legislative Assembly, Debates (1997) p 828 (Craig Knowles).
90 New South Wales, Legislative Assembly, Debates (2005) p 16763 (Sylvia Hale).
91 New South Wales, Legislative Assembly, Debates (2006) p 20731 (Frank Suttor).
92 NSW Legislative Assembly, n 5, p 7695.
individual LEPs, giving him enormous power to shape and alter the process. Significantly, the need for consultation on a LEP is at the discretion of the Minister. For example, a LEP the Minister determines to be “minor” will not be subject to any public consultation, notwithstanding the reality that even minor changes to development standards can generate massive impacts on immediate neighbours. As Draper pointed out, public participation refers to “the meaningful involvement of people in decisions that affect their lives”.93

The planning reform legislation also fails to provide for public consultation on the final form of a LEP before it is gazetted, even where the Minister has made significant changes to the draft LEP following public exhibition. The Minister is also empowered to construct different consultation procedures for different LEPs. All of these reforms will make opportunities for public participation less certain, less transparent, and more complex.

Bishop and Davis once noted that the “terrain for participation” lies somewhere between the extremes of “policy making by administrative fiat and direct democracy”.94 Bishop further observed that the nature and extent of opportunities for public participation in between these extremes is conceived as a “measure of democratic health”.95 On this reckoning, the planning reform legislation has severely compromised the health of democratic environmental planning in New South Wales.

**Public participation in development assessment**

The Act proposes a new range of entities to assess applications for development, including the Planning Assessment Commission.96 The functions of the PAC are to be controlled by the Minister, and include: the provision of advice, reviewing projects or concept plans under Pt 3A; reviewing part or all of the “environmental aspects” of a DA or an EIS; and any role of a JRPP, IHAP or Planning Assessment Panel conferred on it by the Minister. The PAC will have a permanent chair, and up to eight part-time members. There is nothing to stop the Minister personally composing the panel for individual applications. The PAC has no independent income, and must rely on other agencies for staff, which may undermine the independence of the commission since it will be entirely dependent on the Minister for Planning for its procedures, functions and resources. The processes to be followed by the PAC will be detailed in the regulations, and may include details of when and how public hearings are held, as well as restricting the right of parties to legal or other representation before the PAC, and the publication of the PAC’s findings and recommendations. The PAC does not have the same degree of independence as the LEC (it cannot, for example, employ staff), yet, as a statutory body representing the Crown, it has the same immunities as the Crown. The PAC also effectively usurps the jurisdiction of the court, since no matter can go to the court once it has gone through a public hearing by the PAC.

Likewise, Joint Regional Planning Panels are personally selected and appointed by the Minister. As discussed earlier in the article, JRPPs stand as unelected consent authorities in the place of elected local government councils. While there is provision for representatives from the relevant local government areas to be included on the panel, Ministerial appointees will have the controlling vote on the panels. Local councils may find themselves in the situation where taking a position as part of a JRPP on a contentious development proposal may be perceived as accepting the validity of the JRPP’s decision. Consequently, local councils may take the view that it would be better to maintain independence by refusing to participate as a minority player in the decision-making process.

The independence of local councils to appoint Independent Hearing and Assessment Panels is also undermined in the planning reform legislation. While several councils have already appointed IHAPs

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96 *Environmental Planning and Assessment Act 1979* (NSW), s 23B-23F.
to provide advice in relation to development proposals, local councils will lose the discretion to determine who will be appointed to IHAPs, with only those persons selected by the Minister for Planning as suitable for appointment being eligible for selection. The Minister also assumes power to determine the remuneration of individual IHAP members.97

The new layers of consent authorities also undermine opportunities for public participation via dispute resolution in the LEC. The opportunity for any person to bring an action in the LEC to remedy or restrain breaches of the EPAA98 has traditionally enabled citizens to undertake public interest litigation which has provided the impetus for the development of jurisprudence in planning law.99 Yet, the planning reform legislation limits rights to challenge certain decisions by the Minister for Planning, such as the appointment of, or powers given to, a planning administrator, planning assessment panel, or regional panel.100 Timeframes for applicants to bring appeals in the LEC are also reduced from 12 months to three months.

The independence of the LEC is also undermined by the creation of a number of new bodies, such as the PAC, JRPPs, and Planning Arbitrators, each of which replicate certain functions of the court. For example, the LEC will not be able to hear appeals into Pt 3A projects where the PAC has conducted a hearing.101 This allows the Minister for Planning to effectively oust the jurisdiction of the court in relation to Pt 3A matters simply by requiring the PAC to conduct a hearing on whatever terms the Minister decides. Appeals to the LEC will also be abolished in relation to any matter in which the PAC has conducted a public hearing.102

The introduction of Planning Arbitrators also serves to oust the jurisdiction of the LEC to hear appeals where the Planning Arbitrator has issued a determination, unless the consent authority consents to the applicant bringing an appeal.103 Considering that the consent authority will be liable for the Planning Arbitrators’ legal costs,104 it is difficult to envisage a situation in which the consent authority will consent to an appeal being initiated.

While the introduction of new bodies empowered to hear appeals in planning matters may superficially appear to increase opportunities for public participation, it effectively threatens opportunities for the resolution of planning disputes in an open, impartial and expert forum. For example, while s 39 of the Land and Environment Court Act 1979 (NSW) provides that the court has all the functions and discretions of the body whose decision is the subject of the appeal, the functions of planning panels are subject to change at the whim of the Minister for Planning. So while the court has chosen to allow residents and other members of the public to give evidence in planning matters,105 planning panels may not be able to exercise such discretion. The insertion of “joinder” provisions in the Land and Environment Court Act has enabled the court to join third parties, such as community associations or environmental groups, to planning appeals.106 The Land and Environment Court Act

97 Environmental Planning and Assessment Act 1979 (NSW), s 231(7).
98 Environmental Planning and Assessment Act 1979 (NSW), s 123. A similar provision in the Local Government Act 1993 (NSW) provides for open standing to any person to take proceedings in the LEC to remedy or restrain any breach of that legislation: Local Government Act 1993 (NSW), s 67(4)(1). A relevant case example is Oslakuck v Iron Gates Pty Ltd [1997] NSWLEC 63, where the applicant successfully brought action to restrain breaches of a development consent to undertake a large-scale residential subdivision and for mandatory orders for remediation and reinstatement of the site.
100 Environmental Planning and Assessment Act 1979 (NSW), s 118AG.
101 Environmental Planning and Assessment Act 1979 (NSW), s 75K and 75L.
102 Environmental Planning and Assessment Act 1979 (NSW), s 23F.
103 Environmental Planning and Assessment Act 1979 (NSW), s 97(5).
104 Environmental Planning and Assessment Act 1979 (NSW), s 23P.
105 See Double Bay Martina Pty Ltd v Woollahra Municipal Council (1985) 54 LER 313.
106 Land and Environment Court Act 1979 (NSW), s 39A. Inserted by LEC Amendment Act 2002 (NSW), Sch 2.
also provides for the voluntary mediation of proceedings. 107 The wide powers of the LEC have enabled the court to conduct on-site hearings and on-site conferences between the parties, in which the public may participate at the discretion of the court. 108 The court has also introduced planning principles which establish a clear framework for determining common issues in merit appeals. 109

Unlike the LEC, panels do not need to provide reasons for their decisions, so are not subject to public scrutiny. Nor are panels guided by established planning principles, or subject to clear rules of procedure.

The planning reform legislation does, however, allow the regulations to provide for new categories of objector merits appeals. 110 Nonetheless, only certain persons will have standing to bring such an appeal (such as immediate neighbours), and the conditions precedent to bringing such an appeal are likely to be very restrictive. For example, the Department of Planning has suggested that third party appeals may be brought where "specified planning controls (such as height or building bulk limits) have been exceeded by more than 25%". 111 Such limitations severely compromise the effectiveness of this new appeal right. Moreover, the suggestion that third party merit appeal rights will only be triggered if development standards are breached by more than 25% sends a clear message that non-compliance with development standards up to 25% will be tolerated. Somewhat ironically, this undermines public participation, by implicitly allowing developers to disregard planning controls developed in consultation with local communities by up to 25%.

RECOMMENDATIONS

When introducing the amending legislation the Minister stated: "Over the years the Act has been extended, altered and interpreted by the courts to the point that I would argue it no longer fulfils its original intention. It is time for reform." 112 This statement is unchallengeable – however, it seems from the above analysis that the 2008 reforms have continued to move away from the original principles on which the EPAA was established to the extent that the Act is no longer consistent with its objectives. To restore consistency with the objectives of the EPAA would require a number of changes to the current legislation. It is beyond the scope of this article to detail all the changes required, but some suggestions for reform are set out below.

Plan-making

The amalgamation of SEPPs with REPs is a more streamlined form of State plan-making. However, SEPPs should include a requirement for environmental studies, consultation and public participation. Likewise, the previous provisions for environmental assessment, heritage considerations and community participation should be restored for a LEP. It is not sufficient for these considerations to be considered only at the "gateway" stage. Further, details of participation and assessment should be outlined in the Act and not relegated to the Regulations. The initiative to prepare a LEP should be confined to councils, with the Minister retaining the power to direct the preparation of a LEP in appropriate circumstances.

Development assessment

Section 79C(1) of the Act should be amended to include a requirement to have regard to ecologically sustainable development when determining development applications. The courts have been innovative in overcoming this limitation by requiring regard to be had to the objects of the Act when

107 Land and Environment Court Act 1979 (NSW), Pt 5A. Mediation was introduced in 1991 through the rules of the court, and is currently provided for in the LEC Rules 1998 (NSW), Pt 18.
108 Land and Environment Court Act 1979 (NSW), s 34 and 34A.
110 Environmental Planning and Assessment Act 1979 (NSW), s 96B.
111 NSW Department of Planning, Strengthening Appeal and Review Rights (Media Fact Sheet, 3 April 2008) p 1.
112 NSW Legislative Assembly, n 5, p 7695.
considering the "public interest" in s 79C(1)(e). However, this is no substitute for having ESD incorporated into the substantive provisions of the Act. ESD requirements should be elaborated to take into account adaptation to climate change as an integral aspect of environmental sustainability.

The restrictions on land where complying development could be approved, enumerated in s 76A(6) of the EPAA, should be restored. Complying development should not be extended. While it is true that some of the current requirements being imposed by council are inappropriate for small developments and renovations, it would be preferable to create a two tier development control system, with minor development being subject to less stringent procedures. Minor development applications would continue to be determined by council and be subject to the environmental requirements of the Act. It is also necessary to ensure that decisions by certifiers are accountable and transparent. The amendments go some way toward achieving this but it would be preferable for a certifier to be assigned from a list maintained by a body such as the Building Professionals Board.

Part 3A of the Act should be repealed. Critical infrastructure could be dealt with in a SEPP. Significant development could be dealt with in the Act with the PAC undertaking the functions of the Minister. Significant development should be subject to the same environmental and community consultation requirements as any other development.

IRPPs and Planning Arbitrators are unnecessary and the provisions establishing these bodies should be repealed. If there are problems with existing institutions, the way forward is to reform these processes, rather than create new institutions outside the current system which in turn will create further problems. The LEC has worked extremely well, although the high cost of litigation is placing the court beyond the reach of "mums and dads" and small developers. McClellan J introduced a number of changes to the merit appeal system which improved efficiency and reduced costs. These reforms could be carried even further by implementing the suggestion for "paper hearings", mooted by McClellan J and the Cripps' Report. These would involve the introduction of "hearing-free" appeals in relation to small development, such as the erection of a house or the extension of an existing one. Reforms of this nature would be preferable to creating new bodies to exercise some of the court's review functions.

Limiting public participation and democratic expression through the panelisation of planning will ultimately increase conflict and resentment in the planning system, which will undermine the speedy resolution of development issues. Technocratic approaches to land-use planning have failed in the past. As Nelkin observed, such approaches "not only failed to solve social problems but often contributed to them", leading to a "decline in public trust". The re-emergence of technocratic planning will ultimately produce the same result: disillusionment, anger, conflict and a more litigious and unwieldy planning system. Democracy may appear chaotic at times, but experience demonstrates that democratic approaches to land-use planning are the most efficient and effective.

CONCLUSIONS

The 2008 reforms mark a return to pre-1979 EPAA conditions, where the planning and court system were fragmented and distributed between a number of different bodies. The 1979 EPAA not only provided a "one-stop shop" but also changed the value system to focus on environmental and democratic principles. The amending legislation sacrifices environmental concerns on the altar of "efficiency" and replaces democratic decision-making with technocratic bodies. It endorses a value system based on efficiency and professionalism. It signals a return to the technocratic approaches that
dominated planning in the post-war period, promoted by instrumentalism and systems theory. For example, the PAC echoes the role of the State Planning Authority of the 1960s. The creation of JRPPs echoes the role of regional redevelopment authorities, such as the Rocks Redevelopment Authority of the 1960s. A return to technocratic approaches to planning reflects what Weber termed the “threat of bureaucratic domination.” As Weber noted, the actual ruler in a modern state is “necessarily and unavoidably the bureaucracy, since power is exercised neither through parliamentary speeches, nor monopolitical announcements, but through the routines of administration.”

Far from promoting power sharing, the role of local government has been downgraded. Such an approach to planning puts the professional planner in the role of interpreting and implementing the public interest on the community’s behalf. Expanding the use of unelected “expert planners” in the planning system minimises the role of democratic expression by local communities in the way that they want their neighbourhoods to grow, change or stay the same. As Anton suggested, participation in decisions affecting land-use “can be viewed as the application of democratic governance to environmental matters.” As the National Trust of Australia points out:

It is fundamental to democratic government that communities have rights to determine collectively the environmental planning for their areas via local government and through councillors representing their communities. The proposed changes appear to operate to constrain and limit community influence in this area.

The planning reform legislation also fails to meet the objective of increasing opportunities for public participation, and in fact meets the opposite objective by reducing existing opportunities for public participation in the creation of EPIs and the assessment of applications for development. This will complicate the task of statutory interpretation by consent authorities and the LEC, since the provisions of the EPAA are not consistent with the stated objects of the EPAA. It will be interesting to see how the court resolves this tension. For example, will the court read down the new provisions of the EPAA that restrict opportunities for public participation, or will the court seek to maintain “increased opportunities for public participation”, as declared in the objects to the Act?

By failing to conform to the major objectives of the EPAA, the planning reform legislation will ultimately fail to achieve the major reason for its introduction — that is, to address the increasing regulatory burden and tangle of processes imposed through the planning system. Over the past decade, a huge number of reforms, each ironically designed to “reduce red tape” in planning, has added layer and layer of complexity onto the pre-existing system. Without a fundamental overhaul of the entire planning system, continuing reforms will simply add more layers of complexity onto what has gone before. As the Local Government and Shires Associations of NSW succinctly stated, the planning reform legislation:

[W]ill not reduce “red tape” but significantly increase the amount of regulation and regulatory bodies.

This will not only add to the complexity of the planning process but will be confusing for applicants.

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120 According to McLoughlin, the decision-making procedure under the systems approach sees the planner establish goals in the public interest and course of actions to achieve them. Public input is only sought in the implementation of courses of action: McLoughlin JB, Urban and Regional Planning: A Systems Approach (Faber and Faber, 1969). Other proponents of the systems approach include Geoffrey Chadwick: Chadwick GP, A Systems View of Planning: Towards a Theory of the Urban and Regional Planning Process (Pergamon Press, 1971); Faludi A, Planning Theory (Pergamon Press, 1973).
124 National Trust of Australia (NSW), n 31.
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...costly for councils and their communities – it will be ratepayers that will have to bear all the costs associated with the new planning panels and arbitrators.\(^\text{123}\)

For any legislative scheme in planning to operate effectively and efficiently, it must set out clear objectives and then set out a system to meet these objectives. Continuous incremental change to the EPAA since its introduction in 1979 has failed to keep faith with the original reasons for the introduction of the 1979 legislation. The clear differences between the objects of the current planning reform legislation and the original Act emphasise the need for fundamental reform of environmental land-use planning in New South Wales. The government must determine whether it wants to change the stated objectives of planning, or whether it wants to amend the legislation back into some sort of conformity with the objectives of planning law as currently stated. Unless planning legislation is clearly focussed, and consistent with its objects, the New South Wales planning system will continue to be characterised by confusion, inconsistency, complexity and disarray.