Submission
No 67

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

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The Director
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13 February 2008

Dear Madam

Re: SUBMISSION TO THE STANDING COMMITTEE ON STATE DEVELOPMENT – LEGISLATIVE COUNCIL INQUIRY INTO THE NSW PLANNING FRAMEWORK

This submission is made on behalf of the NSW Division of the Planning Institute of Australia (PIA NSW or the Institute). The PIA is the peak body representing professionals involved in planning Australian cities, towns and regions. The Institute has around 4500 members nationally and 1300 members in New South Wales. PIA NSW plays key roles in promoting and supporting the planning profession within NSW and advocating key planning and public policy issues.

The submission has been prepared by NSW Institute members working in government and the private sector, with particular input from members of the Planning Law Chapter and associated network of planners interested in Planning Law. The key issues and the Institute's response are summarized in this letter. The more detailed attachment provides further comment on the problems with the existing legislation; opportunities to adopt a more integrated and strategic planning approach (including the national perspective); overseas examples and some objectives for new planning legislation.

1.0 General Position Statement

The Institute submits that the current planning system in NSW has become too complex and cumbersome, and progressively orientated to development control at the expense of strategic planning, environmental concerns and public participation. The Environmental Planning and Assessment Act 1979 is 30 years old, has been significantly altered in recent years and is struggling to serve the community. A thorough 'back to first principles' review of the legislation is now needed.

PIA NSW believes that major legislative change is necessary if NSW is to successfully manage growth and create sustainable communities for current and future generations. The Institute advocates an integrated strategic planning approach to deal with the many, interrelated and often complex issues, including those of climate change and natural resource management that directly affect the more 'traditional' areas of land use planning.

Integrated strategic planning involving all three levels of government is badly needed to set the policy framework and reconcile competing interests from the outset. The alternative is to resolve these issues 'down the track' at the local LEP or development assessment stage, which is time consuming, expensive and ad-hoc. Strategic planning is, in our opinion, the key missing link and the precursor to sustainable statutory plan making and development assessment.

PIA therefore has taken the opportunity of the Inquiry to consider the NSW planning system in its broadest sense, including how it might be integrated with national legislation affecting the planning, use or development of land, with the view of improved consistency between all States and Territories of the Commonwealth.

PIA NSW proposes that the planning framework should include a new ***Strategic and Integrated Planning Act,*** preferably based on overarching principles adopted at the national level. This would ensure that strategic planning actions have greater pre-eminence in the planning framework and are clearly distinguished from the development control process.

In relation to development control, PIA NSW supports the Development Assessment Forum's (DAF) *Leading Practice Model for Development Assessment* and suggests that a proposed ***Land Use Administration and Development Assessment Act*** could be developed as the vehicle for creating much simpler and more user friendly procedures and practices based on this model. This legislation would complement and help implement the strategic direction formulated under the aforementioned *Strategic and Integrated Planning Act.*

2.0 Response to the Terms of Reference of the Standing Committee on State Development

This Inquiry provides a unique opportunity to consider the NSW planning legislation in its broadest context and how it relates to other legislation affecting planning, land use or development, whether Commonwealth or NSW legislation. A more detailed response, at Attachment 1:

- highlights the problems with the current NSW legislation and how it operates
- outlines the possible scope and objectives of new legislation; and
- presents the benefits of adopting a strategic planning approach over the narrowly focused development control preoccupation that is reflected in the current NSW legislation.

The PIA NSW response to the specific terms of reference draws on the content of Attachment 1 and is summarised as follows:

Terms of Reference 1.

1. That Standing Committee on State Development inquire into and report on the national and international trends in planning, and report whether the development of new planning legislation over the next five years would be justified, and if so, the principles that should guide such legislation.

The Environmental Planning and Assessment Act (EP&A Act) fails to meet the reasonable expectations of the public in regard to economic, social and environmental issues and the proper administration of land use in the State. The main problems with the current legislation, which justify new planning legislation, are as follows:

- A high degree of complexity
- An excessive concentration in the EP&A Act on development control processes
- Inadequate recognition of and lack of clarity on, the role of strategic planning

- Reliance on multiple layers of control to achieve strategic objectives where they exist
- Diminished concern for, and integration of, planning for the natural environment and heritage
- Lack of integration of planning policies and outcomes across the various government and utility agencies, and between the three spheres of government
- Administrative processes that inhibit reasonable access to judicial and merit review and legal challenge to the actions of the Minister
- Complexity and excessive cost in the combining of land use and building regulatory issues as a part of the development approvals process
- A progressive shift away from sharing of planning powers, to a centralised control focused on the Minister for Planning and the Minister's appointed statutory bodies.

The current system in NSW has derived from a process of incremental amendment to the Environmental Planning and Assessment Act, 1979 which has created greater complexity and uncertainty and reduced its efficiency in managing the use and development of land. Plans are often outdated and insufficiently nimble to keep pace with rapidly changing conditions and community expectations, and often fail to satisfy competing interests. This causes frustration and delay.

The NSW planning legislation has become progressively more orientated to development control at the expense of strategic planning, environmental concerns and public participation in the planning and implementation processes; processes that were at the heart of the 1979 Act but have been gradually eroded. Along with the lack of clarity in terms of public planning policy, this has generated increased inefficiency, uncertainty, delay, cost and frustration particularly with

- the increasing need to deal with key strategic issues on a project by project basis, especially for the larger more complex projects,
- the progressive constraining of public participation in planning and development approval processes, often in the name of efficiency, and
- the increased tendency or need to seek redress from the court system as an independent review mechanism.

In Europe, the United Kingdom and the USA, currently it is possible to find a significant number of useful examples of planning regimes in which the strategic approach is embodied as a prelude to the creation of land use plans which closely resemble the statutory planning process in NSW. This is exemplified by the "European Spatial Development Perspective (ESPD)" outlined in Attachment 1.

In Europe the planning system is integral to the economic development of the EU member nations. This is not contrary to the concept of Environmentally Sustainable Development (ESD), but rather a very practical example of how economic, social and environmental improvement can be integrally linked. Thus a decision in Ireland to invest in a major facility such as a port, airport or highway development which is taken at a national level is also linked to the County and Corporation implications of housing/ population growth, and local infrastructure development.

The implication for Australia would be that a virtue of the integration of planning systems on a national scale might be that national economic initiatives e.g. investment in the key national infrastructure such as the rail and national road systems should integrate with the State Plan in terms of what the State Government wishes to achieve and that the State Plan is delivered via local planning strategies/ LEPs that build towns/ infrastructure/ resource development that make best use of the National and State investment initiatives.

PIA NSW supports the replacement of the EP&A Act with new legislation as part of a major overhaul of planning legislation in NSW. Further 'tinkering' or amendment to the current Act is unlikely to resolve the current problems. Nor would it signal real change and provide the necessary impetus for associated cultural change. The new Act should properly integrate with

other relevant Acts to avoid duplication and remove multiple approval/ legislative provisions. It should be based on a set of core values or principles that deal with:

- Environmental, social and economic sustainability
- Community consultation
- Clear definition of the roles and responsibilities of planning authorities, government agencies, Ministers, local councils, proponents and the public, based on procedural fairness, equity, accountability and good governance that minimises the potential for corruption
- A framework that is non- adversarial and based on engagement
- A framework that is fully integrated across different Federal and State legislation, across spheres of government and is comprehensive in its dealing with planning issues (natural resource management, catchment management, heritage, climate change, etc)
- An obligation to do strategy first before implementation of plans
- An imperative to improve the sustainability of the environment
- An emphasis on spatial planning (the relationship between land uses and activities across regions) not just site planning
- Setting out a process for approvals that provides for an appropriate level of assessment according to activity, holds to the primacy of the public interest over private interest, is certain, quick and logical
- Provide for mechanisms for appeal and administrative review of decisions
- Be developed to use emerging trends in information technology to facilitate assessment, information availability, decision making and monitoring of outcomes.

Terms of Reference 2.

2. In particular, the Standing Committee on State Development is to inquire into:

a. The implications for NSW planning of the Council of Australian Governments reform agenda.

PIA NSW believes that an Australian national system of land use planning should be developed, which embraces the strategic approach at all levels of government and generally follows the principles promoted by the Development Assessment Forum (DAF) and supported by the Coalition of Australian Governments (COAG).

The imperative of making the NSW planning system compatible with other planning approaches in the Commonwealth (harmonising) also makes necessary the introduction of a fundamentally restructured planning process in NSW.

It is essential that a more strategic planning approach be adopted at the national and state levels to deal with critical issues such as population growth, natural resource management, public health, economic development, climate change and sustainability.

The reform agenda should extend across all States in a national framework applying common principles but not necessarily processes. The work of the Development Assessment Forum (DAF) sets out a national planning framework. The DAF guidelines on Strategic Land Use Planning (December, 2001) set out a process that can serve as the foundation for reform of government decision making on planning policy issues. The work of DAF should be extended by COAG to achieve a uniform planning framework for all States.

b. Duplication of processes under the Commonwealth Environment Protection and Biodiversity Act 1999 and NSW planning, environmental and heritage legislation

Duplication needs to be removed and the various pieces of legislation relating to the planning and management of land need to be made simpler, more consistent and fully integrated.

Introduction of the strategic planning approach as promoted by PIA NSW would avoid the overlap of differing policy based intentions and the duplication of processes and controls. The strategic method of planning is based on research and data analysis, options development and comprehensive assessment, and most importantly a reconciliation of competing issues at an early stage. It incorporates or takes into account current government policy, and indeed helps inform the development of that policy. It is a prelude to the determination of appropriate land uses, controls and method of administration (statutory plans), and to be sustainable politically *must* involve comprehensive community consultation.

c. Consideration of climate change and natural resource issues in planning and development controls

An appropriate response to the issues of climate change and natural resources will require a more nationally-based, longer term and sophisticated approach and policy direction. In NSW the heavily development orientated planning system has failed to adequately address these issues and incorporate them adequately into its plan making and development control processes. The result in many cases has been to seek redress or direction from the courts on a project by project basis.

Clear government policy responses on climate change and natural resource issues need to be integrated in up-front strategic planning. Only then can any regulation be set at the state or local level (consistent with that policy) prior to the development assessment stage.

A 'one stop shop' for all relevant regulation is necessary for incorporation at the appropriate statutory level, or incorporation into a consistent set of guidelines, whether it be for climate change, natural resource management, heritage or other social, economic or environmental policies impacting on the use of land.

d. Appropriateness of considering competition policy issues in land use planning and development approval processes in NSW

Competition policy issues should be considered in the wider planning context and appropriately included at the plan making stages (as opposed to the development assessment stages). A land use orientated planning act is not an effective vehicle for such a process and this supports the need for a strategic approach to be applied through new legislation and the creation of a Strategic and Integrated Planning Act.

The planning and management of regions inherently involves intervening in the market to obtain outcomes according to agreed sustainable planning principles and the strategic planning framework. Competition policy may be one of many relevant planning considerations but not necessarily prevail. For example, after full and due consideration of all relevant factors such as traffic, parking, infrastructure demands, and impact on existing services, a consent authority may refuse the establishment of a new supermarket in an area already well serviced by similar facilities notwithstanding competition policy.

e. Regulation of land use on or adjacent to airports

The control of land use on or adjacent to airports (or for that matter any other major item of infrastructure, such as ports) should be considered as part of a strategic planning framework in the first instance. That strategic framework needs to take into account the national, state and local needs associated with airports, as well as their impacts. Airports should be subjected to the same regulatory regime as applies to all other major critical infrastructure in NSW, and non aviation uses of airport land (for example shopping facilities serving the general community) needs to be subject to state and local zoning and regulation in the same manner as any other non-critical infrastructure, irrespective of their location on or off land under the control of the Civil Aviation Authority.

As part of any major legislative overhaul associated with a new fully integrated strategic planning Act, associated State and Federal legislation would need to be brought into line. In this case, for example, the Airports Act 1996 would need to be reviewed.

f. Inter-relationship of planning and building controls

Control and certification of construction standards should be separated from the planning policy, statutory plan making, and development assessment processes administered by State and local government.

Planning controls may appropriately include controls on buildings that affect urban design and neighbourhood amenity such as on building bulk, height, scale, form and in some cases, for example in conservation areas, design detailing, colours and materials. These controls are designed to achieve a desired planning purpose and do not go to issues of building safety.

Once planning approval has been obtained, compliance with the building controls as set out for example in the Building Code of Australia (BCA) can be confirmed by qualified certifiers. For administrative efficiency and consistency, building certification should only apply to controls that can be codified and there is no potential for discretion or a variety of differing interpretations.

The decision to allow joint assessment of Development Applications (DA) and Construction Certificates (CC) has created a more complex and time consuming process. Even where there is not a joint DA/CC the determining authority often seeks detailed design information, including the ability to satisfy the BCA, at the planning approval stage. This approach is more costly, as detailed design and documentation is required up front, without any increase in certainty as to the final outcome. This in turn can lead to increased litigation initiated by developers, due to their substantial and early financial commitment.

One option for applicants is to seek an 'in principle' planning approval for key parameters only, such as land use, building envelope, floor areas etc. This is followed by a second DA for the detailed design, with or without an accompanying CC. The current legislation does not preclude such staged DAs but some determining authorities are reluctant to approve development 'in principle' without full design details.

g. Implications of the planning system on housing affordability

The existing, highly complex process of land use planning approvals, particularly when coupled to the construction, structural and servicing elements of building as a prelude to certification, has arguably contributed to an environment in which housing affordability has been significantly eroded. In particular this can be seen if there is a post hoc need to resolve fundamental design, environmental, heritage or other matters. In some cases planning controls may add to

construction costs, but improve longer term operating costs (such as from improved energy efficiency).

The planning system does not operate in isolation of the economic system. Addressing affordability is a national imperative that cannot be resolved by the planning system alone. One of the mechanisms to tackle affordability is to introduce innovative national and state taxation and financial incentives to target areas of need (e.g. key workers, lower income residents, special need groups, etc).

Having set such a strategic direction, the planning system can then facilitate the delivery of that housing supply consistent with that strategy. The overseas experience of mandating a percentage of affordable housing in every new residential development and offering tax credits for predetermined periods to offset the cost of the affordable housing supply is one way to stimulate the housing market to deliver the targeted housing. The infrastructure to service the increased demand for amenities, utilities, roads and community services could be met by tax benefits to deliver those services, an apportionment of development levies and innovative council funding mechanisms such as municipal bonds.

Perhaps most critically the impact on housing affordability arises from the lack of land zoned for housing particularly in the Sydney Metropolitan area, whether for low density greenfield sites on the fringe or land zoned for medium and higher densities in the existing urban areas. The complexities and delays in rezoning and upzoning as a result of the NSW planning system (including often the delivery of services and infrastructure, and in some cases community resistance to such proposals) can severely restrict the release of land for housing. The constrained residential land supply ultimately impacts on housing supply, increases prices and reduces affordability. With improved strategic planning, and political commitment to resolving often difficult issues associated with densification, the supply of appropriately zoned residential land could be delivered more quickly. Some housing could also be delivered more quickly on that land if it qualifies as exempt or complying development, as is intended with the new Housing Codes due to commence operation in NSW February 2009.

3.0 Conclusions and Recommendations

In summary the majority of the specific issues highlighted in the Inquiry's Terms of Reference could, and should, be incorporated into a new legislated strategic planning approach.

Such an approach will enable government to the address and integrate all relevant issues affecting land use planning at the earliest possible stage rather than leave it to local plan making and development assessment at the project stage. This needs to encompass all the matters referred to in the Terms of Reference including environmental protection and biodiversity, climate change, resource management, competition policy, control of land use on and adjoining airports, housing affordability and land supply.

PIA NSW encourages COAG to support and embrace a national strategic planning agenda which could be linked to the Infrastructure Australia Program. This national planning agenda would also provide the overarching strategic principles to be incorporated in new State legislation.

Accordingly the Institute's main recommendations are:

Recommendation 1

That the State Government support a national strategic planning framework that provides the overarching strategic principles to be incorporated in legislation in each State and Territory across Australia.

Recommendation 2

That new legislation be developed to replace the NSW Environmental Planning and Assessment Act as a priority.
Such new legislation should

a) ***comprise a Strategic and Integrated Planning Act, (based on overarching strategic principles adopted at the national level and a Land Use Administration and Development Assessment Act.***
b) ***be based on the Development Assessment Forum (DAF) models for strategic planning and development assessment already adopted.***
c) ***be formulated and include wide consultation with all stakeholders including the community through standard parliamentary processes (such as issuing white and green papers).***

Recommendation 3

That a new Strategic and Integrated Planning Act for NSW require:

a) ***strategic planning to***
   - ***be undertaken at the State and local levels***
   - ***be integrated vertically between the three spheres of government and horizontally across all relevant government agencies at each level and***
   - ***address all key competing interests between levels and agencies and provide a clear and consistent policy direction.***

b) ***state and local statutory plans in any associated legislation to be consistent with the strategic planning policy framework referred to above.***

Recommendation 4

That a new Land Use Administration and Development Assessment Act for NSW be based on the DAF model for development assessment and allow for:

a) ***Staged DAs for 'in principle' planning consent.***

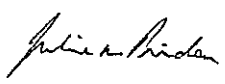
b) ***Development for all critical infrastructure, including airports, to be subject to the same environmental planning regulations in NSW. Non aviation uses on airport land should be subject to the same planning regulations as any other development in NSW.***

c) ***the control and certification of construction standards to be separated from the planning policy and DA assessment processes.***

Further details and background to this summary letter and recommendations are found in the document attached. This attachment also forms part of the PIA NSW submission.

The Institute thanks the Standing Committee for inviting us to lodge this submission and would welcome an opportunity to present to the Inquiry.

Yours faithfully



Julie Bindon

President
NSW Division Planning Institute of Australia

Attachment 1 –
"The Application of a Strategic Planning Approach to New Planning Legislation in NSW in Response to the Inquiry into the NSW Planning Framework" by PIA NSW (February 2009)

ATTACHMENT 1

THE APPLICATION OF A STRATEGIC PLANNING APPROACH TO NEW PLANNING LEGISLATION IN NSW IN RESPONSE TO THE INQUIRY INTO THE NSW PLANNING FRAMEWORK

CONTENTS

1 INTRODUCTION

In November 2007 the Department of Planning released a discussion paper entitled "Improving the NSW Planning System". Following a relatively short period for responses which was reported on by consultants in March of 2008, a draft amendment to the planning legislation was exposed to the public and in August 2008, with some relatively minor amendments, this became the Environmental Planning and Assessment Act 2008.

It would appear that having regard to the concerns of some areas of the public and professional associations and also relating to agreements entered into through the Council of Australian Governments, COAG, the New South Wales Parliament charged the NSW Legislative Council's Standing Committee on State Development with examining the Environmental Planning and Assessment Act, 2008 as now enacted. It is inferred that a fundamental purpose of this review was the ultimate harmonisation of the planning legislation for New South Wales with other similar legislation in Australia as well as considering a number of other issues referred to in the terms of reference for the Inquiry. The terms of reference of this Committee have been attached as **Annexure 1**.

In response to the invitation of the Standing Committee for interested parties to submit written statements in relation to the topics referred to in its terms of reference, the NSW Division of the Planning Institute of Australia (PIA NSW), has taken the opportunity to consider the NSW planning legislation in its broadest context and examine how it might be integrated with national planning legislation suitable to apply to all States and Territories of the Commonwealth. This derives from a perception that the Committee's invitation represents a unique opportunity to consider afresh the system of planning legislation in use in Australia. Moreover it would allow the presentation to the Standing Committee of potentially fundamental improvements or changes to the legislation that controls the use of land and the creation of places suitable for human habitation. In this context, an underlying ambition has been assumed: that such human settlement should be harmonious with the natural environment in which it is to be located and be intrinsically sustainable.

In approaching its task of assessment of the existing legislation and the potential relationship with planning legislation in other States, PIA NSW has made the fundamental assumption that harmonisation inevitably implies an interaction between all levels of government and the public. Moreover it has become quite clear in recent times, that fundamental issues relating to the protection and maintenance of the natural environment and security of access to water for human consumption, all imply the need for achieving inter-dependence of State planning controls with provisions that necessarily must transcend localised State concerns.

In this context, PIA NSW has concluded that expanded national planning legislation, necessarily must be far more than simply a method of development control of land use developed from a relatively narrow base of environmental and physical concerns. On the contrary, expanded planning legislation is seen as needing to embrace as a minimum, all the issues relating to:

- Population Growth
- Human Settlement and Activity
- The Natural Environment
- Natural Resource Management issues
- Sustainability in a variety of contexts
- Public Health and Pollution Control
- Infrastructure, Energy and Physical Access
- Economic Development and associated issues
- Social Sustainability and Social Planning

Given the complexity of the inter-relationship of these various issues, PIA NSW proposes that an overarching process of strategic planning should be included in contemporary planning and land use administration systems of National, State and Local government in Australia, if a satisfactory resolution of the competing issues is to be achieved. In this a fundamental objective would be the satisfactory reconciliation of human settlement and activity with the natural and man-made environment and, in achieving such a result, necessarily the strategic approach would need to apply at all levels of government so as to provide an appropriate basis for detailed planning at the local level. This also assumes that such planning would need to be implemented through a conventional process of land use administration and development control.

In addition, having regard to the general thrust of the report prepared by the Legislative Review Committee of the NSW Parliament, (see **Annexure 2)** reporting on the implications of changes embodied in the proposed Environmental Planning and Assessment Act 2008 and immediately preceding its enactment, another fundamental objective for any new planning legislation should be to ensure that, in relation to the land development process, an appropriate level of fairness applies to the administrative procedures. Moreover, the recourse of individuals to legal processes in relation to perceived injustices should be available as of right. In this, PIA NSW is concerned that at the highest level, the power of State Planning Ministers should be appropriately constrained by reference to State legislatures and instrumentalities as well as to judicial review.

In this, the availability of a process of judicial review of the actions of all levels of government is considered to be fundamental to the operation of legal processes that impinge on the rights of individuals. In New South Wales such legal rights have been closely related to the emergence of a process of merit review at the local level, administered by the Land and Environment Court of New South Wales and this is seen as a relevant structure for operations at the national level. By contrast, the emergence of a variety of new development approval bodies, either not subject to local elected representative decision making or protected from involvement in the Land and Environment Court on appeal, is not seen as desirable by PIA NSW.

2 DEFINITIONS

As may be inferred from the introduction to this submission, the key elements of the PIA NSW position are that:

- The current Planning Act in NSW now fails to meet the reasonable expectations of the public in regard to economic, social and environmental issues relating to their living environments and the proper administration of land use in the State in general.

- The ambitions and objectives of the Environmental Planning and Assessment Act 1979 as originally enacted should be reinstated and should include careful consideration of the natural environment as a prelude to human activity and development control through land use planning.

Having regard to the extent to which satisfying such ambitions will involve all the levels of government, it is anticipated that such a task will require to be approached in a more strategic manner than currently tends to occur. Accordingly, the process referred to as "Strategic planning" will need to be included in any new Planning Act. In this context, reference to the publication "Good Strategic Planning" (2001), emanating from the Development Assessment Forum (DAF) and under the auspices of the Commonwealth Department of Transport and Regional Services, can be made as usefully describing the process that is implied by the terminology, "Strategic planning".

In this document, and ascribed to Westerman, is the following definition of "Strategic planning":

> *"Strategic planning is a continuous and systematic process during which people and organisations make decisions about intended future outcomes, how they are to be accomplished, and how success is to be measured and evaluated."*

This might be seen as contrasting significantly with the present form of "land use planning" and development control that has occurred in New South Wales, with the progressive amendment of the Environmental Planning and Assessment Act 1979 to its present form as contained in the legislation of 2008. Indeed, one of the current and most persistent criticisms of the current planning legislation in New South Wales, is that it has become almost exclusively a document directed at development control and, in the process, has become progressively more complex. Moreover, it is now subject to other layers of regulation deemed necessary by the State Government to make it a workable system, particularly where major or State significant development is under consideration.

It is assumed by PIA NSW that improving the quality of National, state and local planning through the introduction of a strategic approach ultimately will lead to the creation of statutory land use planning instruments of a much more useful and relevant form (LEPs) than tends to be the case at present. In New South Wales statutory local environmental plans are used in local areas to define the way in which the locality will develop in the future. In practical terms, such a form of control has been reasonably successful and it can be anticipated that as a mechanism to control the form of development on land in a local area, the local environmental plan will persist into the future. However, it is also relevant to note that in a number of localities in New South Wales, inappropriate boundaries to local government areas have created particular problems that require special attention and are not susceptible to solution via the local environmental planning route.

Evidently, some other approach may be required where this situation is apparent and for this an intermediate process can be proposed.

Experience suggests that this intermediate process may be achieved through another form of plan which has been shown to be a useful bridge between strategic and statutory planning. This is the "structure plan" and as a means of connecting in visual and diagrammatic terms, the intentions of a strategic plan to the subsequent proposals in a land use plan, it is particularly useful. Specifically, the structure plan makes far simpler the appreciation of intentions for specially sensitive locations and modes of access than when obscured within the provisions of a conventional statutory land use plan. It can also cross local government as necessary and overcome the problems associated with inappropriate boundaries.

3 PROBLEMS WITH THE EXISTING LEGISLATION

In 2008 after nearly thirty years of operation, the Environmental Planning and Assessment Act, 1979 had grown significantly in size, particularly in the last decade. The progressive addition of a plethora of amendments designed to overcome various perceived shortcomings has created a document of great complexity that even the most experienced legal and planning practitioners have substantial difficulties in navigating. This has had the inevitable consequence of promoting a highly cautious approach to development control in the local government arena. In turn, this has tended to promote litigation and recourse to the Land and Environment Court of New South Wales as a means of obtaining a coherent and final response to applications to develop.

Rather more seriously, ambitions relating to the natural environment as well as cultural and social issues, rather than being reconciled with other concerns for the use of land, tend to be ventilated in relation to specific development proposals. This might be contrasted with a process in which such potentially competing issues are resolved initially via a process of strategic planning rather than being left until the local environmental planning controls are enacted and, accordingly, have become highly inflexible and not easily subject to amendment. This is a situation that appears to have generated innumerable matters for the Land and Environment Court of New South Wales to resolve. Moreover such a process inevitably tends to suppress social issues or the mature appreciation of scientific issues underlying the environmental concerns.

Given the evolution of this unwieldy and time-consuming process, which has more and more become a limited and highly complex method of development control, it was perhaps inevitable that the State Government would seek means to simplify and expedite the development process, particularly where it relates to State significant development. However the introduction of Part 3A of the EP&A Act, designed to obviate the delays that were seen to be occurring at the local government level has led to an unfortunate situation in which direct approaches to the Planning Minister have been associated in the Media with financial donations of a political complexion. This is unfortunate as it has tended to undermine the standing of planning in New South Wales. Moreover, as it appears that these provisions in the Act were directed at overcoming delays precipitated by public participation processes together with a perceived problem of adequate skills in local government to respond to complex and large scale development proposals, this is doubly unfortunate.

A direct response to the issue of financial donations, the recent amendments that are now embodied in the Environmental Planning and Assessment Act, 2008, have included provisions designed to distance the Minster from such direct involvement in the development approval process. The introduction of bodies independent of local government, such as the Planning Assessment Commission, charged with the responsibility of determining certain State significant development as well as development involving significant costs and job creation potential, may be seen as a reflection of this concern. These independent bodies have also added to the complexities of the approval process, disempowered locally elected officials and established new machinery for particular categories of development.

In addition, a number of the amendments of 2008 appear to result in the concentration of planning decision-making power in the person of the Planning Minister, with even the control of the State Parliament being specifically limited. In this context, the concerns of the Legislative Review Committee as expressed in their report immediately prior to the introduction of the Bill to the New South Wales Parliament can be referred to (see **Annexure 2**). Explicit concerns expressed in that document relating to the reasonable rights of individuals to appeal against the planning decisions of the State would appear to require very careful assessment and modification in the context of planning legislation intended for national application.

In summary, the problems that are now perceived to exist in the NSW legislation as it has evolved to 2008 are as follows:

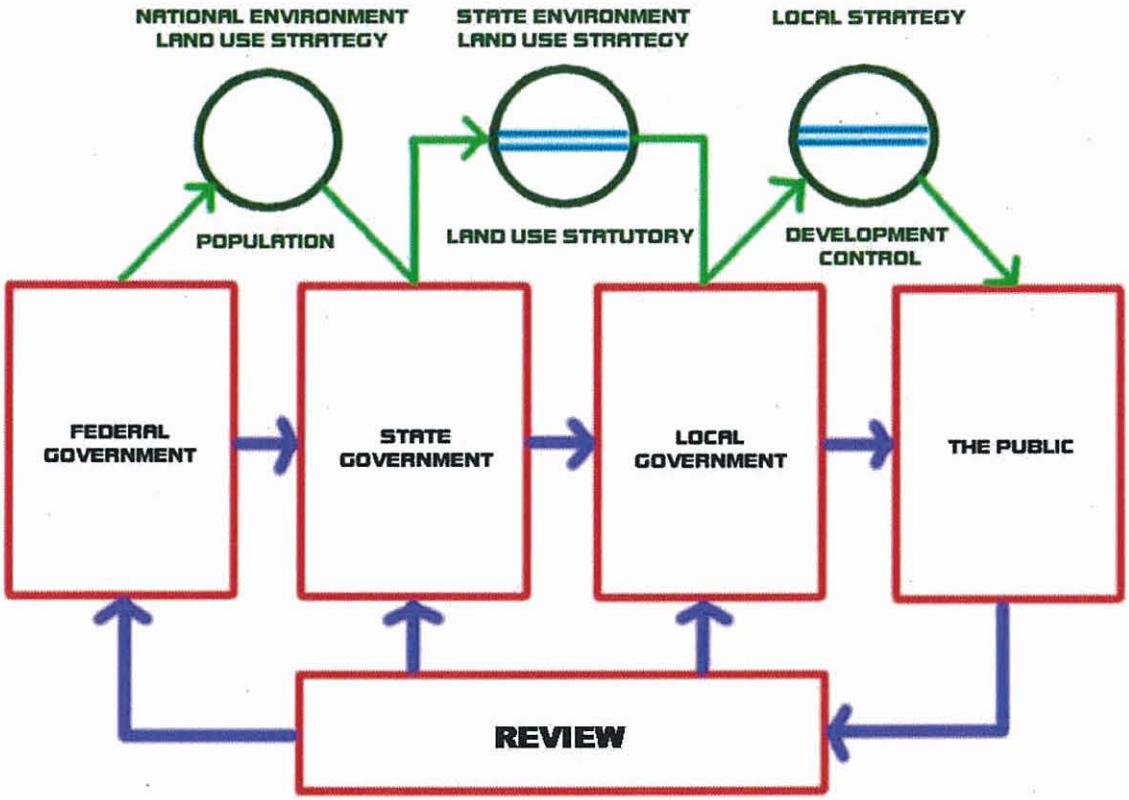
- Lack of clarity in relation to strategic ambitions and a high degree of complexity
- An excessive concentration in the current Act on development control processes
- Diminished concern for the natural environment and heritage
- Administrative processes that preclude reasonable access to judicial and merit review
- Legislative provisions that prevent or inhibit legal challenge to the actions of the Minster
- Reliance on multiple layers of control to achieve strategic objectives where they exist or ill-defined ambitions,.
- Complexity and excessive cost involved in the conjunction of land use and building regulatory issues required as a part of the development process
- Apparent subordination of responsible social, economic and environmental planning to other issues affecting land use
- Depreciation of heritage based protective provisions

4 OPERATION AND SCOPE OF NEW PLANNING LEGISLATION

With the opportunity to integrate planning legislation in New South Wales with a system intended to operate throughout Australia, it is considered necessary to define where the present Act would lie in relation to such an expanded form of planning and regulation.

Reference to the diagram provided below, **Figure 1**, suggests the type of legislative relationship that might apply to strategic and land use planning. The implication for the future of an integrated planning system to apply to Australia as a whole is that in order to embrace the strategic approach, modifications to the structure of existing planning legislation is likely to be essential. The preferred approach involves the creation of an entirely new Act which deals with strategy and reflecting national, state and local ambitions and would allow the exploration and resolution of complex competing concerns that arise in the context of the environment and land use. It may be possible to restructure and simplify the Environmental Planning and Assessment Act 2008 so as to deal expressly with administration and development assessment and associated issues such as public exposure of development proposals. PIA NSW however, recommends instead a new Act dealing with development assessment and its administration in NSW.

FIGURE 1 GOVERNMENT AND PUBLIC RELATIONSHIPS WITH PLANNING



This would also allow the problematic policy issues which have generated much of the current complexity to be removed to the more appropriate legislative vehicle of a new Strategic and Integrated Planning Act. Such a new State legislative instrument could be directed at achieving a comprehensive strategic framework involving all tiers of government including the local level. This strategic framework could then be expressed in the form of structure plans relating to discrete geographic regions or local areas. In addition, such new legislation could also be directed at the production of State Strategic Plans dealing with spatial aspects of issues such as population growth and distribution, access, infrastructure and basic services including water supply, environmental and heritage protection as well as social and economic development. Alternatively provisions relating to the strategic approach might be accomplished by introducing a new part to the EP&A Act however the danger is that it could create further confusion and complexity without removing the fundamental problems with the existing legislation.

For whichever of the two approaches discussed above might apply, it is proposed that new planning legislation should withdraw from a principal concern with development control and embrace a range of issues which at present tend to be responded to at a late stage and in a somewhat ad hoc fashion. In this regard, PIA NSW proposes that the following issues should be

seen as forming the core of a State strategic approach and become the ultimate basis for statutory planning that might follow. These core issues would be:

- Population Growth and Location
- Environment and Heritage Protection
- Resources, Energy and Sustainability
- Economic Processes
- Social Development and Equity
- Infrastructure and Services Provision
- Land Definition, Use and Controls

5 OBJECTIVES FOR NEW PLANNING LEGISLATION

Core planning objectives for new planning legislation relating to both State and Commonwealth planning relationships as expressed in **Figure 1** above should include the following:

- Achieve an integrated system of national planning to be applied at Commonwealth, State and local government levels relating to environment, habitation, access and services.

- Provide an administrative and legislative framework intended to create an environment in which human habitation and its demands are reconciled with the preservation of the natural environment and heritage.

- Insure that where land is to be used, it is in the context of appropriate consideration and assessment of environmental and sustainability issues (including the implications of physical change precipitated by climatic variations).

- Provide for a pre-eminent process of strategic planning, assessment and review as a prelude to statutory forms of land use control.

- Provide an independent system of judicial review available to challenge the legal validity of decisions relating to particular projects made at all levels of government by private citizens or organisations.

- Provide an independent system of merit review of development decisions relating to the use of land in the context of relevant and applicable statutory and policy instruments as recommended by DAF.

- As part of the strategic approach to plan making, provide for citizen participation processes and require a mandatory process of regular periodic review of all statutory instruments within a period not exceeding 5 years.

- Simplify provisions for changing statutory land use in localised and small areas designed to allow special types of development, or development in a particular locality, and associated with expanded rights of appeal on a merits basis.

6 A NATIONAL PLANNING PROCESS

Assuming that the present system of planning legislation that applies in New South Wales may require a fundamental reorganisation and expansion when seen in the context of a national approach to planning law, it is possible to examine the relationships that might apply within such a system and the issues that would need to be taken into account.

In the following diagram, **Figure 2**, the relationship between the processes advocated can be seen as including a series of modules which might be created in separate legislative packages (Strategic and Integrated Planning Act plus a Land Use Administration and Development Assessment Act). Alternatively, they might be contained within a radically restructured version of the Environmental Planning and Assessment Act 2008 containing a new strategic planning component with radically simplified provisions for land use administration and development assessment.

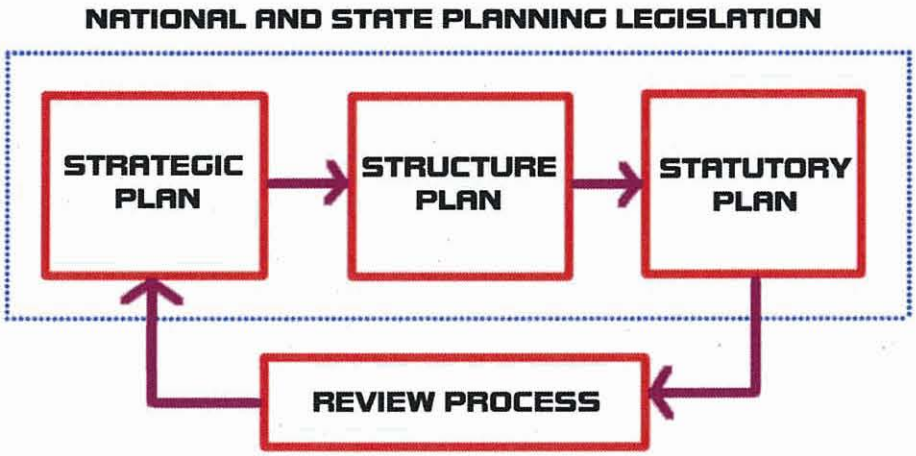


FIGURE 2 INSIDE THE PLANNING LEGISLATION – A NATIONAL MODEL

If one of the desirable outcomes of the current review of the New South Wales legislation were to be a significant simplification of land use planning and development assessment, this might well arise most expeditiously and easily through the creation of a separate new legislative module.

Whichever approach is taken, it can be suggested that the various issues referred to earlier, and requiring attention in a coherent and consistent manner, can be ascribed to one or other of the planning modules referred to in the diagram provided in **Figure 2** and expanded in the listing below, relating to each of the modules.

MODULE	ISSUE OF CONCERN
STRATEGIC PLANNING	Definition of the area subject to planning and control Assessment of population growth Determination of desired population locations based on a full and relevant range of issues Identify environmental components and sensitivity (including terrain, topography and ecological communities) Consider economic factors potentially affecting location Identify major infrastructure needs and resources Establish form of transport access by land, sea and air Consider social issues including spatial context and location of existing urban areas Establish citizen attitudes and ambitions Define existing and future land use relationships Determine water and energy use, production, generation and sustainability Assess public benefits and costs Determine economic implications and funding Define method to be adopted for amendment of plans Develop regional and local strategies related to budget
STRUCTURE PLANNING	Delineate key spatial land use patterns and transportation relationships Identify areas of environmental sensitivity Define heritage elements and areas for environmental protection
STATUTORY PLANNING	Convert Structure Plan land use relationships to Local Plans Create a cadastre based land use data base for public access Develop design-siting and subdivision controls to amplify land use controls Introduce an electronic, digital land definition and information system Establish an independent development assessment process Define method of determination of land use applications Include a system of independent judicial and merit review and assessment of al development decisions Ensure that statutory instruments are reviewed and revised on a regular basis

7 INTEGRATED PLANNING FOR COMMONWEALTH, STATE AND LOCAL GOVERNMENT

Given the massive complexity of the natural and man-made environment, hoping to control adequately how land should be used, with all relevant issues appropriately considered and responded to, is a supremely optimistic task especially when undertaken through a single piece of legislation such as the Environmental Planning and Assessment Act 1979.

Perhaps it is not surprising therefore, that when faced with the task of reconciling a substantial array of competing demands, the New South Wales State Government has sought to respond through a proliferation of amendments to the Act created in 1979 and with an overlay of supplementary Acts and Regulations directed at handling special concerns such as environment and sustainability. Inevitably the complexity and untidiness of the process that results from responding to such a multiplicity of competing demands, has led almost inevitably to high levels of cost and delay in processing and, more seriously, recourse to the legal system for the final resolution of disputes. Moreover such disputes have occurred both at the State Government level as well as routinely in the sphere of local government.

In examining the most recent manifestation of the New South Wales planning legislation created by the 2008 amendments, it is clear that further complexity and confusion has been created rather than a solution of the basic problems earlier referred to. Through their very complexity such amendments could not reasonably be expected to bring order to the process of statutory planning at the local level. Moreover, it is inherent in this process of amendment that increasing complexity is unlikely to generate increased efficiency or expedition in undertaking the development assessment processes. Just as seriously, the progressive move to increasing centralisation, with reduced involvement of both the public and the Court, has created a process that cannot be expected to induce universal citizen support in the longer term. This is particularly so when the amended Act may ultimately be seen by the public as inextricably linked to controversial forms of redevelopment, the planning of which has seen minimal local citizen involvement.

With the intervention of Commonwealth Government in State affairs as they relate to such fundamental issues as the supply of water and responses to the potential impacts of climate change, something more robust than the committee based interchanges that are reported to be occurring in the Council of Australian Governments, COAG, would appear to be desirable . By contrast the methodology available in the strategic planning approach embraced by the Commonwealth Department of Transport and Regional Services and presented to the public through the Development Assessment Forum, DAF, earlier referred to, would appear to have relevance to all levels of government. In this, it would be highly desirable for COAG to support and embrace a national strategic plan, linked to the Infrastructure Australia program as well as Caring for Country.

However as earlier asserted, a strategic planning approach cannot be expected to operate successfully in NSW if simply grafted onto the existing legal arrangements as a series of further amendments. A significant change is suggested as necessary by PIA NSW and in this, two approaches have been discussed. The preferred approach by PIA NSW would be to create a totally new Strategic and Integrated Planning Act, directed at defining and resolving the competing strategic issues that arise in relation to the use of land. In addition, this could form a prelude to the fundamental restructuring of the Environmental Planning and Assessment Act to become a Land Use Administration and Development Assessment Act. This would be directed at concentrating the resources of the 2008 Act into a primary concern with the effective administration and control of land use, through a coherent and simplified system of development assessment.

8 THE STRATEGIC PLANNING APPROACH APPLIED

There may well be fundamental reservations as to the soundness of either adopting or adapting planning approaches used in other parts of the world to the situation in Australia. However, in the context of the approach preferred by PIA NSW and developed in previous sections of this submission, overseas examples can be pointed to as indicating the potential to achieve far better results in planning than are currently occurring in, particularly, New South Wales.

In Europe, the United Kingdom and the USA, currently it is possible to find a significant number of useful examples of planning regimes in which the strategic approach is embodied as a prelude to the creation of land use plans which closely resemble the statutory planning process to be found in NSW. In this context, and at the national level, it is possible to see expressed clear support for the approach advocated in the foregoing PIA NSW submission. This is contained in the "European Spatial Development Perspective (ESDP)" and given it compactness, it has been included in this submission as **Annexure 3**. While this document is clearly entirely Euro-centric in its content and concerns, the general approach taken is generally consistent with the PIA NSW submission relating to planning processes and how they might be developed in the Australian context.

As an interesting and direct reflection of the ESDP, an example can be cited in the Irish national planning system which is usefully discussed at the following web address: www.qub.ac.uk/ep/research/span/resources/RoI**PlanningSystem**.pdf

In addition, under the umbrella of the Irish planning system, can be found a particular example of the process of strategic planning undertaken as a prelude to the creation of a land use planning and development assessment processes as well as administration.

Reference to the Cork City Council planning report entitled, *Cork Area Strategic Plan*, *CASP*, which was originally adopted in 2001 but has been revised in recent times to reflect changing circumstances, indicates the creation of an approach which, in general terms, could usefully be applied in the Australian and NSW context. PIA NSW suggests that this example should be examined in greater detail as a prelude to the introduction of desirable local changes to the existing planning system, particularly in New South Wales.

As a direct expansion of the strategic planning work undertaken at Cork City Council, reference can also be made to the document entitled, *Cork City Development Plan 2004* which is intrinsically closer to conventional strategic land use planning as currently applicable in New South Wales. In particular, this document, while including a significant component of development driven policies and objectives, also provides quite conventional land use and zoning provisions as a basis for controlling uses and activities.

It is to be noted that both the Cork City Council documents can be found at the council website: http://www.corkcity.ie/

Notwithstanding the inevitably parochial character of both the ESDP and the examples from Cork City Council, PIA NSW believes that they reveal a generally similar approach to that taken by PIA NSW in presenting its submission for consideration. However, this is perhaps unsurprising in that the approach taken by the Institute could not be seen as novel and has underlain good planning practise for many years, going back to the 1930s. In this regards, the work of Abercrombie in the UK during that period, though expressed in somewhat different language to today, clearly supports a process that now would be described, using contemporary terminology, as embodying both strategic and statutory approaches.

9 CONCLUSIONS

As commented in the introduction, PIA NSW has seen the invitation to make a submission in relation to the existing planning legislation in New South Wales, as a major opportunity to consider the broader problems inherent in developing national planning legislation. This would also allow the inclusion of the Commonwealth Government's emerging concerns relating to resource and climate related issues as well as environmental sustainability in a new arrangement of State planning instruments to include strategic approaches.

In summary, PIA NSW is of the opinion that continuing to meet the demands of the community through a process of amending what has become in essence a development control orientated legislative process, is likely to compound the difficulties that had been sought to be overcome. This is particularly the case when it can be seen that the context is a complex socio-economic environment, to which can be added the high concern for environmental and heritage issues that has developed over a 30 year period. It is also relevant to the planning process that in recent years, a highly vocal and self-interested public has emerged, whose concerns are able to be ventilated through access to the media in particular and the use of facilities such as the Internet.

Given this context, the Institute therefore submits that a quite fundamental change to the existing planning legislation is required to meet the situation that has developed in the early part of the 21st century. In responding to the current environment, reliance on traditional methods of statutory land use planning and development control cannot be expected to produce sustainable and liveable communities, especially having regard to the longer term impacts of climate change and diminishing natural resources including oil. The Institute submits that the methodology of strategic planning as referred to in this submission, represents a more appropriate solution than reliance on highly complex development control and that this process can apply equally to the relations of the Commonwealth and State Government's as well as State and Local government.

In the foregoing discussion, the way in which strategic planning might be accommodated in the structure of new planning legislation has been discussed. From this has come the proposal that a new Strategic and Integrated Planning Act should be introduced. This would then allow the existing Environmental Planning and Assessment Act, 2008, to be fundamentally reconfigured into a Land Use Administration and Development Assessment Act to deal specifically with land use administration, development assessment and appeals, intended to achieve a far simpler and expeditious system of development assessment and determination. Moreover, the type of legislative structure that has been discussed, could apply with equal utility to all the States of the Commonwealth, thereby making common problems and issues more easily resolved in the expanded context that exists across State borders in particular.

ANNEXURE 1

TERMS OF REFERENCE OF THE STANDING COMMITTEE ON STATE DEVELOPMENT

1. That Standing Committee on State Development inquire into and report on the national and international trends in planning, and report whether the development of new planning legislation over the next five years would be justified, and if so, the principles that should guide such legislation.

2. In particular, the Standing Committee on State Development is to inquire into:

   a. The implications for NSW planning of the Council of Australian Governments reform agenda

   b. Duplication of processes under the Commonwealth Environment Protection and Biodiversity Act 1999 and NSW planning, environmental and heritage legislation

   c. Consideration of climate change and natural resource issues in planning and development controls

   d. Appropriateness of considering competition policy issues in land use planning and development approval processes in NSW

   e. Regulation of land use on or adjacent to airports

   f. Inter-relationship of planning and building controls

   g. Implications of the planning system on housing affordability.

3. That the Standing Committee on State Development will

   a. Undertake a review of national and international best practice\

   b. Hold hearings in early 2009

   c. Report by 14 December 2009

4. Review progress subsequent to its final report.

ANNEXURE 2

LEGISLATIVE REVIEW COMMITTEE – EXTRACT

FROM LEGISLATION REVIEW DIGEST No 7 of 2008

4. Environmental Planning and Assessment Amendment Bill 2008

Issue: Oppressive Official Powers – Schedule 2.1 [27] – Insertion of Part 4, Division 4 - Proposed section 89 (1) (a) and (b) Determination of Crown development applications and proposed sections 89A (1) (a), (b) and 89A (2) Directions by Minister:

77. The Committee notes that a consent authority cannot, without the approval of the Minister, refuse a Crown development application or impose a condition on its consent to a Crown development application. Although this re-enacts the current limitations on the power of consent authorities, however, in effect, it means that there is no opportunity for a person to make their case or representation to the consent authority if there is objection to the Crown development application. The Committee considers these official powers appear to unduly trespass on individual rights to have their views heard and represented by making the consent authority unable to refuse or impose conditions on a Crown development application without the prior approval of the Minister. Accordingly, the Committee refers this to Parliament.

Issue: Procedural Rights – Schedule 2.1 [19] – Proposed Section 79C (1A) Rejection of submissions – development (other than designated development) subject to objector review:

81. The Committee has concerns about procedural fairness and the right to review with respect to the proposed section 79C (1A), to be inserted by Schedule 2.1 [19], by legislating away the need to give notice and to the right of review, and considers individual rights and liberties may be unduly trespassed, and refers this to Parliament.

Issue: Access to Justice and Procedural Rights – Schedule 2.2 [73] - Proposed Section 152 Right to be heard:

83. The Committee will always be concerned about legislation or regulations that authorise administrative decision-making without providing for the right of those affected to be represented where there is a right to be heard, especially if there are to be no appeals from determinations of the Planning Assessment Commission after a public hearing, and persons qualified to apply for reviews for certain classes of development or determinations may be limited by regulations.

84. Therefore, the Committee considers this may be an undue trespass on the right of procedural fairness and access to justice, by proposing powers to remove the current unlimited right of a person to be represented arising from the proposed powers to make regulations prohibiting or limiting the right of persons under the Act to be represented at reviews by the Commission or before other planning bodies. Accordingly, the Committee refers this to Parliament.

Issue: Right To Property - Acquisition of land not on just terms – Schedule 5.1 [9] – Proposed insertion of Schedule 5 – Paper subdivisions – proposed clause 3 (2) (f); clause 3 (2) (g) and clause 3 (3) - subdivision orders:

88. The Committee is concerned that the proprietary rights of the remainder of the owners may be unduly trespassed and refers this to Parliament, since clause 3 (2) (g) is proposing to only

require the consent of 60% of the owners of the land and owners of at least 60% of the land. The Committee further notes that proposed clause 3 (3) treats two or more owners of the same lot as only one owner for the above purposes, which may unduly trespass on the rights of another owner if not all owners of the same lot have consented but are nevertheless, treated as being only one owner.

90. The requirements that the acquisition of property be on just terms and be appropriately compensated as a result of acquisition are important safeguards of the right to property. The Committee is concerned about the Bill's departure from the *Land Acquisition (Just Terms Compensation) Act 1991* in respect to its provisions on the determination of compensation. Accordingly, the Committee is concerned that the proposed clause 3 (2)(f) may trespass unduly on personal rights and liberties, and refers this to Parliament

95. The Committee notes that the above clauses provide for the compulsory acquisition of subdivision land or interests in land without the application of the provisions (or modified application) of the *Land Acquisition (Just Terms Compensation) Act 1991* with regard to the valuation of land for compensation; determination of amount of compensation; interest on compensation; rate of interest on compensation; trust account; compensation in the form of land or works; payment of compensation arising from court proceedings; and provisions on the payment of compensation.

96. The Committee is concerned about the lack of protection the above clauses afford to property rights and interests, and their departure from the application of the *Land Acquisition (Just Terms Compensation) Act 1991*. The Committee considers personal rights and liberties could be unduly trespassed and refers this to Parliament.

Issue: Rule Of Law - Schedule 3.1 [7] - Proposed insertion of Part 3 of Schedule 1 – Planning Agreements - proposed clause 21 – Parties to planning agreements:

100. The Bill proposes that a planning agreement can be registered if the agreement relates to land under the *Real Property Act 1900* or if the agreement does not relate to land under the Real Property Act, then where there is agreement to the registration by each person who has an estate or interest in the land (proposed clause 24)). Therefore, the proposed clause 21 (1) of enabling the Minister to approve the addition of any party to the planning agreement without specifying requirements for a relevant connection, appears to be very wide in scope and may erode the rule of law with regard to the principle on the privity of contract since the planning agreement can be registered by the Registrar-General under the Real Property Act or in the General Register of Deeds. Accordingly, the Committee considers this may unduly trespass on individual rights and liberties, and refers it to Parliament.

Issue: Ill And Wide Defined Powers – Proposed Part 2, Division 2 in Schedule 1.1 [9] SEPPs – State Environmental Planning Policies:

103. The Committee notes that the scope for policies that may be made "with respect to any matter that is, in the opinion of the Minister, is of State or regional environmental planning significance", appears to be extremely wide.

104. The Committee also considers that in the circumstances of where there is no requirement for consultation with other Ministers and public authorities (other than the Director-General of National Parks and Wildlife) in the drafting and preparing of the SEPPs, along with the wide power of the Minister to determine any matter that is, in the opinion of the Minister, of State or regional environmental planning significance, may make personal rights and liberties unduly

dependent on an unfettered discretion on the making of SEPPs and an insufficiently defined administrative power. Accordingly, the Committee refers this to Parliament.

Issue: Ill And Wide Defined Powers – Proposed Part 3, Division 4 in Schedule 1.1 [11] Local environmental plans - LEPs – Proposed section 56 (2) and sections 56 (3) and (4) - Gateway determination:

107. The Committee notes that the scope for the Minister's determination with regard to a gateway determination as set out in the above proposed section is very wide, including the extent for community consultation requirements and other consultation (or if any, depending on regulations to be made out for community consultation requirements for the categories of instruments).

108. The Committee considers that this may make individual rights and liberties unduly dependent on an insufficiently defined administrative power, and refers this to Parliament.

Issue: Ill and Wide Defined Powers - No default maximum of community infrastructure contributions for direct contributions and indirect contributions - Schedule 3.1 [6] – Part 5B, Division 2 – Proposed Sections 116J (3); 116K (3) (b); 116K (4); 116L (1) (b); 116L (1) (c):

110. The Committee considers that it is appropriate to vary any maximum contribution level by regulation, as such variation would be disallowable by Parliament. However, the proposed sections 116K (4) and 116L of allowing the Minister, by direction, to vary the maximum percentage for contributions, appear to be very wide, and unlike a contribution level to be varied by regulation, would not be disallowable by Parliament.

111. The Committee further notes that no default maximum amount is set by the Bill in the event that the regulations do not prescribe an amount. The Committee is concerned that the failure of the Bill to provide a default maximum level of direct and indirect community infrastructure contributions may be an inappropriate delegation of legislative power, and refers this to Parliament.

Issue: Exclude Judicial Review – Schedule 2.1 [13] - Proposed Section 23F – No Appeals Against Decisions By Planning Assessment Commission After Public Hearing:

116. The Committee is of the view that the proposed section 23F is very broad, including a function delegated to the Commission under the Act. It has the potential to deny a person natural justice by removing the opportunity for appeal or review on any question of law. Taken together with the Committee's concerns with access to justice and procedural fairness where the other proposed section 23E (c) on making regulatory provisions that parties are not to be represented or are only to be represented in specified or limited circumstances, the Committee draws Parliament's attention to the fact that individual rights and liberties appear to be unduly dependent on non-reviewable decisions.

Issue: Exclude Judicial And Merits Review – Schedule 2.1 [52] - Proposed Section 118AG and subsections (1); (2) (a), (b); (3); (4); (5) – Protection for exercise of certain functions by Minister:

119. The Committee is of the view that the proposed section 118AG is very broad. It has the potential to deny a person natural justice by removing the opportunity to even review any question of compliance or non-compliance by the Minister or the Minister's delegate to any function conferred or imposed on the Minister or a delegate of the Minister, relating to the

appointment of a planning administrator or planning assessment panel or the conferral of functions on a regional panel. Accordingly, the Committee draws Parliament's attention to the fact that individual rights and liberties appear to be unduly dependent on non-reviewable decisions.

Issue: Exclude Judicial And Merits Review – Schedule 3.1 [7] – insertion of Proposed Schedule 1 – Part 1 Community infrastructure contributions – proposed clauses 2 (2); (3) (a) and (b) - Appeals:

126. The Committee is of the view that the proposed clauses have the potential to deny a person natural justice by removing the opportunity for appeal or review on an indirect contribution as part of a condition of development consent determined in accordance with a contributions plan, or for appeal or review on contributions plan by a direction of the Minister under this Part, or for review of the reasonableness in the circumstances of a requirement for a community infrastructure contribution in accordance with a contributions plan. The Committee considers that individual rights and liberties appear to be unduly dependent on non-reviewable decisions, and refers this to Parliament.

Issue: Exclude Judicial And Merits Review – Schedule 3.1 [7] - Proposed insertion of Part 2 of Schedule 1 – State infrastructure contributions - proposed clause 16 - Restrictions on appeals and changes to conditions:

128. The Committee considers that the proposed clause 16 has the potential to deny a person natural justice by removing the opportunity for appeal or review in respect of a Minister's determination or direction, or in respect of a condition imposed by a consent authority or the Minister with regard to State infrastructure contributions. The Committee is of the view that individual rights and liberties may be unduly dependent on non-reviewable decisions, and refers this to Parliament.

Issue: Exclude Judicial And Merits Review – Schedule 3.1 [7] - Proposed insertion of Part 3 of Schedule 1 – Planning agreements - proposed clause 26 91) - Appeals:

130. The Committee is of the view that the proposed clause 26 (1) has the potential to deny a person natural justice by removing the opportunity for appeal to the Court in respect of the failure of a planning authority to enter into planning agreement and with regard to the terms of a planning agreement, even if it may be on a question of law.

131. The Committee considers the importance of judicial review for protecting individual rights against oppressive administrative action and in upholding the rule of law, and is concerned if a Bill purports to oust the jurisdiction of the courts. Therefore, the Committee believes individual rights and liberties may be unduly dependent on non-reviewable decisions, and refers this to Parliament.

Issue: Henry VII Clauses – which allow amendment of an Act by a Regulation – Schedule 2.1 [35] - Proposed sections 96C, 96E (1) and 96E (9) Applications for review – objectors:

135. The Committee is concerned that allowing regulations to exclude objectors from applying for reviews and restricting the making of review applications by applicants and objectors, to certain classes of development or determinations, appear to be a significant delegation of legislative powers.

136. The Committee finds that allowing regulations to make such review rights of the legislation not apply in relation to certain classes of determinations or development, and to certain persons,

could be an extremely broad power, which in theory, may enable regulations to be made to undermine the operation of the legislation.

137. The Committee notes that the ability of Parliament to effectively scrutinise the classes of development for reviews and the limiting of classes of persons to apply for reviews by such regulations, will be dependant on Parliament sitting. Therefore, the Committee considers that this constitutes an inappropriate delegation of legislative power, and refers it to Parliament. The Committee is of the view that such classes of determination and persons qualified to apply for reviews, could be more appropriately made in the Principal Act by an amending legislation rather than through the regulations.

Issue: Matters which should be regarded by Parliament – Schedule 3.1 [6] – Proposed Part 5B, Division 2 – Proposed sections 116I (1) (a); 116I (5) (a) – Councils limited to contributions for key community infrastructure; and proposed Part 5B, Division 4 - Proposed section 116V – Council planning agreements limited to key community infrastructure:

140. The Committee is concerned that key community infrastructure is to be prescribed by or defined in the regulations rather than be made in the legislation. The Committee notes that allowing for regulations to determine the kinds of key community infrastructure, may be delegating the power to make a main component of the legislative scheme. Therefore, the Committee considers that defining or prescribing key community infrastructure by regulation rather than in the legislation, appears to be an inappropriate delegation of legislative power, and refers this to Parliament.

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

142. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

Issue: Enabling the issuing of directions to influencing the exercise of executive powers without any obligation for them to be tabled in Parliament - Schedule 3.1 [6] – Part 5B, Division 2 – Proposed Sections 116L and 116K (4) – Minister's directions about community infrastructure contributions:

144. The proposed sections 116K (4) and 116L of allowing Minister's directions, to vary the maximum percentage for contributions, or to direct the consent authority as to the requirement for a community infrastructure contribution, appear to be very broad. The Minister's directions would also not be disallowable by Parliament. The Committee considers these sections may be inappropriately delegating legislative powers and could be insufficiently subjecting their exercise to parliamentary scrutiny; and accordingly, refers this to Parliament.

Issue: Enabling the issuing of guidelines, policies or plans to influencing the exercise of executive powers without any obligation for them to be tabled in Parliament – Matters which should be regarded by Parliament - Schedule 5.2 [1] and 5.3 – Concurrence and referral requirements:

147. The proposed Schedules of removing the requirement for the concurrence of the Minister for Climate Change and the Environment when carrying out development in the coastal zone for development that requires development consent; or is exempt development; or is done according

to a coastal zone management plan, appear to be very broad. Such development in the coastal zone if carried out through a management plan or a development consent would not be disallowable by Parliament. The Committee considers this may be an inappropriate delegation of legislative powers and could be insufficiently subjecting their exercise to parliamentary scrutiny; and accordingly, refers it to Parliament.

148. The Committee is concerned that any removal of provisions on concurrence or referral requirements could be done through a State environment planning policy or through the guidelines, which may not be disallowable by Parliament or they may not be sufficiently subjected to parliamentary scrutiny. The Committee also has concerns with the requirements of concurrence or referral to be set out in regulations rather than be made in the legislation. Therefore, the Committee considers that prescribing the details of when concurrence requirements are not required by regulation rather than in the legislation, appears to be an inappropriate delegation of legislative power, and refers this to Parliament.

ANNEXURE 3

EUROPEAN SPATIAL DEVELOPMENT PERSPECTIVE (ESDP)

The European Spatial Development Perspective (E.S.D.P.)

Comments and recommendations from the European Consultative Forum on the Environment and Sustainable Development

January 1999

The European Consultative Forum on Environment and Sustainable Development
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Foreword

The European Consultative Forum on the Environment and Sustainable Development was established as a consultative body by a Commission Decision in 1997 (97/150/EC) within the framework of the Fifth Action Programme "Towards Sustainability". Its purpose is to advise the Commission on policy development and to provide a bridge to different sectors of the European society. Its members are appointed in a personal capacity by the Commission on the basis of suggestions from European interest groups. A balance of representation from non-governmental organisations (NGOs), industry, business, consumers, local and regional authorities, trade unions, science and other interests is provided for in the Decision.

Among its other activities, the Forum has organised a Working Group on Urban and Spatial Issues, because it believes that there are strong links and impacts from urban development and spatial organisation on sustainable development, as well as on environmental quality, energy consumption, mobility, health and quality of life. Urban and spatial development also touches issues already treated by different working groups of the Consultative Forum as for example agriculture, enlargement, integration, global climate change, health and quality of life.

The first task of the Working Group was an analysis and evaluation of the first draft of the European Spatial Development Perspective (E.S.D.P.). Members of the Working Group have participated in the transnational seminars organised in 1998 to discuss its various aspects. They have also taken into consideration that the E.S.D.P. is related to a number of other European and global initiatives, such as:

- Eurocities (a network of 81 cities in 25 European countries),
- The International Council for Local Environmental Initiatives (ICLEI),
- The Local Agenda 21,
- The European Community Programme of Policy and Action in relation to Environment and Sustainable Development (5th Environmental Action Programme),

- The European Commission Expert Group on the Urban Environment,
- The Directive of the European Commission on Habitat protection (Natura 2000),
- The Communication from the Commission on Sustainable Urban Development in the European Union: a Framework for Action (COM 605),
- The Transeuropean Networks,
- The Habitat II initiative.

The first assessment of the E.S.D.P. was discussed by the Plenary Session of the Consultative Forum on 14 October 1998 in Copenhagen and the final comments and recommendations were approved by the Forum on 27 January 1999 in Brussels.

We hope that these comments and recommendations will constitute a useful contribution to a very significant European initiative

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Executive summary

General principles on spatial development

- Respect of sustainability goals by economic decisions with spatial implications.
- Need of Strategic Impact Assessment of such decisions.
- Balance of social cohesion and sustainability with competitiveness and the markets through spatial development.
- Conservation of the rich territorial variety of Europe.
- Respect of ecological equilibrium between natural and anthropic systems.
- Spatial planning contribution to local and global climate change control.

Positive aspects of the E.S.D.P.:

- First integrated view of the whole European continent.
- Use of a spatial framework for co-ordinating a wide spectrum of policies.
- Novel trans-sectoral and proactive approach to planning.

Areas for improvement:

- Social and cultural concerns:
- Conflicts between the goals of competitiveness and cohesion need to be addressed.
- Greater emphasis on the social aspects and their spatial impacts, particularly in the urban systems.
- Inequalities between the E.U. and the neighbouring regions in the East and South need to be addressed.
- Conservation of the rich diversity of land use in Europe, and avoiding the homogenisation of its territory.

Environmental concerns:

- Threat of fragmentation of the European territory by transport networks.
- Possible confusion as to the "sustainable development" of the natural and cultural heritage, which is a European wealth to be safeguarded and enhanced.
- Protection of biological diversity not only through an „ecological network", but through integrated management of the entire territory.
- Sustainable management of the water cycle.
- Greater incorporation of health and quality of water considerations.
- Contribution by planning policies to the local and global climate change efforts and commitments.

Recommendations for implementing the E.S.D.P. :

- Greater emphasis on clear and courageous policy formulation.
- Wider awareness of the E.S.D.P. initiative by decision-makers, the planning professions and the general public, through appropriate training and campaigns.
- Necessary redrafting to clarify terms and to sharpen the message.
- Provision for the use of Sustainability Indicators and Strategic Environmental Assessment.
- The role of the future Observatory Network in co-ordinating the process should be strengthened.

Conclusion:

The E.S.D.P. a very positive European initiative, to be strongly supported and further improved, through a multi-level consultation process.

1. General principles on spatial development

The Consultative Forum considers that the following principles should be the guidelines for all initiatives concerning the spatial development of Europe within the framework of sustainability and with full respect to the precautionary principle:

1 Policies and decisions especially economic ones with implications for spatial development, concerning mainly human settlements, agriculture, transport, energy, tourism, and industry must not have negative impacts on sustainable development and its objectives.

2 To achieve this, and before making such decisions with spatial implications, it will be necessary to undertake Strategic Environmental Assessments on long-term ecological effects and to monitor ecological changes with appropriate indicators. The current instrument of Environmental Impact Assessments is in principle insufficient to provide adequate safeguards and in practice often abused.

3 The above are of critical importance in the case of political decisions that may have catastrophic effects such as draughts and floods, erosion and land slides, as well as soil, water and atmospheric contamination.

4 Spatial planning should balance public interests between on the one hand the objectives of social cohesion and sustainability and on the other the need of competitiveness and market imperatives.

5 A paramount objective should be the conservation of the rich diversity of the European territory, which includes geomorphologic, biological, landscape, land-use, cultural and social aspects. Inappropriate efforts at "harmonisation" and homogenisation should be carefully avoided. Indeed, diversity of landscapes contributes to ecological diversity, especially biological diversity.

6 Ecological equilibrium of the landscape implies taking into account the interactions and the balance between complex natural and anthropic systems, avoiding one-sided approaches.

7 As land-use may have detrimental effects on the climate spatial planning should be used as an effective tool for combating local and global climate change.

2. Positive aspects of the E.S.D.P.

The European Spatial Development Perspective (E.S.D.P.), whose first official draft was approved in June 1997 by the E.U. ministers of spatial planning in Noordwijk of the Netherlands, is the result of four years of hard work undertaken by the member-states and the Commission (mainly DG XVI) since 1993. Difficult discussions were held under many presidencies of the EU, and gradually (and sometimes painfully) a considerable degree of consensus was achieved. This process explains both the strengths and the weaknesses of the document. In any case, any shortcomings of the E.S.D.P. do not diminish its historical importance as the first official and systematic initiative to consider the European territory in its entirety, and to plan its future in a cohesive and collaborative spirit.

Thus the objectives of the E.S.D.P. are both wide and noble. They can be summarised freely as the intention to use a spatial framework for co-ordinating a broad number of policies concerning the continent, all of which have an impact on the condition and use of the European territory. In this sense, the E.S.D.P. breaks new ground, as its approach is trans-sectoral and integrating, but also proactive. This should be contrasted to the traditional physical planning approach - still prevalent in many parts of Europe - which tendsto be reactive and regulatory, and looks at the spatial dimension mainly on physical and technical terms. It is, therefore, an initiative to be commended and strongly supported by all those concerned about a better future for the European Union and its people.

3. Areas for improvement

There are, however, a number of weaknesses, which should be remedied through the current process of debate and improvement.

Perhaps the main one is the insufficient effort to reduce the tension between the seemingly conflicting goals of competitiveness and cohesion. The demands of globalisation balance. Sustained economic growth may not harmonise with sustainability, at least in the short term. The E.S.D.P., while recognising in its analytical part the importance of social problems within Europe, and the disparity in conditions and opportunities between regions, in its policy section does not address the issues with clear and decisive initiatives, probably because of disagreements among the Member States. Thus the social issues affecting Europe (inequalities, unemployment,

economic migration, social exclusion etc.) and their spatial dimension are not given sufficient prominence.

The social issues are especially important within the urban systems, where the majority of the population of Europe resides and works. Urban organisation, energy management, urban transport planning and sustainable mobility, noise, waste and pollution management,urban regeneration, urban ecological networks, telematics, co-ordination of sectoralpolicies, solidarity and social integration are all sustainability aspects that need to be addressed in a consistent way, if a better quality of life for the citizens is to be achieved.

These remarks are reinforced, if the periphery of the Union and its neighbouring countries are considered. Europe is not an island and should not be considered as such. The inequalities even between the less affluent Member States of the Union and many of the surrounding countries (such as those of the South and East Mediterranean or of Eastern Europe) are enormous and still growing. The resulting social and economic problems within these countries have an increasing impact on the E.U., mainly through uncontrolled economic population fluxes, with a pronounced spatial dimension.

In its analytical part, the E.S.D.P. recognises the diversity of the European territory and notices the need to maintain it, by adapting planning solutions to local specificities. Yet, in its policy section, it includes a number of aims, which will undermine this diversity, such as increased accessibility, more even distribution of economic activities, greater availabilityof development incentives. It would be perhaps wiser to recognise the particular characteristics of each region and to capitalise on its comparative advantages. In this way, the present patchwork of densely developed urban centres, rural areas with milder economic activities, and natural areas of minimal human intervention, could offer the citizens of Europe wider and more sustainable choices.

On the environmental side, such an approach would leave intact greater areas of the continent, which is being fragmented at present at an unprecedented rate by the ever expanding European transport networks. In this context, the policy aim of connecting all local transport networks with international ones does not seem a sound choice.

E.S.D.P. stresses the need to maintain the biological diversity of Europe, as well as of its cultural resources, "by the prudent management and sustainable development of the natural and cultural heritage". It proposes the establishment of an "ecological network" as currently being established through "Natura 2000". Two remarks on this:

- The natural and cultural heritage has certainly an economic value, as evidenced by the number of visitors to some of Europe's historic cities, and to its limited natural parks; and it does constitute a comparative advantage on the global scale, which should be maintained at all costs. To speak, however, of its "development" (even if it is sustainable) may lead to excesses.

- The biological diversity of the continent cannot be assured just through an ecological network of protected areas, as nature depends on continuity. The recent toxic threat to the Doñana National Park is a characteristic example. It requires also the integrated management of the whole territory and of human activities in it, along the principles of sustainability.

As far as sustainable water management is concerned, maintenance of the water-cycle, water allocation for the conservation of ecosystems, ecological problems with water transfers, the

negative impacts on the environment of water management engineering works and both flood and draught mitigation should be taken into account.

Considerations on health and quality of life should be given a greater prominence, so that they are taken seriously into account in all spatial policies and interventions included in the E.S.D.P.

In addition, the use of territorial planning measures (such as a rational organisation of activities in space to reduce the need of mobility) in order to decrease gas emissions, within the framework of controlling the global climate change, should be given prominence in the policy aims of the E.S.D.P. initiative. Efforts to decrease commuting by bringing closer housing and working locations , improving the life quality of cities, relying on new technologies, as well as developing regional production and consumption patterns should be strongly encouraged.

4. Recommendations for implementing and developing the E.S.D.P.

Recognising the importance of the spatial dimension in the process of achieving sustainable development, the Forum considers that the European Spatial Development Perspective (E.S.D.P.) should be actively further developed. In this context a change is needed from the present emphasis on analysis and its somewhat timid approach to objectives, to a provision of a clearer and more courageous policy orientation framework for the European continent and its neighbouring regions. This should overcome the limitation agreed in Leipzig in 1994 of the approach being indicative and not prescriptive.

Stronger and clearer statements will contribute to a better understanding and acceptance of the ESDP among a broader public. At present, this important European initiative is known only by a limited circle of EC and government staff and certain professionals involved. Very rapidly, it needs to be made known and understood by three major target groups: decision-makers, professionals involved in planning processes, and the wider European public. This task seems straightforward for the first group, but much more difficult for the other two. It is suggested that for the planning professionals appropriate training courses should be incorporated in university curricula, and made available to practitioners through their professional organisations. In addition, scientific exchanges in Europe should be encouraged with EU financial support, and their results being taken seriously into account in decision-making. For the awareness of the public on the same issues, the non-governmental organisations can play a decisive role.

Such a training and awareness process will require systematic actions and appropriate resources, and should be carried out simultaneously on the European, the national, and the sub-national and local levels. It will also require a drastic redrafting of the present E.S.D.P. document, in order to:

- clarify the terms used, thus avoiding inevitable confusion (especially in translations);
- make its statements clearer and more easily assimilated by the general reader;
- provide specific examples and case studies, which will render the policy aims more concrete and less ambiguous.

In addition, it has to be strongly emphasised that the operativitiy and efficiency of this initiative depends on adequate updated and consistent basic information, and will be extremely limited if, in particular, updated mapping is not available, including use of soils (land cover), and also the translation into Geographic Information Systems (GIS), existing information on the quality of environment and natural resources productivity and functionality.

For that purpose updating of land cover is urgent. This has become a multipurpose tool for planning, Strategic Environmental Assessment, monitoring changes and produced territorial indicators. Most of actual maps are based on 1990 satellite images and should be updated no later that during the year 2000, and made available to all potential users.

Also, during the redrafting of the E.S.D.P. the use of Sustainability Indicators and Strategic Environmental Assessment for all major decisions should be incorporated.

The E.S.D.P. has to be understood as a long-term process within the European Union, which will mature and develop during the next few years. In this process, the proposed European Spatial Planning Observatory Network (E.S.P.O.N.) could be a useful structure, not only in providing credible data (as proposed at present), certainly in association with the European Environmental Agency and European Statistical Office (Eurostat), but also in co-ordinating this process, and in making the necessary information widely known.