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INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

Organisation: University of New England

Name: Dr Robyn Bartel, Dr Rae Dufty, Dr Colin Hearfield, Mr Paul McFarland, Dr Stephen Wood and Associate Professor Robert Baker

Telephone: 02 6773 2904

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into the

New South Wales Planning Framework

conducted by the

NSW Legislative Council State Development Committee

Preparing the NSW Planning System for a Fairer and more Sustainable Future

Submitted by

Dr Robyn Bartel, Dr Rae Dufty, Dr Colin Hearfield,

Mr Paul McFarland, Dr Stephen Wood and

Associate Professor Robert Baker

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Geography & Planning
School of Behavioural, Cognitive and Social Sciences
University of New England
Armidale 2351 NSW

ABOUT THE AUTHORS OF THIS SUBMISSION: The authors of this submission welcome this inquiry and the opportunity to have input into the process of evaluating and improving the NSW planning system. The Council of Australian Governments (COAG) reform agenda for planning in New South Wales, climate change and natural resource issues in planning and development controls, and the duplication of processes under relevant Commonwealth and NSW legislation are all issues which are critical to address if the planning system in NSW is to further the achievement of the best environmental, social and economic outcomes for the people of NSW into the future. There are also some related issues of concern which the inquiry must address if the terms of reference are to be adequately considered and which we hope may be brought to the table via this submission.

Dr. Robyn Bartel has a PhD from the University of Melbourne, and holds science and law degrees, a University Medal in Geography and a Master of Higher Education, all from the Australian National University. Dr Bartel is a member of the Planning Institute of Australia and has spent the past 12 years examining regulatory schemes affecting the interaction between humans and the landscape.

Dr. Rae Dufty has a PhD from the University of New South Wales and is a member of the Institute of Australian Geographers, the NSW Geographical Society, with affiliations to the Australian Housing and Urban Research Institute. Dr. Dufty's research involves critical assessments of Australian housing policy at the national and state level, and the impacts of housing policy on processes of internal migration.

Dr. Colin Hearfield has a PhD from the University of New England in philosophy and social theory. Dr. Hearfield has publications in social theory and local government and is currently undertaking a number of research projects in Geography and Planning at UNE.

Mr. Paul McFarland has been teaching Planning at the University of New England since 2005 focussing on the areas of Development Control Planning, Transport Planning and the history and evolution of urban and regional planning. Mr. McFarland has over 20 years experience in local government town planning having worked at a variety of Councils in the Sydney metropolitan area, the Sydney urban / rural fringe and in rural New South Wales. Whilst having broad experience in all aspects of planning at the local / regional

level, Paul's main area of expertise is in development planning. His last local government position was as Director – Planning and Environmental Services with Bellingen Shire Council.

Dr. Stephen Wood was awarded a PhD in 2004 for his thesis 'Desiring Docklands: Deleuze and urban planning discourse'. Dr. Wood has worked as a planner at both state and local levels in New South Wales and Victoria. He joined UNE in 2007 and currently teaches in transport planning and urban design and architecture. His research interests relate to planning theory, urban design, urban character, and theories of place & space.

Associate Professor Robert Baker has been Chair of the International Geographical Union Commission on 'Modelling Geographic Systems' from 2004-2008. Associate Professor Baker's main research interests are in Holocene marine environments, Internet traffic, the geography of retailing and the development of applied mathematical geography. He is also interested in coastal geomorphology.

ABOUT THIS SUBMISSION:

This submission contains a two page Key Summary of the recommendations which the evidence collated herein suggests should form the basis for planning reform in NSW, a four page Background section, a 36 page issues based section responding to the Terms of Reference and a four page Consolidated Bibliography. We welcome further communication on this submission. Our contact details appear below:

Dr. Robyn Bartel
Tel. (02) 6773 2904
Email: rbartel@une.edu.au

Mr. Paul McFarland
Tel. (02) 6773 2821
Email: pmcfarla@une.edu.au

Dr. Rae Dufty
Tel. (02) 6773 2801
Email: rdufty@une.edu.au

Dr. Stephen Wood
Tel. (02) 6773 2804
Email: stephen.wood@une.edu.au

Dr. Colin Hearfield
Tel. (02) 6773 2426
Email: chearfi3@une.edu.au

Associate Professor Robert Baker
Tel. (02) 6773 2884
Email: rbaker1@une.edu.au

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KEY SUMMARY/RECOMMENDATIONS

Recommendations relating to Terms of Reference 1a), 1b), 1c) and 1d).

1. An overarching policy position needs to be developed and all activities of government need to work towards environmental sustainability and liveable communities, and they need to work towards these aims via a process which embodies the principle of good governance and which provides for 'real' public participation.

2. There needs to be harmonization of the planning system and planning objectives with other activities of the public and private sector. Why, for example, is it often mentioned in environmental legislation that measures for the protection of the environment need to be both efficient and economically sensible? Does economic policy require that all actions to maximise productivity and efficiency be also environmentally sustainable? If it is left up to the planning system alone, and as currently in place, and/or to development assessment as the sole tool, then there will inevitably be conflicting pressures and perverse outcomes that will compromise the achievement of environmental sustainability.

3. There needs to be an integration of land use management with natural resource management, which must include people who can participate meaningfully.

4. There needs to be adequate and substantive coordination of integrated natural resource management across jurisdictions and the whole of government.

5. There needs to be a greater commitment to evidence based policy design, implementation and evaluation.

Recommendations relating to Term of Reference 1g).

6. An integrated and holistic approach should be taken to planning in New South Wales. This requires, at minimum, a significant overhaul of the Environmental Planning & Assessment Act, 1979, and related planning instruments so as to create a planning system that regains the vision and relevance to the contemporary environment as occurred at the time of enactment. Preferably, a new Act should be developed that is reflective of the current and future planning needs of New South Wales.

7. The review of local government building and planning performance should include a survey to determine resident and applicant levels of satisfaction with the general system

within which their local authority operates and the outcomes arising from applications determined by that authority. Such a survey would give greater context and meaning to the quantitative data, which, as it currently stands, provides little in terms of meaningful comparison between or across Councils.

8. The planning and building regulatory framework should be revised so that a level of "in-principle" approvals be created so that delays and expenses in providing excessively detailed and complex information at the Development Application stage is avoided until such time as agreement is reached on the concept of the development proposal.

9. There is a need for greater linkage between the objectives of the EPA and the operations of the planning system.

10. There needs to be recognition that the operations of the planning and building regulatory system are directly responding to and reflective of the determinations of the Land & Environment Court.

Recommendations relating to Term of Reference 1h).

11. Tenure specific, clear and measurable definitions of 'housing affordability' that take in all aspects of the cost of housing (including environmental and access costs) is more broadly necessary for accountability in the effectiveness of Government policies and the promotion of good governance overall.

12. Macro-economic policy solutions should involve all levels of Government directly intervening in the housing market to improve affordability and energy efficiency. Such interventions will not only provide stability for the industry in the short-term but also initiate transitional market reform to ensure that inequalities produced by current housing prices will not be exacerbated by future economic restructuring.

13. It is important that governments seek to boost housing supply in those areas that will see an increase in demand because of their access to public transport, employment and other services.

BACKGROUND:
Critical Overview and Social Values/Planning Principles

A: Critical Overview

A number of criticisms have been directed at the current planning framework to which we would, in the first instance, like to draw your attention.

1) Unlike Victoria, SA, WA and the ACT, there is in NSW no comprehensive planning policy, with any statutory weight, that addresses the inter-related issues of environmental sustainability, urban settlement, industry, housing, transport and infrastructure (Gurran 2007: 122). While there are various disconnected policies, such as *A New Direction for NSW: State Plan 2006*, the *NSW Biodiversity Strategy* (1999), the *NSW Coastal Policy* (1997) and *Integrating Land Use and Transport* (2001), the manner in which these policies are to be implemented, with the exception of the *NSW Coastal Policy*, remains unclear.
2) With regard to current legislation, the *Environmental Planning and Assessment Regulation 2000*, designed to support the *Environmental Protection and Assessment Act 1979* (the *EPAA*) through the clarification of operational procedures, has in certain respects undermined the necessity to carry through strict environmental and development assessment in the case of major or critical infrastructure projects. With projects of this type the Minister for Planning is currently the sole consent authority and under Part 3A of the *EPAA* the Minister may waive the environmental and development controls which would otherwise apply (Gurran 2007: 280-1).
3) A further significant criticism of the *EPAA* concerns a failure to address resolution procedures relating to potential conflicts between social and economic issues on the one hand and those of ecological biodiversity and environmental sustainability on the other (Farrier and Stein 2006).
4) It has also been argued that current policies and legislation, while they might advocate community consultation in development processes, do not effectively enable extensive public governance of urban and regional development (Gleeson and Low 2000).

B: Core Social Values – Principles for Planning

1) Sustainable Development

Sustainable development is defined as 'development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs' (World Commission on Environment and Development 1987: 8). What this principle of sustainable development or intergenerational equity further heralds is a

socially and geographically contextualised balance between both environmental and economic sustainability as well as social equity in the use of land. The practice of sustainable development thus confronts the task of managing the often conflicting goals of environmental preservation, economic development and public versus private land-use claims.

> The 'property conflict' between economic growth and equitable sharing of opportunities arises from competing claims on uses of property as both a private resource and a public good. The 'resource conflict between economic and ecological utility arises from competing claims on the consumption of natural resources and the preservation of their ability to reproduce … The 'development conflict' between social equity and environmental preservation arises from competing needs to improve the lot of the poor through economic growth while protecting the environment through growth management (Godschalk 2004: 6).

The manner in which these three modes of conflict and their competing claims are politically mediated in the interests of sustainable development concerns the principles and practice of good governance. Good governance forms the third of our core social values, which we discuss below.

2) Livable Communities

'Livable communities', as a social value and planning principle, builds on the principle of sustainable development by focusing on the everyday, physical environment, where attractive public-space shaping through building and mobility systems' design become vital concerns. It extends the principles of environmental sustainability to social sustainability. Planning for livable communities needs to address simultaneously what the *Charter of the New Urbanism* articulates as the 'three scales of development: (1) region, metropolis, city, and town; (2) neighborhood, district, and corridor; (3) block, street, and building' (Godschalk 2004: 7). And it needs to do so principally through 'design, quality of place, its scale, mix, and connections (Calthorpe and Fulton 2001: 274). The principle of 'livable communities' is also a definitive feature of the planning movement, *Smart Growth*. While similarly aimed at countering the unlivable quality of urban sprawl through sustainable growth strategies, this movement focuses particularly on the provision of good air and water quality, the preservation of natural resources and open spaces. The principle of 'livable communities' is also committed to 'the making of community, through citizen-based participatory planning and design' (Godschalk

2004: 6). Livable communities are thus shaped not only by environmentally sustainable building and transport design, but also by community participation in the development of such planning designs. In effect, livable community outcomes are also mediated in large part by the principle and practice of good governance.

3) Good Governance

The significance of good governance as a social value derives from its liberal democratic implications. Distinct from the hierarchical, 'top-down' control of central government, the exercise of power through processes of good governance concerns a participatory, 'bottom-up' approach to community policy and decision making. The principle of good governance thus points to the potential political autonomy of local and regional communities in developing for themselves an environmentally sustainable and livable future. Governance, however, does not preclude a relationship with government. According to the Commission on Global Governance (1995: 2), governance is:

> … the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting and diverse interests may be accommodated and cooperative action may be taken. It includes formal institutions and regulations as well as regimes empowered to enforce compliance and informal arrangements that people and institutions have agreed to be in their interest.

Hence the role of government in processes of governance is to enforce or secure community agreements as well as set the regulatory and enabling limits within which governance practices may occur. Government thus serves both collaborative and authoritative functions within governance processes. This pre-eminent mediating role distinguishes government from governance.

While the practice of governance, as it has emerged over the last decades, may be read as a strategy or technique of government (Hearfield and Sorensen: forthcoming) to reduce the economic costs of developing and maintaining necessary community infrastructure, the participatory democratic implications of governance arrangements are nonetheless only now being made evident. Indeed governance was initially aimed at creating public-private partnerships, driven solely by considerations of increased productivity and economic efficiencies, where the community at large remained outside the equation. However, as Cheshire *et al*. (2007: 4) indicate:

> [The] idea of governance has since been broadened to incorporate more democratic ideals of citizen participation, with the ensuing structures also being extended to include a broader range of stakeholder groups. As well as emphasizing the responsibility that citizens must bear in managing their own lives, … equal attention has also been placed upon the *rights* of those citizens to have a greater say in the policy making process via participatory decision-making structures, community consultation activities, state-community partnerships, and bottom-up strategies of development [Cheshire's italics].

What this shift in the idea of governance towards a distinctly participatory, democratic mode of governance promises is a systemic shift from state managerial modes of governance to self-governing regional and local networks where community decisions are fully ratified and made secure by government.

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SECTION ONE: Land Use Planning for a better Environment and Society

The Global Financial Crisis (GFC) means that the political and economic climate has changed, perhaps radically, from the time in which the central issues precipitating this inquiry were identified. The planning system cannot exist in a vacuum from these changes and this inquiry therefore cannot ignore them. For example, there are pressures arising in this new era which will push land use management both away from and towards more environmentally sound principles, as is presently occurring with the 'pump priming' of development at the same time as increased government support for renewable energy. One thing however seems certain, and that is a return to government regulation whose place, if not content, finds support both popularly and across ideological divides. It was only very recently that 'regulatory failure' was understood to mean unnecessary and fruitless government incursion in spheres in which the market could be trusted to achieve better and more efficient outcomes. Almost overnight the meaning of the term has reversed, and so rapid has been the conversion that the irony of the situation appears to have gone unnoticed. 'Regulatory failure' is now a term used to describe government negligence in failing to regulate sufficiently in areas where market failure was obviously inevitable. Obvious, that is, to all but those very business and industry groups, and government idealogues, who lobbied and engineered the withdrawal of public oversight and control.

The threats posed by the GFC are exceeded however by an even greater crisis; that of the global *environmental* crisis, due to climate change, land degradation, land use conflict and food and water shortages. Last year the phrase "climate change" outranked both "bail out" and "recession" as the most oft used political buzzword (Global Language Monitor, 2008).

How then should this inquiry best acknowledge the shifts in public policy required to meet these challenges of our age? By accepting two things: firstly, that global forces, both economic and environmental, will have local effects which must be recognised and appreciated, and local actions, in turn, will have global ramifications. And secondly, that government regulation will become increasingly, rather than less, important in securing the public good through limiting the excesses of private greed. In order to maintain its social license however, government measures need to be effective and fair. The planning system in NSW has been sadly lacking on both counts and the remainder of this section will outline these failures and prescribe a series of solutions.

TOR 1a) Guiding principles for the next five years for legislative reform

Questions

Is there a need for further development of planning legislation in NSW?

What further changes to the planning legislation are needed?

What principles should guide any future development of planning legislation in NSW?

Submission Answer

Before an answer to the question of whether planning legislation in NSW requires reform can be made it is critical that an assessment of whether the current planning system has been successful be performed. Such an assessment requires an evaluation of the performance of the planning system against some pre-determined criteria or measures. One obvious measure would be achievement of legislative goals. However a broader assessment would include these goals in the evaluation: were they good goals? Were they the right goals? Were they SMART[1] goals? Broader measures of success and processes of evaluation therefore need to be developed and this process requires discussion of values and principles. The background to our submission (above), has highlighted for the inquiry three principles and aims, which, throughout this submission, are argued to be of pre-eminent import: environmental sustainability (or sustainable development), liveable communities and good governance. This section will examine the evidence for how and why the current system is inconsistent with these principles, and without reform will continue to diverge from these principles. First however a brief reference to these principles.

The three principles introduced above are not dissimilar to those highlighted by COAG (2008). In the Communique of 26 March 2008 COAG discussed the importance of environmental sustainability, public participation and economic efficiency (COAG Communique 26 March 2008, p 3). Environmental sustainability equates with this submission's first guiding principle of sustainable development. Public participation is one vital ingredient of good governance, the broader principle preferred by this submission. Both environmental sustainability and good governance (including public participation) are essential to liveable communities, this submission's second guiding principle. Liveable communities however also require respect for and acceptance of difference and commitment to quality of life, including livelihood. COAG's third principle (economic

[1] SMART goals are ones which are S specific M measurable A achievable/attainable R relevant to broader goals/or rewarding/or rememberable (there are many Rs in the literature) and T time specific. See for example Brennan, 1989.

efficiency) may be therefore incorporated within the second and third guiding principles of this submission. The necessary caveat to this approach of course is that economic efficiency under this conceptualisation is assessed in the real world rather than any imaginary theoretical one and must therefore not be blind to externalities or social and environmental impacts (Williams and McNeill, 2005).

The three principles discussed in the background to this submission, and which incorporate the COAG principles, will be deployed here to both guide the evaluation and the recommendations for reform over the next 5 years. These principles are neither rare nor unusual creatures and this submission stands sure-footed within a long and established public policy tradition regarding land use management. Both public participation and environmental sustainability are listed as objectives of the *Environmental Planning and Assessment Act 1979* (NSW).[2] It is beyond the scope of this submission to enter into the extensive and long running debate of what 'environmental sustainability' means or should mean. For the purposes of the NSW planning system the definition is provided in s 6(2) of the *Protection of the Environment Operations Act 1997* (NSW) (for "ecologically sustainable development").[3] This definition incorporates the precautionary principle and

[2] The objects of the Act are:
(a) to encourage:
(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,
(ii) the promotion and co-ordination of the orderly and economic use and development of land,
(iii) the protection, provision and co-ordination of communication and utility services,
(iv) the provision of land for public purposes,
(v) the provision and co-ordination of community services and facilities, and
(vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and
(vii) ecologically sustainable development, and
(viii) the provision and maintenance of affordable housing, and
(b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and
(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment.
See also section 8 of the *Local Government Act 1993* which requires councils to "properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development."

[3] The definition of ESD in the *Environmental Planning and Assessment Act* adopts the definition from s 6(2) of the *Protection of the Environment Administration Act 1991* which states that "ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:
(a) the precautionary principle-namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
In the application of the precautionary principle, public and private decisions should be guided by:
(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
(ii) an assessment of the risk-weighted consequences of various options,
(b) inter-generational equity-namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,

the principles of intergenerational equity, conservation of biodiversity, and improved economic evaluation (utlizing the broader accounting referred to in the preceding paragraph). Public participation is not defined in the legislation but is increasingly recognised as being fundamental to good governance. It can be realised (and thwarted) at various levels in the planning system.

1) Public participation and good governance

Public participation in planning can be conceived of as occurring at three levels: at the government level (in Australia at the Federal, State, local and also regional levels) through democratically elected representatives; at the level of land owner and user; and via a more fluid and open ended 'grass roots' engagement. It is public participation via the grass roots and via legislated means that has been compromised most by decisions to 'rationalize' and centralize development decision-making at State level in New South Wales. The Government should be increasing, not reducing, avenues for the public to be involved in the planning process. Enabling and supporting public participation requires great attention to detail; to means, mechanisms (including conflict resolution) and institutional structures. It is not easy to do well but the benefits are enormous (see Black, 2001; Campbell and Marshall, 2000; Godschalk, 2004; Healey, 1992; Innes, 1996).

In the not too distant past New South Wales led the way in opening access to social justice in the area of environmental governance: through facilitating public participation in the development approvals process; opening standing provisions for public law (s 123 of the *Environmental Planning and Assessment Act 1979*); as well as for merits review for third parties (s 98 of the *Environmental Planning and Assessment Act 1979*); through establishing both a specialist environmental court (the Land and Environment Court); as well as avenues for alternative dispute resolution. However since the introduction of these measures, which did not, as some feared, bring the system to a grinding halt (McClellan, 1995) the pendulum has swung back: in legislation, through the 'rationalisation' of public

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(c) conservation of biological diversity and ecological integrity-namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,
(d) improved valuation, pricing and incentive mechanisms-namely, that environmental factors should be included in the valuation of assets and services, such as:
(i) polluter pays-that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,
(ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,
(iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.

participation in order to support the fast-tracking of development, in particular major projects under Part 3A of the *Environmental Planning and Assessment Act 1979*, and in poor decision-making that has taken little account of existing controls, including the State's own planning policies, thereby declaring their inconsequence (Frew and Crenshaw, 2008). It is clear that the people of New South Wales are greatly concerned about this retraction of their role (ABC, 2007; Clayfield, 2009; Robins, 2009). In October 2008 the State Opposition perceived such significant electoral mileage in the issue that they announced they would abolish Part 3A if elected (Liberal Party, 2008).

Public participation, as a key element in the practice of good governance, is underpinned by the democratic principle of fairness or social reciprocity. It is only fair for people to be involved in the formulation of laws under which they themselves will be governed and community resistance is inevitable if laws do not have broad public agreement (Bartel, 2008). The evidence for the benefits of public participation in contributing to good governance and a fairer society is unequivocally supportive. If people are involved in the process of decision making then not only are different values and perspectives brought to light which may be valuable but the people themselves are more likely to be receptive of the result, even if the eventual outcome is not to their liking (Tyler and Smith, 1997). The advantages for better laws, reduced social conflict, increased social cohesion and less resistant individuals and groups are obvious. However public participation needs to be substantive and to be performed well, if it is to have these benefits (Arnstein, 1969; Bloomfield et al., 2001; Innes and Booher, 2000; Lowndes et al 2001; Pini and McKenzie, 2006).

Present planning processes require greatly improved mechanisms for public participation (rather than fewer) and the critical actors within the system, including local councils, need to be better resourced in order to perform their proper roles. Local councils are the best placed, both in terms of geography and community access, to play a greater part. The risk is however that they may be inadequately prepared for this responsibility and have insufficient capacity for it, therefore finding it cumbersome and its utility suspect. As well as explicit policy provision therefore, more support needs to be provided to local government by the State government so that the potential benefits are able to be realised. Of course, it would also be beneficial for public participation to be more meaningfully adopted at State level, if only so that policy makers may experience its benefits firsthand and therefore be personally persuaded of its worth.

Ill-considered policy reactions to misidentified deficiencies will only serve to undermine the achievement of ends which the planning system should be furthering, including securing the integrity of, and trust in, institutions of government and government process. Recent findings of local council corruption (ICAC 2008), developer agitation against needless NIMBYism,[4] delays and complicated process may support centralization and 'fast-tracking' on grounds of expediency. However there is insufficient evidence to suggest some widespread crisis or endemic malignancy, or that so-called 'green tape' is an unjustified 'hindrance.' Developers are quick to denounce objectors for being motivated by vested interests but there is an unfortunate lack of irony in their accusations: it is the development lobby who are undoubtedly more powerful in having their vested interests heard by government.[5] Local councils could not be corrupted if they were not so powerful! It is precisely *because* the general public are more likely to be alert to hitherto unidentified issues and concerns surrounding developments, including suspected corruption, that they should be afforded a role.

Care needs to be taken that responsible government is not compromised by political weakness, complicity or capture by private interests. Action needs to be taken to ensure that attacks on justified limitations to the pursuit of private interests (i.e. in the name of the public good) are not left unanswered in the debate. The planning system does not exist to promote development, nor even to facilitate development, let alone at all costs. The planning system exists to *plan* land use management in the interests of the public good; for the many, indeed for all of us, not the few. The public need housing and industry but not at the expense of water, air, food, soil, biodiversity, community cohesion and long term survival. Otherwise there would be no point, would there? Sovereign risk need not be feared if it 'risks' attaining better outcomes over poorer! There is a need for the NSW government to facilitate and secure meaningful public participation, including in plan making and rule formulation, not just in development assessment. The current system is working against even this minimal role for the public.

Because the current system is working against public participation this inquiry needs to examine how and why this has occurred and recommend a return to engendering real

[4] NIMBY is an acronym for Not In My Backyard and is used to label protesters who oppose development proposals located in their immediate vicinity. It is a close relative of the BANANA, Build Absolutely Nothing Anywhere Near Anything.

[5] Former NSW Premier Morris Iemma has called for the abolition of political donations (Salusinszky, 2009).

public participation to ensure good governance and better outcomes for land management and communities in the state of NSW. Avoidable delays and poor process obviously need to be addressed, but fast-tracking assessment at State level will not necessarily lead to better governance overall and legislative requirements such as environmental assessment still need to be performed if environmental objectives are to be met and public participation facilitated if a fairer society and more liveable communities are to be engendered.

2) Environmental sustainability

In concert with the recent withdrawal of opportunities for public participation in the NSW planning system there has been a "distinct trend towards the wind back of significant environment safeguards to facilitate the provision of major infrastructure or development" (Gurran, 2007: 271). The safeguards for both smaller and larger developments are inadequate and for existing uses virtually absent. The primary focus of the present planning system, including environmental impact assessment, is new proposals, and not existing land uses. The environment and the people within it are a whole interconnecting system but the NSW planning system adopts a largely reactive and piecemeal approach which does not look back in time and only rarely into the future. Its focus is almost exclusively on discrete parcels of land imagined as isolated entities.

Building controls such as BASIX, a leader in its day, again also only look at new and not pre-existing buildings. Retrofitting, development conception, and better incorporation of existing uses and future demands into assessment plans are all areas which could be included in a more integrated approach to land use planning. These are all areas of sore and glaring need if environmental sustainability is to be achieved. A more holistic approach is required in terms of integrated natural resource management (incorporating all parts of the system, including people), coordination across jurisdictions, and across the whole-of-government.

It would be a mistake however to roll out existing controls on a broader scale as even for the land uses which are caught within the system, i.e. the medium-size proposals, there is nothing water-tight about the approach, firstly in terms of the nature of the assessment and secondly in terms of evaluation.

2a) Assessment. Environmental factors "must" be considered in assessing new developments (s 79C of the *Environmental Planning and Assessment Act 1979*) however this is ultimately a discretionary provision and discretionary provisions do not guarantee environmentally sustainable outcomes.[6] Factors such as economic impact must also be considered and it appears customary to assume that these will be in opposition to the environment and that if a proposal is economically beneficial then the environment will just have to wear the deleterious impacts. As Gurran (2007: 252) acknowledges "the Act does not state what weight should be given to each of these factors, as long as they are formally considered. Similarly, there is no rule that if the consideration of these factors is negative, that consent should be denied. Rather, the development application must be considered overall." The more intensive consideration of environmental impacts required through Environmental Impact Assessment, is also deficient as it is performed for only very few proposals, is also incapable of determining outcomes, and as a process is lacking in many ways, not least of these being developer-bias (perceived and real) (Bates, 2006).

Many land use conflicts appear to be narrowly reduced to a contest between 'the economy vs the environment'. This conceptualization freezes the planning system from evolving beyond this coarse dichotomy. It may be seen as an early advantage however that the planning system, unlike other areas of government, must at least give a nod to the environment, even if only superficially. It could exploit this advantage and use it to lever the changes required. However at present it is oblivious to this opportunity and at the most fundamental levels the planning system in New South Wales is basically all about growth (Owens, 1994). But land is a non-renewable resource. The current planning system in New South Wales fails to recognise this elementary aspect as it appears to favour a model of residential and industrial expansion without recognising that there are limits to growth and that land is a finite resource. Such an approach flies in the face of the most obvious evidence of all (a singular planet Earth) and increasing international concerns around water and food security. Environmental sustainability cannot be viewed as a public good which may only be afforded in times of plenty or where there is land in excess of that immediately required for economic gain. The present system however appears to be

[6] The meaning of "must consider" and similar legislative statements directing administrative decision making has been adjudicated upon. The High Court has defined that matters to be taken "into account" or had "regard to" means that the matters must be given weight as a fundamental element in the making of the decision (*R v Toohey ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 per Gibbs CJ at 333 and see discussion in Bates, 2006: 4.19). "Consider" probably equates with "have regard to" and Bates (2006: 4.19) concludes that the decision of Moffitt P in *Paramatta CC v Hale* (1982) means that mere "adverting to a matter and then rejecting it [is] not taking it into consideration". Nevertheless it is a highly discretionary area, as other factors also must be considered and no substantive outcome is required.

incapable of adopting any other position than that of siding with the economy (constructed narrowly, and indeed artificially, as something which exists independently of the environment) rather than attempting to forge a resolution between these apparently opposing forces (While *et al,* 2004). Such tradeoffs are evident, even explicit, in such false economy policies as the BioBanking scheme which is a trade-off stating 'save here and destroy there'. It is not clear how this policy is to achieve a net gain in the cover of native vegetation (i.e. the current aim set by the NSW State Plan 2006) or preserve our natural estate in an environmentally sustainable fashion. In fact the evidence suggests that it can't (Burgin, 2008). The NSW State Government Plan (2006) requires an increase in the extent of native vegetation cover by 2015, alongside an increase in the number of sustainable populations of native fauna and an increase in the recovery of threatened species, populations and ecological communities (Priority E4).

The targets set by the NSW Government Plan are not going to be met whilst the current planning system views environmental sustainability and economic gain as contrary and conflicting objectives and is blind to how they can be mutually reinforcing, or even how both ends may be achieved from a single land use. The 'zoning culture' reinforces this view: with public land used for public purposes and private land used for economic gain. The planning system is also largely blind to multiple uses. A greater understanding and appreciation, and legislative recognition, is required of the complexity of land function. For example, a greater blurring is required between public and private outcomes from land uses. Farmers are now required to manage land in order to provide ecosystem benefits and there is ample scope for urban residents to be included in this spreading of responsibility for public good provision (perhaps more, considering that regulation of land practices in urban areas is more readily accepted than in rural areas). Equally, areas reserved may also have income generating ventures more traditionally associated with private uses, although this feature may meet with some electoral disapproval.

Increasing the blurring between public and private sectors in such areas as Public-Private-Partnerships for public infrastructure have had some unfortunate failings and have been criticized in principle, but perhaps a transition phase is inevitably rocky. In relation to urban planning Gurran (2007: 273) observes that "planning as urban governance should mediate across the public and private sectors and civil society in pursuing greater social equity, through spatial planning policies that promote equitable access to quality employment, education, housing, recreation and transport opportunities; as well as the

benefits of attractive, high quality built and natural environments." The historic division between public and private property management in peri-urban and rural areas also needs to be overcome. Land uses should be designed which merge economic gain and environmental sustainability and which blur the aims of public good and private profit. The private, wealth maximising side of the equation must be environmentally sustainable (as enshrined in the economic valuation principle in s 6(2) of the POEO Act); and indeed it must be *in order for it to be* also economically attractive. It can not afford to be in opposition to environmental sustainability for this would mean that it is no longer economic!

2b) Evaluation. Even for the few land parcels that grab the attention of the development assessment process, there is little evaluation post-assessment to ensure that outcomes are as predicted. State of the Environment reporting is a requirement at both State and Local government levels but there are few requirements beyond this. How is anyone to know whether yesterday's decision was any good? It should not be left to the Auditor-General. By then it is too late. The damage will have been done (and further damage, albeit political, may occur). It is obvious that more attention needs to be paid to evaluation. It is perhaps the most difficult part of the policy framing and implementation cycle and perhaps also the most essential (Bartel, 2003).

3) Evidence-based policy and good governance

Evaluations of whether policy measures will result, or have resulted, in environmentally sustainable and equitable outcomes requires extensive empirical research. Evidence-based policy is increasingly a priority in all areas of government both here and overseas, yet implementation can be difficult (Duncan and Holloway, 2006). Evidence-based policy design and evaluation does not mean, however, that every shred of evidence needs be collected before a decision can be made and there are other social factors which also need consideration, such as equity issues, the precautionary principle and complicating political exigencies. It is perhaps unfortunate that the scientific knowledge on which we base decisions is frequently uncertain and insufficient. Yet science operates on the basis that we do not know everything and so proceeds with continual testing and evaluation in order to arrive at more complete understandings. Hence, in the potential absence of sufficient scientific knowledge, it becomes imperative to also consider the role of principle-based decision-making in planning. Although science is required in order to achieve and assess environmental sustainability, the precautionary principle in conjunction with good

governance practices can also be used as a basis for decision-making in the absence of sufficient scientific evidence. The most obvious example of this is the application of the precautionary principle in developing policy responses to climate change. Moreover, this sort of decision-making support is itself largely evidence-based in the area of risk assessment management and in social research. The introduction of state sections in local environmental plans presents an opportunity for the NSW government to implement evidence-based, and also principle-based, policy design, in the development and alignment of these sections with their local counterparts. For example, what is capable of being generalised across the state and what is geographically specific? There is an opportunity for the State government, through these sections, to recognise and realise the principles of environmental sustainability, good governance, and liveable communities through a more significant commitment to evaluation, public participation, as well as a revitalised support for natural resource management to be integrated across all levels of government, all sectors and jurisdictions and all land uses. However there is also a not insignificant threat that state sections may be used to further stymie the achievement of these aims and indeed place further limits on the role of local councils as the critical 'place-shapers' (Lyons, 2007). Local councils need to be fortified, not undermined. If state sections are misused the very opposite of ideal aims may be achieved.

It is time for New South Wales to re-examine the gross deficiencies in its system, and its legislatively flimsy and poorly articulated environmental policy instruments (such as SEPPs) and move forward to map an integrated resource management future for the state. As New South Wales is a party to COAG there are opportunities for Australia's most populous state to drive the agenda for reform in its preferred direction.

TOR 1b) The COAG Reform agenda

Questions

Are the reforms and discussions at the Council of Australian Governments level important for the future development of the New South Wales planning framework?
What are the specific implications of the work of the Council of Australian Government on planning in New South Wales?

Submission Answer

The approach to land use management taken by COAG appears to mirror that taken by the NSW planning system. For example, COAG's 'Leading Practice Model for Development

Assessment' focuses on new proposals and reactive assessment with the ultimate aim of securing expediency only. Any further moves to 'lock in' assessment processes may secure short-term certainty at the price of environmental sustainability and liveable communities in the long run. There is therefore room for improvement which NSW, as a party to COAG, may drive, using this inquiry's response as a springboard. Development conception, regional-scale land use planning, as well as mere proposal assessment, need to be integrated with natural resource management more generally and all government levels and agencies need to adopt a coordinated approach to manage inter and intra-jurisdictional issues. Instead of being reactive and only dealing with specific proposals it needs to be proactive and 'whole of system' directed. Nicole Gurran has made the insightful observation that "(T)he re-establishment in 2006 of the 'Department of Planning' seems to signal a retreat from the ambition of integrated environmental assessment, infrastructure and natural resource management in NSW" (Gurran, 2007: 212). Any land use has flow-on effects for the management of other natural resources, especially water and energy use, and for soil and air quality and the state of our biodiversity and ecosystem health. New South Wales, with its pollution laws to address pollution, water laws to address water, threatened species laws to address threatened species etc., with all respective agencies operating in isolation from each other and in isolation also from cross border agencies armed with similar remits, is following a recipe for falling behind the eight ball.

Separating planning into its own department is no mere administrative nicety and atomizing and 'siloing' planning actively works against and compromises policy moves to regionalize, coordinate and integrate natural resource management. Regionalization as a policy preference has been given support at the Federal level via the Australian Government's response to the Productivity Commission's Inquiry into the Impacts of Native Vegetation and Biodiversity Regulations, Recommendations 8 and 10: "Recommendation 8: Regional institutions should be further developed and charged with addressing regional and inter-regional resource sustainability issues within broad parameters determined at national, State and Territory levels. Regional bodies should provide for genuine regional consultation, representation and decision making and be granted sufficient flexibility, authority and resources to implement their decisions. Recommendation 10: Public-good native vegetation and biodiversity objectives ideally should be fed through regional institutions to promote coordination and consistency of approaches, and therefore least–cost joint solutions" (Australian Government, 2004).

To drive policy development and responses in this area a more evidence-based approach is required, using scientific assessments of the land resources at the state and the nation's disposal. The state, and the nation, needs to know how much land is required to be maintained under agriculture, considering food and water security issues, income and productivity issues and buffers against climate change or other impacts (for example terrorism). The state and the nation needs to know how much water is required and how much native vegetation and habitat needs to be re-established in order to cushion against the impact of climate change and to maintain and improve current ecosystem, catchment, community and human health. This data could be used to develop National blueprints, which in turn could base more holistic plans at the regional and local levels which recognize the impacts and interconnections between land uses and which incorporate community participation and coordinated whole-of-government approaches. Much of this data has already been collected – it just hasn't found its way into the policy cycle yet. Since most of this data, and the resources and the power exists at the national level COAG can make this happen.

TOR 1c) Duplication between NSW legislation and the Commonwealth EPBC Act

Questions

What are your experiences involving assessment processes under New South Wales and Commonwealth environment legislation for controlled actions?

Did the bilateral agreements reduce duplication of approval procedures for the controlled action?

Are there areas of duplication that need to be addressed?

Submission Answer

The focus of the Commonwealth system, like the NSW system, is fresh proposals, and in the Commonwealth's case, due to the Constitution, to an even more circumscribed list of circumstances. Commonwealth areas of control are exhaustively listed in the EPBC Act, although there is also provision to extend the Commonwealth's control, and the expansion of such control in the current political climate may not be unlikely, as it is already occurring outside the EPBC Act over water in the Murray-Darling. Many of the current and likely future areas will fall under both Commonwealth and State control. There is considerable opportunity for this inquiry therefore to address both discrepancies and overlaps between the NSW system and the Commonwealth system of assessment. For example, there are significant concerns with the separate state and national registers for

natural and cultural heritage and biodiversity status lists (endangered, threatened species etc). There is a need for reform here. Another example is that the responsibility for referral is placed on proponents, rather than the usual decision makers. Local councils could be enabled to provide a 'one-stop' shop for referrals (Local Councils and State government may refer proposals under s 69 but this is neither mandatory nor integrated within the NSW development assessment process). It is also obvious that two EIAs for the one development should not have ever been necessary. Two wrongs don't make a right. EIA is well-recognised as a severely flawed and deficient process (see for e.g. Bates, 2006) but this submission will merely note this because there are more substantive issues at stake. There are more problems due to oversight than to duplication. It is recognised that the Commonwealth has been on training wheels and that there have been deficiencies on numerous levels not least of these being implementation (MacIntosh, 2004; 2006; Scanlon and Dyson, 2001).

Most critical, therefore, is the need to address the skills shortage and policy myopia in the areas of implementation vital to achieve the necessary goals at both the State and Commonwealth levels. This includes that of coordination across the jurisdictions. While natural resource management in the Australian Federation is officially in the hands of the states, the political reality is that the regulation of many natural resource management issues will increasingly be coordinated nationally. The COAG reform agenda explicitly establishes a cooperative approach for sustainable use of our natural resources (COAG Communique 26 March 2008, p 3). Critical national issues on the horizon which will be coordinated (at least) at Commonwealth level will be carbon and water trading. This has obvious implications for planning at a State level.

TOR 1d) Climate change and natural resources issues in planning and development controls.

Questions

How should climate change be addressed in the planning framework?
Is the current framework adequate to consider the potential effects of climate change?
How should natural resources issues be taken into account in the planning and development approval framework?

Submission Answer

The question of how natural resource issues should be treated has already been answered by this submission i.e. in an integrated fashion, which is not presently the case. The deficiencies already identified should serve as sobering news for anyone who had expected the planning system to be an adequate framework for addressing the additional complicating factor of climate change. Already the system is playing catch-up to decisions of the Land and Environment Court which are more in line with a scientific understanding of the situation facing the globe.

1) Climate change

The decisions in *Gray v The Minister For Planning And Ors* [2006] NSWLEC 720 ('the Anvil Hill Case') and *Walker v Minister for Planning* [2007] NSWLEC 741 (although watered down on appeal) mean that climate change increasingly will become a matter to be considered as an impact of development and in development assessment.[7] The Anvil Hill case has brought life cycle Environmental Impact Assessment onto the table for coal mine projects and it is not unforeseeable that EIAs for many other apparently innocuous uses will be required to assess the impacts of end-use in the not too distant future. Through the introduction of carbon and water trading it is not unforeseeable that water and energy footprints and embodied energy ratings will be calculated and the costs charged to both proponents and land users. This will 'slow up' the development process still further unless the planning system itself institutes more appropriate planning policies so that unsuitable developments can not reach proposal stages. It is critical that the phase of development conception is not just left to proponents. There simply have to be regional and integrated natural resources management plans incorporating approved development style, including environmental standards, in order to mitigate the impacts of, and adapt to, sea level rise, water scarcity, and increased fire, wave and storm intensity as well as to safeguard food security and biodiversity. Furthermore these need to be developed through public participation and based on the available evidence in order to fulfil the aims incorporated in the overarching principles of this submission. These plans can not be watered down to meet the needs of individual proponents or some assumed higher short-term political priority. They would need to replace current plans and play a greatly enlarged role in land management and in management of existing uses as well as proposals.

[7] See also Gippsland Coastal Board v South Gippsland SC [2008] VCAT 187.

2) Other natural resources

Energy and carbon footprints are one aspect of land use that the planning system must engage with (it will be forced to anyway). Water footprints are another. The Murray Darling Basin and metropolitan water use are squeaky wheels during times of drought. Population pressures (numbers and distribution), irrigation, mining demands and popular perception are all key here as traditional approaches of increasing water supply to meet demand (rather than matching demand to supply) are found wanting by the inevitability of resource scarcity (Wahlquist, 2008). The problem for the planning system is not only that land is viewed as isolated parcels but also that land use is seen as an isolated aspect of human interaction with the landscape, rather than as an activity which necessarily involves usage of other natural resources. There must be a move to integration.

3) Integration of natural resource management

Integrated natural resource management, properly considered (see for example Hagmann et al, 2002) is not just about natural resources but people. It is vital that the planning system, involving as it does both land use and the people who use it, is incorporated together with pollution, water, energy, industry and biodiversity regulation in an integrated approach to natural resource management (Bellamy et al, 1999). Integrated natural resource management also needs to be coordinated across jurisdictions and across the whole of government. Such a move requires an even bolder blindness to boundaries than the regionalisation of natural resource management, but without it environmental sustainability can not be achieved.

Discussion for this section

The planning system makes overtures to environmental sustainability but it has so far refused to engage with what this concept really means in practice or even to make any concerted effort to implement current frameworks in order to achieve it. The NSW planning system, and government more generally, conceives of environmental sustainability as something in inherent and increasing tension with economic gain, and, at its most neo-traditional and modernist extreme, with progress itself, instead of as a way to pursue these.

In all areas related to environmental sustainability (which are <u>all</u> areas (sic)) the planning system in NSW constructs itself as engaged in an endless battle of meeting competing priorities, with outcomes being suboptimal and inevitably win/lose or compromises. The

parties involved are also seen, and therefore see themselves, as either winners or losers, happy or unhappy. Where compromise cannot be reached, or lived with, conflict is the result, which leads not only to greater unhappiness (not a very useful outcome) but also to greater expense. One cannot serve two masters. There are tradeoffs in objectives, in plans, and in land uses. The economy-environment tension is thus given endless life support. These tensions are translated at the personal level as a choice between healthy living and livelihood. Such concerns, based in the social justice principles of the green movement, are not inconsiderable (Dietz, 1996), but in some cases have become artificial constructs, which can be avoided altogether by policy approaches which refuse to be subservient to this false dichotomy.

We need to adopt double loop learning to see that it is our whole way of thinking about, framing and approaching the problem that is actually the problem (Agyris, 1976: 2005). Public participation is the key to moving forward in our ways of thinking because the present system betrays an underlying narrowness of perspective which needs to be challenged by broader viewpoints which may be informed by and tested against the light of the empirical evidence. This is not to deny the role of the technocracy, nor the bureaucracy, nor of government, but to recognise that present systems of governance have been suffocated within ways of seeing that are no longer viable and which are more beholden to historic views, and the lobby groups which peddle them, than to the broader public and to the public good. Lobby groups are means of stifling, not broadening, debate. There are more useful voices that are not being heard or listened to, who can identify that the current system is producing and maintaining a tension between the economy and the environment which does not really exist, in any meaningful sense of either of those two terms. The NSW government needs to recognise this solution and enable it to happen.

Perhaps the vision and goals presented here may be considered unrealistic. But then perhaps one or two years ago it would have been unrealistic to suggest that governments should take greater control of the financial markets in the interests of the public good, simply because the money market can not be trusted to take care of itself. The property market also can not be trusted to take care of itself, and, just as the fundamentals of international finance are being reworked, so must the fundamentals of land use management.

Specific recommendations from this section

1. An overarching policy position needs to be developed and all activities of government need to work towards environmental sustainability and liveable communities, and they need to work towards these aims via a process which embodies the principle of good governance and which provides for 'real' public participation.

2. There needs to be harmonization of the planning system and planning objectives with other activities of the public and private sector. Why, for example, is it often mentioned in environmental legislation that measures for the protection of the environment need to be both efficient and economically sensible? Does economic policy require that all actions to maximise productivity and efficiency be also environmentally sustainable? If it is left up to the planning system alone, and as currently in place, and/or to development assessment as the sole tool, then there will inevitably be conflicting pressures and perverse outcomes that will compromise the achievement of environmental sustainability.

3. There needs to be an integration of land use management with natural resource management, which must include people who can participate meaningfully.

4. There needs to be adequate and substantive coordination of integrated natural resource management across jurisdictions and the whole of government.

5. There needs to be a greater commitment to evidence based policy design, implementation and evaluation.

Concluding remarks for this section

It is 200 years since Charles Darwin's birth and this has been much heralded in the popular and scientific press. There is even a special exhibition at the National Museum of Australia. It is furthermore 150 years since the publication of the *Origin of Species*. It can therefore be no longer considered radical to appreciate our interconnection with all life and the global systems which support life on Earth. However the real ramifications of this understanding, and its implications for planning policy, appear to be lost at government level. The time is right for the NSW government to more fully appreciate its responsibilities in relation to the regulation of land use management and to take a more sophisticated role in shaping places for the people of New South Wales.

The state knows what it is like to be a leader: it has one of the oldest carbon markets in the world; BASIX was the leader within Australia for a time; and the *Environmental Planning and Assessment Act* was at the vanguard in 1979. But NSW has since lagged behind. With a more integrated and coordinated approach at government level, and the deployment of more sustainable models for new and existing developments at ground level, NSW can place policies and programmes on the table for adoption at the National level, thereby reducing the expense of catch-up transition later and saving the ignominy of falling behind in the forum-shopping competition in the meantime.

There are economic imperatives for NSW to develop more sustainable industries to assist its economy in the short and long term, and especially to reduce its reliance on coal exports. The reality (or not) of climate change is immaterial: carbon trading is real, as will be the inevitable decline of the fossil fuel sector globally, due to the finiteness of the resource base. Rather than a situation of 'make hay while the sun shines' the state should be reading the writing on the wall. It is clear that if the legislature won't act then the judiciary will, as the Land and Environment Court is unlikely to sit on its hands. External forces, including international agreements and Commonwealth directives, could also mean that the choice will not be there for the state to make.

Through the take up of its recommendations, what this submission hopes to achieve is the commitment by policy makers to goals which are mutually reinforcing, rather than contradictory, and which are clearly articulated and adopted across the whole of government, not just the planning system. It is submitted here that these goals, as described above, are environmental sustainability, liveable communities and good governance. This means in practice a commitment to public participation, evidence-based policy design and evaluation, and integrated natural resource management.

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SECTION TWO:
Competition Policy

TOR 1e) Appropriateness of considering competition policy issues in land use planning and development approval processes in NSW

Questions

Should competition analysis be a part of local planning decisions?

How should competition be factored into the planning system, if at all?

Competition analysis should be a part of local planning decisions but *only* where it is embedded in policy frameworks that take into account broader socio-spatial factors and objectives. Sound economic reasoning, of the kind embodied in the ACCC's (2008) *Inquiry into the Competitiveness of Retail Prices for Standard Groceries*, must be grounded in thoroughgoing understandings of 'space' and 'place', of the kind engendered by the disciplines of geography, planning and design. This point is implicitly acknowledged by the ACCC:

> The ACCC recognises that zoning and planning policies are designed to preserve public amenity … The ACCC is not in a position to assess the merits of these objectives or the effectiveness of state and territory zoning and planning laws in achieving these outcomes, nor is it the ACCCs role to do so (ACCC 2008: 195).

With respect to appraisal of retail development proposals, for example, competition analysis should comprise but one component in a comprehensive impact assessment framework. Following the lead established by the UK's *Planning Policy Statement 6: Planning for Town Centres* (Department for Communities and Local Government 2005), this framework should ideally subject proposals to a series of tests including not only a 'competition test',[8] but also a 'sequential test'[9], a 'net community benefit test',[10] and an 'accessibility test' amongst others. In turn, this suite of assessment tools should be deployed against a backdrop of proactive and strategic retail planning policy development.

[8] For useful guidelines, see the NSW Land and Environment Court's determinations in *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) and *Fabcot Pty Ltd v Hawkesbury City Council* (1997).
[9] Where in-centre applications get preference to edge-of-centre and out-of-centre proposals.
[10] For useful guidelines, see the Victorian Civil and Administrative Tribunal's determination in *Nascon Australia Pty Ltd v Maroondah & Canterbury Gardens Shopping Centre & Ors.*

Failure to situate competition analysis within broader contexts, in such ways, would likely produce perverse planning outcomes. An out-of-centre supermarket, for example, approved in the name of competition policy, could well *reduce* consumers' 'ability to choose' (Independent Committee of Inquiry 1993). There is every chance the supermarket would erode the viability of in-centre businesses, generating increased vacancies, and curtailing the range of retail facilities and employment opportunities available in the area. Indeed, such scenarios are commonplace in NSW; in regional areas, in particular, many main streets are characterised by vacancy rates between 10% and 20% (Baker 2006: 301), their streetscapes disappearing behind boarded up shopfronts and 'To Let' real estate signage.[11] This is bad for businesses and calamitous for communities. Competition analysis, by itself, is unlikely to halt or reverse such trends; coupled to more robust, rigorous and wide-ranging retail policy frameworks, it may just make a difference.

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[11] Cessnock's main street, for example, is competing with edge-of-centre developments and had a vacancy rate of 16.3% in 2000 and 19.5% in 2003; Maitland's main street is competing with an out-of-town sub-regional centre and had a vacancy rate of 19.8% in 2004.

SECTION THREE:

Planning and Building Controls

TOR 1g) Inter-relationship of planning and building controls

The environment, *per se,* and development and land use, in particular, are complex. Our understanding and expectations of these as a society are in a constant state of flux, especially as we gain more knowledge of the environment and attempt to mitigate adverse impacts of development. There are many competing demands and short, medium and long terms views and expectations to accommodate that add to the complexity. This complexity is reflected in the frequency of amendments to planning legislation and associated regulations and practice requirements. If change in the practice and process of development is desired then a complete and major overhaul of the current planning system and legislative framework would be required.

The 1997 legislative changes that brought all aspects of building construction and subdivision into the Environmental Planning & Assessment Act (EPA Act) along with Development Applications had the potential to create a more coherent and streamlined approach to these matters, so as to eliminate the need to gain separate approvals under different legislation. However, the outcome has been that while there is now only one Act under which development, building and subdivision occurs, the complexity of the system has not been reduced but exacerbated. A discussion of the reasons for this increased complexity makes up this section of the submission. In short those reasons concern:

i) Very detailed information is now required at the Development Application stage for all proposals.
ii) The practices of the Consent Authority need to reflect the decisions or precedents set by the Land and Environment Court.
iii) Legislative controls have become increasingly complex;
iv) The private certifier system for the construction certificate component of the planning process compels Consent Authorities to require more than necessary detail at the Development Application stage.
v) Concern with approval processing times alone ignores fundamental planning tenets.

These issues are elaborated upon in the following:

i) Very detailed information is now required at the Development Application stage for all proposals. The Regulations to the EPA Act specify the information required to accompany a Development Application. There is no distinction here concerning the scale or type of development, other than Designated Development. As a result, Consent Authorities are often compelled to provide more detail than necessary in order to comply with the law. Failure to do so leaves the Consent Authority at risk in the event of appeal to the Land & Environment Court and could result in that authority being sued for losses or damages. A Consent Authority that does not comply with the requirements of the Act and Regulations also risks their authority being removed.

ii) The practices of the Consent Authority need to reflect the decisions or precedents set by the Land and Environment Court.

Each decision of a Consent Authority is subject to a right of appeal under the EPA Act. A responsible, professional authority will, therefore, be mindful of the potential for appeal against the whole or part of any decision made about an application and act accordingly. Quite rightly this potential for appeal helps ensure that consent authorities act in a proper manner as specified in the Act and Regulations. If the Consent Authority does not do so and appeal is made to the Land & Environment Court (LEC), then the authority risks being found against on a technicality of process, regardless of the merit of the argument about the application itself.

However, the protection afforded by the legislation against inappropriate, erroneous or poor practice is a double-edged sword. Each time the Court determines that a procedural error has occurred then responsible Consent Authorities will act to ensure that such errors are eliminated from their organisation. Each such response, however, increases the administrative requirements or complexity of the system and can add costs to the Consent Authority and, in some cases, to the applicant. In most cases it is likely to increase the processing time for each application (or result in the clock being stopped as the Consent Authority seeks further information from an applicant).

iii) The legislative controls have become increasingly complex.

The legislation applicable to planning directly reflects the complexity of issues and differing perspectives, wants, desires and expectations of various sectors within the community. Moreover, ‘planning’ involves not just ‘planners’ but involves specialists from various areas including ecologists, environmental and structural engineers, social scientists,

economists, accountants, legal advisors, who may all or together develop recommendations for presentation to the relevant decision-making body. This further contributes to the complexity of legislative controls.

The EPAA was the leading planning legislation in Australia when adopted. In order to address change the legislation has been amended and adjusted significantly in the subsequent 30 years to the point where it is has become excessively complex to understand and interpret for all but those most familiar with the legislation and its accompanying documents, processes and procedures. It is also worth noting that the greater the passage of time, the more extensive have been the amendments to the Act and Regulations, not only in incremental and cumulative but also 'knock-on' impact.

A necessary step towards resolving the complexity of issues arising in relation to the planning system in New South Wales is to consider that the EPAA is due for replacement with a more contemporary, less complex planning structure and process, rather than continuing to alter and amend the current Act. Other jurisdictions in Australia, e.g. Victoria and Queensland, and overseas, e.g. United States and Canada, have more recent examples of appropriate contemporary planning systems from which New South Wales could potentially develop a world's "best practice" planning system.

The centralised database of planning instruments in Victoria and the use of overlays in that system provides consistency, transparency and integration in the planning system.

The Queensland Government provides a dedicated planning information website (http://www.dip.qld.gov.au/integrated-planning-act/integrated-development-assessment-system.html) where access to clear information on the process and operation of the Integrated Planning Act, a repository of planning schemes and other related information is readily available.

The Local Government Act (Part 26) of British Columbia, Canada provides for a clear framework for planning and landuse management by local authorities in that province. (http://www.bclaws.ca/Recon/document/freeside/--%20l%20--/local%20government%20act%20%20rsbc%201996%20%20c.%20323/00_act/96323_28.xml)

The operations of landuse planning are left to the local authorities to administer in accordance with the framework in that Act. The planning system in New South Wales could be less problematic if it were to be developed in a similar manner.

iv) The private certifier system for the construction certificate component of the planning process compels Consent Authorities to require great detail at the Development Application stage.

Under the EPAA conditions can only be placed on Development Applications - Construction Certificates can either be approved or refused, but cannot be conditionally approved. As a result a Consent Authority has one opportunity to obtain sufficiently detailed information from an applicant

Decisions of the LEC have stated that Certifying Authorities must only deal with information that is clear and explicit in an application. The outcome of this is that Certifying Authorities are unable to make determinations that arise from, or relate to, matters which are implied. They must obtain clear, precise and detailed information from applicants, so as to minimise or abate the risk of an application failing on the basis of an appeal against the determination or an attempt by the Certifying Authority to enforce non-compliance with the conditions of consent. The failure of a case on such technical grounds creates ill-feeling and lack of confidence in the Certifying Authority due to factors such as time, resources, opportunity costs, etc. from all parties, directly and indirectly. Responsible authorities will, therefore, act to ensure that such risks are minimised and accordingly ask for detailed information at the application stage.

There is a constant political desire to simplify and speed-up the approvals process so as to reduce time delays and costs, arguably responding to and reflective of comments and criticisms by developers and the community. Long delays in the processing of Development Applications by Certifying Authorities, however, reflect the complexity of the legislative framework, court decisions and the competing desires and expectations of the public (residents, lobby groups, applicants). Some of these may be considered unnecessary but many are not and the time delay argument is again one that is both overstated and trumped by the higher-order objectives that the planning system is required, and reasonably expected, to achieve.

v) Concern with approval processing times alone ignores fundamental planning tenets.

It is understandable that applicants desire their applications to be processed and determined in the most efficient manner. The Regulations to the Act include provisions that advise that a Development Application is deemed to have been refused if it has not been determined within 40 days, or 60 days in the case of Designated Development. In such cases an applicant has the right to appeal to the Court to determine the application.

One of the most important aspects of the NSW planning legislation is the already embedded requirement for public consultation, providing the community with the opportunity to make submission on planning matters. This was one of the most important and distinguishing features of the EPAA when it was introduced. It provides an opportunity for community input. The desire for rapid processing times needs, however, to be carefully balanced with the opportunity for community consultation. After all, the time taken between conception and lodgement of a Development Application is usually considerably in excess of the time taken or allowed for processing; and it is the long-term impacts and accumulative effects of development on such items as the economy and the environment in terms of infrastructure provision, transport, employment, air quality, water resources and so on that should be taken into consideration – not just the short-term focus on the processing of individual applications in isolation.

Considerable effort is made in collecting data from local government in NSW related to processing time, as well as other information on their activities. These data are reduced to "league tables" of very brief numerical lists. It is unfortunate that there is no qualitative description of the data, or anything in the assessment that identifies the community or applicant levels of satisfaction with the processing or, more importantly, the outcomes of the Council's planning processes and decisions. The community and applicant satisfaction level is a significant omission from the evaluation of the effectiveness of the planning system.

Concern with processing times raises a number of issues otherwise generally omitted from consideration. These include:

a) The type, scale and location of development is variable, and hence the likely impacts, issues, expectations and responses reflect this variability;

b) The lead time in preparing an application to a stage suitable for submission is greater in almost all cases than the time allowed for processing, consultation (where necessary) and determination;
c) Satisfactory outcomes for all parties should be the principal factor in considering whether or not there was "fair dealing" in the processing and determination of a development application;
d) Planning outcomes have long lasting ramifications and cumulative socio-cultural effects;
e) A significant cornerstone of the EPAA are the mechanisms for community consultation, yet most proposals for streamlining decision-making involve minimising or removing public consultation; and
f) The objectives of the Act are ignored.

Processing times for applications are an inappropriate determinant of the quality of outcomes, community and applicant satisfaction or the effectiveness of the planning system. A more comprehensive analysis of a range of items should be considered in assessing the effectiveness of Certifying Authorities and the mode of addressing specific organisations that fail to act in accordance with the legislative requirements. Means of assessment, such as those noted above, and not merely processing time, need to be developed in order to correct this.

Further to this, the underlying objectives of the EPAA i.e. the reasons why the planning legislation was introduced – need to be revisited and examined and the following question answered:

> Do current provisions and practices support the Act and deliver outcomes consistent with its objectives, or have current provisions and practices diverged from these objectives?

If there is any doubt raised in relation to the preceding questions then the planning system requires significant revision in a comprehensive manner.

Resolving the complexity: getting back to the basics

Planning, building and subdivision are intimately linked and these items are appropriately located within the one legislative framework. Nonetheless the manner in which these items are nested within the legislation could be more effective and efficient if the hierarchy of

development encompassed construction in a manner reflective of the scale and complexity applicable to that activity.

Enabling conditional Construction Certificates may also be a means of removing certain types of building works from the Development Application process, returning these types of construction to a process similar to that formally encompassed by Building Applications. This, of course, brings into discussion the whole issue of private certification and opens once again the debate on the appropriateness of private certifiers being able to issue conditional construction certificates and questions relating to the monitoring and enforcement of such conditions.

Discussions, reviews and questions over costs and time of processing applications tend to focus on isolated aspects of the planning process and tend to ignore the fundamental issue: the EPAA was cutting edge when it came into effect on 1st September, 1980, but having undergone numerous and increasingly frequent amendments the Act is becoming outdated. The ultimate and appropriate solution to the NSW planning framework is not to continue to alter the Act in a piecemeal fashion, but to make changes that are substantive and reflective of the current and future directions for NSW.

Recently, various models have been proffered to the State Government that purport to revise the existing Development Application system to create improved planning outcomes in a 'streamlined' manner. Scrutiny of these proposals indicates self-defeat of their stated intent. For what they effectively do is create additional tiers of administrative or expert decision-making, increase complexity, reduce public input and remove accountability.

Rather than piecemeal modifications that undermine the overriding principles which the planning system is required to observe and promote, NSW needs to develop and implement changes to the planning system that provide a contemporary, state-of-the art planning framework to address the needs of current and future generations. It needs to "get back to the basics" of delivering a planning system which achieves social, economic and environmental sustainability for NSW.

Specific Recommendations for this Section

1. An integrated and holistic approach should be taken to planning in New South Wales. This requires, at minimum, a significant overhaul of the Environmental Planning &

Assessment Act, 1979 and related planning instruments so as to create a planning system that regains the vision and relevance to the contemporary environment as occurred at the time of enactment of the EPA in 1980. Preferably, a new Act should be developed that is reflective of the current and future planning needs of New South Wales.

2. The review of local government building and planning performance should include a survey to determine resident and applicant levels of satisfaction with the general system within which their local authority operates and the outcomes arising from applications determined by that authority. Such a survey would give greater context and meaning to the quantitative data, which, as it currently stands, provides little in terms of meaningful comparison between or across Councils.

3. The planning and building regulatory framework should be revised so that a level of "in-principle" approvals be created so that delays and expenses in providing excessively detailed and complex information at the Development Application stage is avoided until such time as agreement is reached on the concept of the development proposal.

4. There is a need for greater linkage between the objectives of the EPA and the operations of the planning system.

5. There needs to be recognition that the operations of the planning and building regulatory system are directly responding to and reflective of the determinations of the Land & Environment Court.

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SECTION FOUR:

Housing Affordability

TOR 1h) Implications of the planning system on housing affordability

1) Housing affordability

In its 2004 report on First Home Ownership, the Productivity Commission identified a combination of demand and supply factors contributing to the decline in housing affordability since the mid-1990s. For example, pressure was seen to have been placed on the demand side of the housing market through:

- Increasing numbers of households with two incomes
- Smaller household sizes
- Increasing numbers of households purchasing 'investment properties
- Immigration (especially in Sydney)
- Access to more affordable and readily available finance
- Increasing incomes due to the recent 'economic boom'
- A 'supportive tax environment' through the 1999 changes to capital gains taxation and the continued ability to negatively gear losses on investment properties.

While acknowledging that the supply of housing is inherently constrained in responding to a sudden increase in demand (due to the unavoidable time lags between land release, providing the necessary infrastructure and constructing the new building), the Commission (2004) also identified that the supply of housing was inhibited by the demand for housing being concentrated in the more desirable, established suburbs. Given this context the ability of the housing market to respond is constrained by a lack of available land to develop, the inability of the state to simply release more land, and where high-rise complexes are generally not a desired option. Furthermore, while the Commission (2004) noted that additional land releases and more efficient planning approval processes would assist in moderating price and affordability pressures in the long-term, these aspects of the planning process were not seen to be directly responsible for the significant decline in housing affordability (see also Beer 2004).

In addition to these constraints on the affordability of home ownership in Australia there are also a number of social factors and existing policy approaches to housing affordability that influence how we address the issue of housing affordability. First, it is important to

note that in many instances a decline in housing affordability will be interpreted as a benefit by many. For example, increasing house prices serve the profit interests of developers and builders. Similarly, many of those who already own their own home benefit from an (albeit potentially unrealised) increase in personal wealth; something that is particularly important for those nearing or in retirement and wishing to boost their income when 'downsizing' to a smaller dwelling. Governments are essentially dealing with two policy imperatives: one that allows individuals and businesses to profit from housing as a form of investment; and two the need to ensure that adequate levels of appropriate and affordable shelter is provided to the population.

In the second instance, it is important not to neglect the effect that the declining supply of public and social housing in the broader housing market has had on the overall affordability of all types of rental housing. Over the last twenty years the supply of public housing in NSW has been allowed to deteriorate due to declining Federal Government funding of this type of housing infrastructure and the need to increasingly direct limited resources into the maintenance of a rapidly aging, existing supply. As a result an overspill effect occurs in the private rental sector, which faces heightened demand pressures from two sources. One source of this increased demand for private rental housing has emanated from those unable to find accommodation in public or social housing. The second source of demand pressure comes from those renters who traditionally would rent for only a couple of years while saving a deposit to purchase their own home. However these renters have become increasingly long-term; trapped by increasing rents and escalating home prices which prevent them from saving an adequate deposit and gaining entry into the housing market.

2) Effects of the Global Financial Crisis and Climate Change

In considering more broadly the issue of housing affordability, two major economic issues also need to be noted: the impact of the Global Financial Crisis (GFC) and the effects of climate change. Both these issues have the potential to have significant impacts on housing affordability. The GFC has the potential to be the pin-prick that bursts the housing price bubble in Australia. This is particularly the case if the building industry finds itself unable to access the necessary finance either to continue existing or to begin new projects. Increases in unemployment may also cause households to default on mortgages. However, the more immediate effects of the GFC should also be considered alongside the longer-term economic implications of climate change and the Federal Government's commitment

to reduce carbon pollution. The economic reforms that accompany this commitment place a new economic value on environmentally motivated planning policies, such as those that pursue urban consolidation, promote public transport and more energy efficient developments. Similarly, already highly sought-after housing stock located in established (usually inner and middle-ring) suburbs are likely to become even more sought after due to their access to employment and public transport. Thus efforts to reduce carbon emissions are likely to see housing located in these areas become less and less affordable,

3) Housing affordability and the planning system?

First it must be recognised that planning alone cannot solve the issue of housing affordability in NSW. For this issue to be genuinely addressed a 'whole-of-government' approach is needed. However for the purpose of this review a number of possible planning approaches are evaluated.

a) Land release

The release of more land by Government is regularly argued to be the panacea to the issue of housing affordability in Australia (e.g. Property Council of Australia 2006; Urban Development Institute of Australia 2007; 2008). Similarly, the Productivity Commission (2004) noted that the constraints the NSW Government had placed on land release, through planning policies such as urban consolidation, were likely to have been one of the reasons for increasing housing prices in Sydney.[12] However, there are a number of arguments against the policy of simply releasing more land as a means of addressing housing affordability in NSW.

First, such arguments and assessments have often been made in an economic context where the environmental costs have not been factored in. Such costs will have to be integrated into the broader assessment of the costs of land release with the Federal Government's commitment to reduce carbon emissions. The inclusion of these 'environmental' costs will place a new premium on development projects that seek to redevelop in areas with good access to public transport and other infrastructure features. Nevertheless such developments will enable a greater reduction in carbon emissions than those on urban fringes that are otherwise considered to be environmentally costly.

[12] Although in no way did the Commission attribute the rate of land release as being the sole reason for the decline in housing affordability.

Secondly, the development of homes on urban fringes is not a viable long-term economic solution for low-income households. In such situations low-income households are forced to sacrifice other important locational advantages such as access to alternative transport options, an affordable proximity between work and home, and other important public infrastructure like educational and health facilities. And all this just so they can gain access to affordable housing.

b) Betterment taxes

Betterment taxes are designed as a means of capturing the unearned increase in land value that comes from land being rezoned from rural to urban. However, left to free market forces, where demand already exceeds supply, this approach, it is argued, will produce the unintended consequence of the tax being redistributed or passed on to the purchaser, leading to a further price increase in new housing and so defeating the social equity made possible through the provision of affordable housing (Beer 2004).

c) Inclusionary zoning

Inclusionary zoning involves the use of certain development controls that require the private sector to provide a percentage of affordable housing as part of every new development. A similar argument to that made against betterment taxes can also be made against inclusionary zoning; that is, left to the market, where demand already exceeds supply, this kind of policy tool simply results in the tax being passed on to the purchaser and increases the costs of housing in such developments overall.

d) Improving the planning approval process

Greater efficiency in the planning approval process would see an improvement in the speed at which new housing supply is delivered. However, both the Productivity Commission (2004) and Beer (2004) note that this policy solution, along with the above planning strategies have a limited capacity to deliver affordable housing.

e) Direct government intervention

The aforementioned micro-economic and planning-based strategies are generally seen to be limited in their potential effectiveness, mostly because such policy tools rely on market forces to address what is essentially ‘market failure’. Similarly many micro-economic solutions to housing affordability (such as land release and tax measures) tend to ignore the economic costs of environmental impact. As previously mentioned, future economic

reform that addresses levels of carbon emissions will make such environmental costs an integral aspect of housing market economics.

The reliance on neoliberal, micro-economic approaches to housing affordability has also reduced the ability of Governments to act on housing markets when they do being to fail. However the announcement of the Federal Government's 'Stimulus Package' to address the GFC presents all levels of Government in Australia with an ideal opportunity to re-engage in macro-economic housing policies (such as building public housing) and make a genuine attempt to address the decline in housing affordability. Government investment in the housing market has been used very effectively in the past as a fiscal tool to stabilise the national building industry and employment in this industry, as well as addressing housing shortages and declines in housing affordability. Furthermore Governments can use this fiscal opportunity to make genuine advances in building and construction technologies that improve the energy efficiency of homes (see Crabtree 2005a; 2005b).

5) Recommendations:

1) Greater clarity needed on the question of affordable housing

Governments and planners alike have to be clearer about what they mean when developing policies around the issue of affordable housing. At the moment what is meant by 'affordability' can be judiciously fudged to suit any agenda. Similarly such debates often revolve around home ownership with the issue of the provision of adequate public, social and private rental stock falling by the way side. Tenure specific, clear and measurable definitions of 'housing affordability' that take in all aspects of the cost of housing (including environmental and access costs) is also more broadly necessary for accountability in the effectiveness of Government policies and the promotion of good governance overall.

2) Housing as an important policy tool for achieving short and long-term economic goals

As Oxley (2004) in his book *Economics, Planning and Housing*, points out, planning systems are called upon to deliver what the market cannot and to prevent or act in response to market failures. While micro-economic policy solutions are useful to provide stability to a well-functioning market, the decline in housing affordability shows that the housing market in Australia is far from 'well-functioning'. In such situations, and faced with the impacts of the GFC and climate change, macro-economic policy solutions should involve all levels of Government directly intervening in the housing market to improve

affordability and energy efficiency. Such interventions will not only provide stability for the industry in the short-term but also initiate transitional market reform to ensure that inequalities produced by current housing prices will not be exacerbated by future economic restructuring.

3) Location as an important factor for consideration when providing affordable housing

When seeking to address the issue of affordable housing, planners and Governments alike cannot ignore the role that 'location' plays as a factor in the costs associated with housing. Indeed when we consider the location of the demand for housing, the solution of releasing more land becomes an oversimplified and essentially ineffective solution, primarily because the demand for extra housing is not located on the urban fringes of many urban centres in NSW. Location is also an important factor when considering the additional strain that economic reforms aimed at reducing carbon emissions will place on housing affordability. Housing affordability is likely to become even more unattainable in the established areas of cities and towns as individuals seek to find more environmentally friendly ways of accessing employment and other consumption opportunities. It is therefore important that governments seek to boost housing supply in those areas that will see an increase in demand because of their access to public transport, employment and other services.

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