Submission
No 48

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

Name: Mr John Mant

Date received: 12/02/2009

STANDING COMMITTEE ON STATE DEVELOPMENT
LEGISLATIVE COUNCIL

Inquiry into the New South Wales planning framework

Submission by John Mant,

Planner and non-practicing Lawyer

February 2009

STANDING COMMITTEE ON STATE DEVELOPMENT
LEGISLATIVE COUNCIL

Inquiry into the New South Wales planning framework

Submission by John Mant, Planner and Retired Lawyer

Introduction

Thank you for the opportunity to make this submission.

It is submitted that the current Planning legislation (Environmental Planning & Assessment Act 1979) was fundamentally flawed from the beginning. The many attempts at reform have made things worse rather than better.

The system has deteriorated because those attempting reform have refused to first recognize and then deal with the fundamental flaws. While some of the attempted reforms in themselves may have been reasonable, by being layered over a flawed framework, all too often they have had adverse results, adding to the complexities and the lack of transparency.

This submission considers that the issue is not the '*further development*' of the present legislation, but the fundamental simplification of that legislation. The fatal flaws must be addressed if effectiveness, efficiency, transparency and the restoration of Parliamentary sovereignty are to be achieved.

In undertaking this task it should be remembered that the imposition of development controls is merely one means of achieving a planned outcome. Governments don't need legislation to plan; they do need legislation to impose development controls over private property.

The development of a new parcel of legislation for development control and assessment is a comparatively simple exercise. What has complicated the situation in the past has been the efforts to create some comprehensive planning system intertwined with a development control and assessment system.

If government thinks it a good idea to pass an Act of Parliament to obligate it to plan (and there are several reasons why legislation for this purpose may not be supported), then it should do so in a body of legislation quite separate from legislation establishing a development control and assessment system. So far as the latter legislation is concerned, it is sufficient to require government to present (preferably at a public hearing) *evidence of good planning* justifying the imposition of development controls.

While this submission does respond to the Terms of Reference, given the fundamental difference with the assumption in the first of those terms, it

canvasses the main faults with the current system and provides detailed solutions. These include an outline of the simplified legislation.

TERMS OF REFERENCE

(a) The need, if any, for further development of the New South Wales planning Legislation over the next five years, and the principles that should guide such development,

The EP&A Act was fatally flawed when it was passed in 1979. While the flaws remain, every few years legislators have been asked to overcome them, not be fixing them, but by overlaying complex 'reforms', many of which have had unintended consequences. Usually these 'reforms' have been preceded by a report from carefully selected experts who wrongly have proclaimed the 'There are no fundamental flaws in the legislation.'

The issue therefore is not 'further development' but fundamental reconsideration of the current legislation.

This section of the submission deals with the original key fatal flaws and the consequences of some of the subsequent changes. There is also a comment on the bypassing of the proper role of Parliament.

The Fatal Flaws in the Original Act

Parts 4 & 5

The Act originally had two quite different ways of obtaining approval – Part 4, which was the old 1930s English style development approval process, and Part 5, which was the then new USA environmental assessment process.

The English system relied on pre-determined development rules and the exercise of bounded discretions under those rules.

By contrast, Part 5 provided for the assessment of impacts with a decision based on that assessment being made by the proponent. Essentially it required each proponent to evidence 'good planning' before it made a decision. Because there was no third party decision-maker, there was no certainty about the 'approval'. Only at the end of the process, when it had been tested in Court, was there any certainty about whether or not the right process and degree of assessment had been achieved. Uncertainty and legal expense ensured.

The two processes were not integrated – at least in the way they were in South Australia, for example. In SA there was just one administrative process for obtaining approval with simple or more complex paths depending on the nature of the proponent and its proposal, and who was the approval body. Where the proposal was complex, or required a change to the development controls, an application in the form of an EIS type was required. All

developments used the same fundamental process and, in the end, there was either a bankable approval or a clear refusal.

NSW messily attempted to provide some certainty in the Part 5 process by layering provisions that provided a role for the Minister for Planning to sign off before the proponent decided whether to proceed. While this was a form of consent similar to that obtainable under Part 4, it was not the Part 4 process.

Given these confusions, the government sought a better process. The solution was not to combine the *two existing processes*, but to create a *third process*, namely that under Part 3A. This allows the major developments that might have been caught by the Part 5 process to be dealt with by the Minister as a development application, but one with a different administrative process than that under Part 4. (In some ways the Part 3A process is a better process.)

One could ask why NSW needs three processes when one would do the job, especially when there are all sorts of complex connections between them?

The Multi-level control documents

The original Act was pretentious in that it purported to establish a layered integrated planning system starting from generalised State Policies, and then going to Regional Plans and then to Local Plans. This probably sounds similar to the ideal planners' planning process, which is, no doubt, being advocated in some of the submissions to this Committee by members of the Planning profession.

In fact there has been no real State planning and little Regional planning. This is because, *as it should be*, the Act is really *development control* legislation. Governments do not want to make their strategic plans statutory documents. The very first State Policy (SEPP No 1) was not an uplifting policy about the future of the State, but a notorious detailed amendment to the wording of all development standards in local control documents.

All that the planning provisions in Part 3 ensured was the proliferation of un-integrated development control documents. There are four classes of documents – SEPPs, REPs, LEPs and DCPs and within each class there can be multiple documents. The legislation encourages the constant layering of control documents without any regard to clarity, or the convenience of users. (For example, the (industry inspired) outdoor advertising 'controls' can be found somewhere in a SEPP, a LEP, DCP or 'Guidelines'.)

In SA, effectively there can only be *one* document for each area or parcel. Both local and State governments can make amendments but those amendments must *specifically amend* the single document. The controls that apply to your parcel of land can be discovered, on line, in one integrated, authorized and up to date printout.

In SA, councils, or the State, or the Court, can only have regard to the provisions of the single document – other documents and generalised statements such as those found in Section 79C do not apply. If one wants typically wide S 79C discretionary tests (e.g. 'the public interest'), they must be put into the controls applying to the particular parcel or area of concern. This means that, where very detailed and specific controls apply to a parcel, there is no suggestion that the planning for the site can be opened up for review under general criteria such as 'the public interest'.

The most recent NSW reforms attempt to simplify the controls, not by adopting the SA solution of a single set of controls for each parcel, but by dumbing them down using standard land use zones and standard codes across the whole of the State – coastal rainforests to desert country, Victorian era suburbs to CBDs and suburban sprawl. Land uses are to be separated; as a consequence, travel between uses is to be maximized. And today's government planners clearly do not require good contextual, sustainable design.

No clear ability for the State to initiate 'spot rezones'

When preparing the new Act before 1979, the State Government undertook to local government that it would not continue the notorious practice of using 'Interim Development Orders' to spot rezone sites. Only local government would have the right to initiate rezonings in Local Environmental Plans, which is where the detailed controls over parcels of land were intended to be.

Very quickly it was apparent that the State needed the right to initiate spot rezonings. So the practice began of using SEPPs as the means to do so. For example, SEPP No 5 rezoned a parcel of land for the Castlereagh Waste Depot.

The policy instrument intended to proclaim high level planning policies made by State Cabinet became the means of spot rezoning individual sites. To disguise the spot rezone, sometimes the SEPP provided some generalised policies to do with the type of use being approved for the particular site, thereby adding to the multitude of controls applying across the State. (As the number of SEPPs looked like reaching an embarrassing 100, titles rather than numbers were used as identifiers.)

Through Part 3A the State Government has now achieved not only a traditional spot rezoning power but the Minister has power to alter, as well as the planning controls applying to a single parcel of land, a number of provisions of other parcels of environmental legislation passed by Parliament. The NSW Minister has far greater executive discretion to ignore legally made controls than any of the planning Ministers in the other States.

No Separation of Powers

In the original NSW legislation there was little application of the separation of powers between the executive and the legislature. In SA, it was recognised,

at the State level at least, that the Minister could not be actively managing the city and the towns and also be seen as a fair and proper decision-maker of individual applications for development. A Development Assessment Commission (PAC) was established which makes decisions on State level DAs and the councils' own applications. On the State Government's own developments, the DAC only makes a *recommendation* to the Minister and, if the Minister doesn't want to accept that recommendation, then the matter has to go to Cabinet.

After years of denial about the need to provide a separation of powers, NSW has suddenly overlaid the existing decision processes with not one, but four new processes - IHAPs, Arbitrators, PAC, JRPPs - a confused range of bodies some which have integrity and accountability issues. The Committee is referred to an article written by this submitter on the genesis and administrative law issues of these new decision-bodies. (*Some of the issues behind the changes proposed to the New South Wales planning system* (2008) 14 LGLJ 17)

While the NSW PAC is a direct copy of the SA DAC, the current Minister, by effectively delegating virtually no decisions to its jurisdiction, has disposed of this separation of powers alternative to Ministerial power before it got started. It is interesting to note that the Minister strongly supports the roles of the other new decision bodies to take power away for local government. There is to be a separation of powers at local government level but not at the State level.

Effectively no TP Merit Appeals

While the original Bill proposed wide-ranging third-party appeals, at the last minute the government kept the right to 'designate' the types of developments that would have third party appeals.

Although there was nothing in the Act to require it, in the end 'designated development' was limited to big polluting developments. No TP rights were given to neighbours in ordinary urban situations.

The absence of a general third party appeal right has had adverse consequences:

- The neighbours of everything other than polluting industries were left with only with an administrative law challenge if they thought an illegal, wrong or corrupt decision has been made. When combined with the multiple control documents, the complex approval processes and the parliamentary nature of council meetings, the opportunities for commencing legal challenges are endless, even if winning one is difficult and expensive.

- To lessen the chance of challenges, development controllers in NSW have become extremely risk adverse. Processes are

restarted at the first sign of a possible error; assessment reports deal in great detail with every matter for consideration (and with multiple and un-integrated control documents there usually are many). Delay is inevitable. The administrative costs of assessment are high.

- The absence of TP appeal rights in NSW also makes it worthwhile to exercise undue influence. With no merit appeal, those objecting to questionable decisions can only resort to a challenge, which few can afford. Where a cheap merit appeal is available, as it is in SA and Victoria, the exercise of undue influence in the first instance is not worth much. The Council's decision is not the end of the line. There is not only a different public ethic in the southern States. The planning process is not so corruption friendly.

Following recommendations by the ICAC, the recent (2008) amendments to the Act included an additional third party 'review' mechanism. This is a 'Claytons' review, not to the Court, but to the newly created Arbitrators. The scope is severely limited.

Instead of this entirely new procedure, all that was needed was to extend the range of designated TP appeals to the Court. However, given that the Government wanted to look as if it was implementing the ICAC recommendations without giving much to the community, the lesser review rights were provided.

Some failures of the 'Reforms'

Combining Building Control

When the Act was passed in 1979, as with every other planning control system at the time, there was general acceptance that there should be separate control systems for planning, subdivision and building.

Since then, there have been various attempts at integrating systems.

After rejecting an attempt at integration at the time of writing a new Local Government Act, in 1997 (the LGA 1993 integrated a wide range of approval and order systems), the DOP incompetently levered the building control system into the planning legislation. Not only was this poorly done, it was accompanied by a private building certification system that had the certifier to issue the certificate to the client, rather, as in SA, to the government that had approved the DA.

Instead of making development control more efficient, it immediately became more complex. Unless exempted or certifiable, everything potentially was a Part 4 application and therefore subject to the full Part 4 process and all the development control documents. And because councils no longer could be sure about exercising building control, they were unable to give broad development approval and leave the less important design details to a later

approval. All the detail now has to go into the DA, instead of using a two-stage sketch plan/working drawing approach. The costs and inefficiencies for applicants and councils are considerable.

As well as all that, councils have been left with the unenviable and expensive task of monitoring and taking action against those building certifiers who, on behalf of the clients who pay them, may have breached the 'substantially the same development' rule.

Included with this submission is a copy of a paper on this topic prepared by the submitter for the Local Government Associations.

After the most recent review of the system by Minister Sartor, the Government decided not to fix the fundamental flaws, but, rather, to add still more regulation and complexity to the discipline system over certifiers.

And instead of simplifying the DA system by having the certificates about the detail lodged with the development consent authority, the Government has greatly extended the list of developments that do not need a DA and therefore do not need to be notified to neighbours.

This is why now, for example, a homeowner may learn only a few days before work commences, that the neighbour is about to build, within 1.5ms to the northern boundary, a two-storied house with an FSR of over 0.7:1.

Part 3A

As stated above, the 'solution' to the Part 4/Part 5 problems was not to create a single integrated application system like SA's, but to amend the Act (using over 150 new sections and many consequential amendments) providing for an *entirely new and additional* system which has bits of both 4 and 5, as well as some of Part 3. As well as dealing with the major Part 5 government developments, Part 3A has been designed to act as a 'spot rezoning' application process for private developers, combining rezonings and development consents in the one application.

The size of the private developments coming under Part 3A has been steadily reduced and now the Minister can effectively declare almost any development as being under its provisions.

An important part of the integrity of the system depends on the Director General of the Department. This position has no statutory tenure and the holder can be sacked at any time for no stated reason. As mentioned above, the newly formed Development Assessment Commission has briefly appeared only to fade from view with the current Minister delegating only a small proportion of developments to this body at arms length from the Minister.

The Tidying up of Multiple Control Documents

Instead of creating a single document, the four levels of control documents have been retained. The best that can be done is to try to reduce the number of documents at each level.

Sometimes this is to be achieved by getting rid of out-of-date documents (some SEPPs), sometimes by collecting many documents and putting them in a loose leaf folder with a single title (the DCPs), or, the most unfortunate solution, by mandating a standard land use zoning system for all LEPs. This latter solution has detrimental environmental, sustainability and urban design outcomes as the 'reform' reinforces the Post WWII belief that the main objectives of Planning should be to separate land uses and increase the demand for travel. The intention also seems to be to ensure that every place will look the same as every other place.

It is understood that the Department is having severe problems in arriving at a standard set of zoning controls that will suit everywhere in the State. Certainly local government is going to great cost to try to conform to a policy that is wrong in content and process.

The answer is to adopt the SA solution with a single document that can be amended by either the State or local government. As in SA the document could be put on a central LIS with access to an authorised set of controls available for each parcel.

The multitude of decision and appeal bodies

There are a large number of decision making bodies now established. Many are appointed by the State but paid for by Councils.

It is submitted that only five are needed to make development assessment decisions:

- Elected councils following an IHAP hearing and recommendation if required.
- IHAPs as advisory hearing bodies. These have operated in several councils without the need for legislation or central regulation.
- The PAC with powers of decision delegated by Regulation.
- The Minister for applications from the State Government following consideration of recommendations by PAC.
- The Land & Environment Court.

There is no need for Arbitrators, and Joint Regional Planning Panels or Planning Administrators.

Wide ranging Third Party appeal rights should be designated and should be heard by the Court.

There should be no S82A reviews of decisions where amended plans can be lodged.

Bypassing Parliament

The original intention of SEPPs was to proclaim State policies regarding urban and regional development and environmental protection. They were not intended to be procedural or regulative. Nor were they supposed to be detailed cadastral development controls. These were to be in the LEPs.

Of course it was naïve for the designers of the 1979 Act to assume that the State would not be interested in affecting the controls applying to individual parcels. From the beginning the SEPPs have been used to amend cadastral controls.

Because they were designed to be high-level policies, State Cabinet was given the power to make them, without the need to first publicise a draft and receive submissions. This may have been reasonable had they been used for the planned purpose. It is not reasonable when a SEPP is used to alter someone's development rights. The use of SEPPs for spot rezonings without a statutory process for community input should not be allowed.

Even more improper has been the use of SEPPs to effectively amend the legislation passed or endorsed by Parliament. An example is requiring consent to a Masterplan before being able to lodge a development application. Parliament should insist that all procedural matters should be in the form of amendments to the Act or by Regulation.

The Parliament in SA reviews new development controls before they are made. They are treated as regulations. EPIs in NSW are considered regulations yet Regulation Impact Statements are not required, nor does Parliament have any say over their content.

Conclusions to this Part

The Act was fundamentally flawed and many of those flaws have not been fixed. Where solutions or ways around have been sought, things generally have become worse. Instead of fixing the mess, the government has substantially reduced the number of developments subject to development notification and assessment and is in the process of providing simplistic State wide codes to permit 'could be anywhere' standard development.

The Act should not be further '*developed*'. It should be fundamentally rethought and rewritten.

Attached are proposals for new legislation. Noted briefly are the faults in the current system that the suggested provisions are designed to overcome.

Governments do not require legislation to plan. They do require legislation to impose development controls over private property. If thought necessary, the development control legislation can require the imposition of controls to be justified by reference to strategic and/or structure plans developed under other legislation. (Such as is proposed for the Local Government Act.)

In designing new legislation, any legislation regarding strategic planning therefore should be kept separate from legislation creating a development control system. The SA legislation is called 'The Development Act', which is a bit presumptuous but on the right track. It is suggested the honest title for new legislation would be 'The Development Assessment Act'.

(b) The implications of the Council of Australian Governments (COAG) reform agenda for planning in New South Wales

COAG have endorsed the Development Assessment Forum's design for a development control system. Given that this design follows many of the principles of the SA legislation, which this submitter had an influence over, I consider there is much in the proposals to support.

However, I consider that the DAF proposals are over complex, rely too much on the integrity of 'experts' and provide too many opportunities for the exercise of undue influence. The proposals for new legislation attached to this submission are a simpler version of similar basic principles.

(c) Duplication of processes under the Commonwealth Environment Protection and Biodiversity Act 1999 and New South Wales planning, environmental and heritage legislation,

One cannot have a single system for dealing with a development proposal without concurrence and referral rights to other government bodies at the same, or other levels of government. In the absence of effective concurrence and referral rights, other agencies will insist on their own system of development control.

The fundamental reason for the proliferation of control systems is the structure of State Governments. With each profession demanding their own department, each department seeks its own development assessment system. The Planning profession is no exception with employment in planning organizations being dominated by members of the Planning Institute of Australia. (This *guild* approach to government structures explains the resistance of the Department of Planning to the integrated Approvals and Orders systems approach under the Local Government Act.)

It is not unreasonable for other environmental professions to be suspicious of a development assessment system operated by members of a single guild, especially one, which has responsibility for land supply and, increasingly, has been taking the side of the development industry.

There are probably opportunities for substituting a concurrence or reference role for the Commonwealth but this submitter has not looked into the issues involved.

(d) Climate change and natural resources issues in planning and development controls,

The content of development controls over parcels of land depends on the nature of the objectives being sought. Climate change and natural resources issues are merely issues of concern to governments that may or may not have consequences for the content of development controls.

For example, if government wishes to reduce the possibility of adverse climate change, then there are a range of objectives and strategies that could be considered. Some of the strategies may require additions or deletions to the controls applying to land.

For example, the current practice of writing development controls using a land use zone format can be seen as making cities less rather than more sustainable. The public is advised that good planning is the separation of land uses and the consequent demand for increased travel. Achieving more mixed uses and a reduced need to travel is made more difficult when the city plan is presented as separate land use zones.

A proper strategic planning process would identify the current method of writing development controls as part of the problem, not part of the solution. First the analysis, then, possibly, the imposition, or lifting, or rewriting of development controls. Along with other actions, of course. The problem is that, being *output* rather than *outcome* organizations, there are no departments in NSW in a position to prepare and implement proper strategic plans. The Planning Department is no exception, which is probably why its traditional outputs have been standard land use zoning and standard design codes.

(e) Appropriateness of considering competition policy issues in land use planning and development approval processes in New South Wales,

This issue is an example of the matters discussed in the previous subsection. Development controls can serve any objectives capable of being achieved by increasing or reducing restrictions on property rights.

Land use zoning tends to deliver monopolies over land uses to various interests. The identification of retail zones, in particular, has generally led to an undersupply. Such land as there is has been monopolized with the policies of development controllers and their Ministers often being manipulated by those monopoly holders.

Really the issue goes back to the original strategic objectives, which, given current planning techniques are seldom clearly articulated. The simplistic *predict and provide* method, which is used by the planning profession to identify land for various uses, does not entail a clear statement of the objectives of zoning for retail and other potentially monopolized uses. There is usually a talk about whether there is a '*need*' for, say, more retail land. 'No there isn't' so far as the existing owners of zoned land are concerned. 'Yes

there is', if the strategic objective is to lower retail rents.

If a more strategic approach was used then the competition consequences of the zoning system would be exposed and, possibly, governments may release sufficient land to satisfy the market, if not oversupply it. Of course, this objective would need to be weighed against other objectives such as urban form. The current method of planning seldom makes these trade-offs explicit.

(f) Regulation of land use on or adjacent to airports,

There is no reason why the monopolist owners of airports should be exempted from controls that apply to other businesses. The current situation arose merely because the Commonwealth Government wanted to obtain a maximum return from the sale of its airports. As with large-scale developers that provide only one retail centre, the Commonwealth used the provisions of the Constitution to create a monopoly price for its land.

(g) Inter-relationship of planning and building controls, and

This is discussed above and in the copy of the LGA document.

If new legislation is about 'development assessment' then there is no reason why it cannot be used to allow and encourage staged approvals - e.g., concept, sketch and detailed. Provided the role of private certifiers is reformed by getting rid of the fundamental conflict of interest and having the certificate lodged with government, the one parcel of legislation could manage a development through every stage.

(h) Implications of the planning system on housing affordability.

There are implications for affordability.

- Development controls tend to limit the supply of land and therefore can increase its price.

- Policies such as rate pegging and exemptions from land tax have shifted the payment for infrastructure to new entrants rather than sharing the cost amongst all beneficiaries.

- The complexities of the DA system described above, especially those imposed by the private certification system, lead to costs and delays.

On the other hand, not all the complaints about the system are justified.

Development controls set land values. There is constant pressure from purchasers to obtain more development rights than their vendors thought were possible. Many of the complaints about the imposition of controls come from purchasers who, having purchased land restricted by development controls, seek to have those controls modified in their favour. This has been one of the drivers for giving the Minister the powers to allow spot rezoning

under Part 3A. One of the arguments for ignoring the controls is that the development would then become 'more affordable'.

Certainly restrictions on the amount of land for urban growth can raise its raw price, especially if the vendors know the true worth of the land because the controls are fixed and in place. By being less clear about the location and sequence of development there can be more opportunity for developers, rather than the owners of the raw land, to capture the value increase from a rezoning.

Were development controls to be imposed following a proper strategic planning process, it may be that something other than the current system for administrating those controls would be adopted. As it is, the crude *predict and provide* planning process does not properly address affordability objectives.

FINAL COMMENTS

It is submitted that the Committee should:

- Recommend that a new parcel of legislation be prepared to establish a development control and assessment system along the lines of the Attachment.
- Consider whether encouragement of strategic planning processes requires legislation and if so, what are the consequences of that legislation for the Budget process of the Executive and Parliament and how the outputs of such processes would relate to the development control and assessment system.

STANDING COMMITTEE ON STATE DEVELOPMENT
LEGISLATIVE COUNCIL

Inquiry into the New South Wales planning framework

Annexure to the Submission by John Mant

ANNEXURE
Development Control and Assessment Legislation

STANDING COMMITTEE ON STATE DEVELOPMENT
LEGISLATIVE COUNCIL
Inquiry into the New South Wales planning framework

Annexure to John Mant's submission

A DEVELOPMENT CONTROL AND ASSESSMENT BILL AND THE ERRORS IT IS DESIGNED TO FIX

What follows is a 'drafting instructions' for Development Control and Assessment Bill that assumes a strategic planning/urban management approach to managing cities and towns – and rural living. The summary of the provisions are set out first with the commentary, including what evil it is fixing, being written in italics.

1.1 What does the Act deal with?

Control over development rights and other property right provisions.
The Act is not about Planning – planning does not need legislation, although the Act can require evidence of good planning to be demonstrated before new controls are made. This is, in effect, a Regulation Impact Statement. It is a matter for body approving the imposition of new controls to decide if there is adequate justification for such imposition. The legislation could require a public hearing.

1.2 What development rights are the subjects of the legislation?

Table of things that are the subject of the legislation and the controls that apply. As in Section 68 of the Local Government Act 1993.

The table is instead of long complex definitions with detailed exemptions for such particulars as 'Exempt development'. The table can list the things that need consent and the criteria that will apply. This table could be State wide with the ability of Councils to exempt particular things from being covered in their areas. This would provide a clear list that can be checked without the need to consult professionals.

1.3 How are the processes dealt with?

All laws should be subject Parliamentary scrutiny – therefore all the process provisions are in the Act or Regulations that have either been passed or scrutinised by Parliament. In the latter case, where the amendment is by regulation, it is subject to a Regulatory Impact Statement and disallowance

SEPP's have been used to amend processes without Parliamentary scrutiny or Regulatory Impact Statements – e.g. Master Plans which substantially affected existing processes and rights under the Act were introduced by SEPPs without any explanation or review by Parliament.

1.4 How are the controls made?

New controls have to be justified by a strategic plan or, in the case of a spot rezoning, an EIS or equivalent. This complies with the principle that the greater the discretion, the greater the information that is likely to be needed.

Either the State or the Council can commence the process of changing the controls. (Except for a major policy review, such as the coastal policy, there could be a time restriction on when the State can take action – say, giving the Council three months to commence the process.)

A statutory public process with the opportunity for an independent panel hearing should be available if there are unsatisfied submitters to any change in the controls. (This is the situation in Victoria and is essential to ensure transparency, and better outcomes.)

The State approves the new controls in the end with perhaps a delegation power for some controls in some areas. The devil can be in the detail and it is difficult to define what controls can be always be approved by local government. In any event, the State will need to control the quality of the information being including in the digital cadastral data base of controls.

Different processes for controls emanating from different levels of government – why a separate process for State and regional level controls, given that the Department is the author of both?

No guaranteed public process for SEPPs. Can be bought in overnight and without justification or independent review.

No right of transparent process for LEP amendments – not even need for environmental study – spot rezoning a major source of corruption as all one needs is to arrange a bare majority in the Council. No matter what advice is received the change to the controls will go through with no need for those making the decisions to give reasons or provide a proper hearing process. All that is then needed is to ensure the Minister does not intervene.

1.5 How are the controls documented?

A single 'document' with integrated controls on a parcel basis.

Any amendments, from whatever source, *must specifically amend the wording of the existing controls.*

The changes are integrated by the State and entered into single DCDB, which is based on the Real Property Title LIS. The role of Parliamentary Counsel is not required for drafting of the controls, as against the subordinate legislation amending the process provisions of the Act.

Interrogators can rely on the information on controls provided by the LIS.[1]

Councils should have the choice as to how they want to draft controls e.g. using a land use format or a parcel/place format.

Present provisions are major fundamental flaw in Act – and the practices have made it worse. The processes did not separate power to initiate control from how the controls were written. The proposals separate the way in which changes to controls are made from how the controls are written and recorded.

There are layers of unintegrated controls – thousands of pages being added to constantly – advisors can be guilty of negligence it they do not read all the pages

No obligation on State or local planners to assess adequacy of existing controls before layering new ones.

Therefore a lack of discipline in making new controls egg Outdoor Advertising, Coastal and Sydney Harbour SEPPs and REPs. How much more effective it would have been had the team drafting the Harbour REP set out their strategic objectives and then asked each harbour council to advise what changes were needed to the development controls in their instruments to achieve those objectives. The agreed changes could be implemented by the one statutory document. How much easier that task would be if each council had but a single document drafted with a parcel/place format.

The Department has been unable to come up with integrated State level controls – that is because SEPP and REPs are a hopeless jumble of amendments to processes, geography lessons, motherhood statements, wish lists, instructions for council control drafting, heads of consideration, general controls with wide discretions, zoning tables and detailed controls and codes.

The current means for simplifying development controls is to insist on standard LEP formatting and wording and zones, with standard design and siting controls being prepared for each of the standard urban products allowed under the standard zones – e.g. detached houses, town houses,.... This crude method of achieving greater efficiency is at the cost of effectiveness, ensuring that everywhere will look the same as everywhere else and that design will not have to respond to its natural or built environment.

In no other State does Parliamentary Counsel approve the planning controls, as against the Regulations amending processes. The total system is such that leads to the view that the PC does not add value. Certainly Parliament's rights do not seem to have been protected from what are effectively

---

[1] Supports the concept of 'stewardship' - bundle of rights *and* obligations that come with the title of land – development controls and details of approvals. See the decision of the NSW Court of Appeal in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2002) 55 NSWLR 446. In this case the terms of a Consent effectively overrode the information on the title.

amendments to the Act being included in EPIs. Where was the Regulation Impact Statement the first time a Masterplan requirement was introduced in the statutory system?

1.6 Nature of controls

Controls should only include words that do development control work – that is affect landowner's property rights – affect the value of land. Other actions implementing a strategic plan should be contained in the strategic plan, which does not need legislation in the same way that development controls need legislative force to effective.

Common definitions – see Victorian clustered definitions

No heads of consideration and particularly no general heads of consideration (Section 79C) in the Act – all provisions in the control document in the form of a clear objective and a measurement if appropriate.

Where possible a measurable standard that will achieve the objective of a control

Tightly controlled waiver of measurable standard in place of SEPP No 1 – must still comply with the actual Objective of the standard

Option of place format or land use zone or other format – place format provides neutral "bowls" or integrated parcel based controls and assists community understanding

Regular assessment of effectiveness of control documents by independent body

No standards or review of performance of effectiveness of control documents

Heads of consideration are lazy planning. For example, does 'economic' in a list of heads of consideration mean one is in favour of protecting the big two retailers or Westfields, or in favour of facilitating competitors such as Aldi?

The Act does permit experiment e.g. Warringah LEP passed under existing Act, but no obligation that any change to the controls applying in the area must specifically amend the existing single document. Therefore SEPPs are laid over the top of LEPs without specifically amending the LEP. There is no obligation for State planners to assess the adequacy of existing controls before adding new ones.

Departmental officers say that there will be too much work for them in checking the nature of existing controls before overlaying new ones. This of course is what everyone else has to do under the existing system. All users should read the vast pile of EPIs when they try to work out what the rules are. If the Departmental officers did it right the first time, everyone could take advantage of their publication of an authoritative integrated wording.

SEPP No 1combined without any third party appeal rights is a major source of corruption and community mistrust of the system. Constant suspicion of deals being done to waive controls in circumstances where there is little or no transparency in the process and no rights of due process.

1.7 When is consent needed?

There are two roles for consents:

- to exercise a discretion (which can only be done by a public body)
- to provide certainty to applicants and assurance to the public (that codes have been complied with, for example)

If the task is only to check the measurements, the consent body should be able to rely on a private measurement certificate but the decision remains a public consent process. Therefore a certificate from a private certifier can be used to demonstrate compliance with measurable standards. The certificate is not a consent but can be relied on by the consent authority without having to check its accuracy.

There is a single system for obtaining consent with information requirements adjusted depending on extent of discretion to be exercised – depending on the 'length of the bed of hot coals'. Where discretion is effectively 'at large' an application in the form of an EIS may be required.

All applications are first lodged with the relevant local council with council forwarding it onto a higher level of government if the regulations require the application to be assessed at that higher level.

Staged consents are facilitated – Master plans are a first stage development consent.

Ability to obtain a certificate from the consent authority on the appropriate process and information requirements before commencing to prepare detailed application – sets out what has to be in the application. No challenge to process mechanism if it complies with the certificate.

The controls that apply are those in force at the time of lodging the application for consent, (as they are in SA).

Existing use provisions restricts alternative use to one that is 'closer' to achieving the objectives of the controls. There is the ability to get a certificate as to the extent of an existing use.

Twenty-two paths for approval according to recent review of present process by Dawkins et al.

No certainty that right path has been taken – in the end consent can be disallowed

Part 4, Part 5 and Part3A – why three processes for approval - there can be litigation on which is the right path

EIS is merely a detailed application for approval – wide discretion therefore lots of information – usually quite excessive amount of information – hence proposal for a certificate for the process

Present private certification process fundamentally flawed – should not have taken away final signing off by a public body:

- *has led to demand for detailed DAs as cannot be assured of control over detail – limited staged approvals, and*
- *corruption of system as no public body check on whether DA has been complied with*

Alternative proposal shifts risk of correctness of measurement to the private certifier but retains a public sign off.

It is unjust to shift the goal posts by changing controls after an application has been lodged.

Current existing use provisions can lead to a result contrary to the objectives of good planning – i.e. shifting existing prohibited uses towards activities closer to achieving the planning objectives.

1.8 Who should give consent?

If there is a dispute about a consent then an arbitral body that conducts itself in accordance with the principles of due process should be involved:

- Independent process – roles not conflicted as they are with Councils and Minister and DG.
- proper hearing – due process principles complied with
- reasons for decision or recommendations

Option of delegation of power to make decision, or provide a public report and recommendation to the representative body or person. The latter encourages the elected body to support rather than blame the hearing body, e.g., As is the case with Councils criticism of the L&E Court.

Establish system of IHAPs for Council decisions. IHAP to make recommendations to Council.

The State Planning Assessment Commission, is retained as a body of independent experts, not representatives, with power to make arbitral decisions on DAs on private land and recommendations on government development and consent on major developments of Councils – especially those where Councils are involved in the development.

PAC to be bound by the rules of natural justice in making decisions.

Minister to retain right of call-in subject to clear criteria for call-in powers contained in regulation.

The Commission should also have the right to comment on changes to development controls

Multitude of decision-making bodies – councils, planning administrators, potentially IHAPs, JRPC, Council, PAC and Minister. Councils, DG and Minister have conflicts of roles. Council is a representative body meeting as a parliament attempting to play a judicial role – bound to fail and does regularly. Councils' performance in this conflicted inappropriate role a major source of community dissatisfaction with local government.

Minister and DG have urban management role, but exercise arbitral decisions. Restricts ability in the first role and public is cynical about the second.

Councils and State Government are judges in their own cause.

Staff assessments need to be exposed – can be too close to the decision – difficult to provide frank and fearless advice when on short-term employment contracts. IHAP and Commission protect staff expertise and independence.

Currently Minister decides what decisions will be made by PAC leading to opportunities for undue influence.

1.9 What rights of review?

Every discretion should be reviewable

Appeal body to be able to make binding judgements of law

Merit appeals not adversarial but inquisitorial e.g.:

> '*Concerning the appeal of John Smith in the area of the Council of Woollahra'.*
>
> (*'Smith v. Woollahra*' is incorrect in law because it is not a challenge to the decision but rather the Court stands in the shoes of the Council and rehears the application.)

Third party appeal rights available to all objectors.

If Court comes to same conclusion as IHAP then costs should be awarded against the council, applicant or third party as the case may be.

Arbitrator appeal system duplicates Court appeal system leading to forum shopping and legal challenges to Arbitrators' processes.

Only applicant has merit appeal right to the Court – with no transparency in decision process and conflicts of roles provide opportunities for corrupt deals

between councillors and applicants, especially with use of SEPP No 1 and increasing weakening of DCP controls

Very limited rights of third party appeals only to new Arbitrators positions and not to the Court.

Third party rights to challenge legality of decision – difficult to win and expensive as can have costs awarded against the plaintiff

Court wrongly treats merit appeals as adversarial rather than inquisitorial

1.10 Other provisions

Land acquisition powers following reservation of land for public purpose –as exist

Land pooling powers including acquisition if failure to join a scheme

Provisions for closing roads as part of a DA, subject to RTA concurrence role.

Section 94 plans to cover more than the provision of facilities of the Consent Authority

Current provisions provide very limited powers for government to positively manage land development.

Developer contributions are unnecessarily restricted. Ministerial sign-offs and maximum limits have distorted the impact logic of the provisions and opened opportunities for corruption.