Submission
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INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

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Submission to the NSW Legislative Council Inquiry into the NSW Planning Framework

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The NSW planning system is in deep malaise:

- there is little or understanding and valuing within the community generally and within the political system specifically (except perhaps within the local government sphere) for the social, environmental and economic benefits that can derive from 'planning' - the proper 'aforethought' in what we do in respect to our allocation of both public investment (in infrastructure and other areas), and private building and transport investment.
- where there may be such regard within local government, it is often used in a negative sense – of retaining privilege for a specific local community.
- the changeable nature of current planning legislation and the open-endedness of planning decisions has robbed the business/development community of one of the benefits, for it, of planning – that is, certainty of the rules. This has been in favour of catering for the speculative side of the business/development community - which in the end only caters for a few.
- the 'rules' of planning as established in legislation have become, for both the customer and the practitioner, almost unintelligible. It is now almost impossible to be sure that one has:
  - (i) located all relevant legislation relating to a particular matter
  - (ii) interpreted that legislation correctly.
- the directness and ease of interpretation of the *Environmental Planning and Assessment Act 1979*, as first gazetted, has been completely lost. Amendment to the legislation to, supposedly, 'free-up' the system has failed entirely. The process of amendment via addition upon addition of new clauses and sub-clauses has merely made it more complicated, requiring frequent cross-reference both backwards and forwards within the Act and between the various subordinate legislation.
- resources that should be spent in developing integrative strategies and on-the-ground implementation of planning objectives must be spent simply keeping abreast of legislative changes and in the invariably lengthy interpretation required to now understand each piece of the legislation.

'Planning' has become almost completely a narrowly-focussed legislative control process rather than a larger encompassing strategic process. In this way it fails the now universal (legislative) objective of ecologically sustainable development that necessarily requires the creative integration of all three social, economic and ecological environments.

The initial term of reference for the Inquiry is also potentially limited in its ability to understand this malaise by referring only to the 'planning legislation'. In NSW what needs to be addressed is the whole planning 'culture'. Generating any cultural

change will require a different approach and skills beyond the 'expert' scientific and legislative knowledge that is usually applied to such issues.

A necessary review in this regard needs to address:

(i) the reduction-ist mindset that accepts that such piecemeal and ultimately complicating amendments that have occurred within the legislation is in any way acceptable.

(ii) the growing belief within the planning profession that 'planning' is about the facilitation of development rather than about ensuring development occurs in accordance with established community standards. (If the only community standard is to facilitate development, then the best way to do this is to remove all planning considerations entirely. If this is the case, then lets bit-the bullet and do it).

(iii) the 'unsured-ness' within the planning profession as to what they are about plus a lack of valuing of the outcomes of 'planning' within the general community breeds a reticence, within practitioners, to make timely decisions. While such reticence exists, no amount of legislation change aimed at 'free-ing up' processes will achieve that aim. Practitioners need to be more confident about what their role in the community is. The community needs to re-establish that role and then support it.

Ironically, the fragmented mindset now afflicting the planning system is reflected not only in the format of that system, but also within the way we seek to address realisations of its inadequacies. This Inquiry is now only one of a number of – yes - overlapping inquiries. For example:

(i) parallel with Term of Reference (iv) is a study into better integration of natural resource management strategies into local environmental planning and overall local government management planning, being undertaken by the Local Government and Shires Association in conjunction with the Centre for Local Government at the University of Technology Sydney and funded by a legislative reform grant from the Commonwealth Government.

(ii) parallel with Term of Reference 1(c) are two reviews of the *Environment Protection and Biodiversity Conservation Act 1999*: one by the Commonwealth Government itself and one by the Council for the Australian Federation (being undertaken by Clayton Utz).

Ultimately, integrating the planning needs and the customer service needs of the community will be best served by way of fostering an integrated mind-set and an integrated system in terms of overall planning and natural resource management.

That said, some specific comments in respect to the individual terms of reference are made below.

Term of reference 1(a):

The need, if any, for further development of NSW planning legislation over the next 5 years, and the principles that should guide such development.

There is a need for further review of the NSW planning legislation to address:

(i) the reduction in legibility of the *Environmental Planning and Assessment Act 1979* as a result of the large number of amendments in recent years

(ii) clarification of the operation of Part 5 of the Act now that it will be used more often given the removal for the need for development consent for an increasing number of matters, as provided in, for example, SEPP (Infrastructure) 2007

(iii) co-ordination of the plethora of plans in existence, and approvals now required, under the increasing raft of legislation related to natural resources and other environmental management, with particular emphasis needing to be given to 'whole of development' needs for proposals with multiple components and implications (eg. as already addressed but only in part, by the introduction of the process of 'integrated' development)

(iv) clarification of the role within general planning legislation of, if continued, the increasing use of the objective/requirement of 'improve or maintain' in natural resource legislation.

In particular there is a need to better resolve the 'customer'-focussed objectives and the 'planning'-focussed objectives of all planning and environmental legislation. In this regard, the current planning reform process has generated a contradictory outcome. Although these reforms have been orientated to stream-lining approval processes, the common method of implementing these reforms via additional legislative provisions that detail exclusions and the like to existing approval regimes has resulted in the legislation overall becoming longer and more complicated to interpret. A result is uncertainty as to the requirements that must be met, thus dissipating and perhaps entirely eclipsing the intended gains in reform.

This dilemma can exist even where there has been a consolidation of instruments. For example, understanding of the ramifications of SEPP (Infrastructure) 2007 is made difficult by:

(i) the large number of functions it incorporates (nomination of exempt and complying development; the permissibility of development; the need for referral of development to other authorities: and the establishment of standards for certain development)

(ii) the large number of development types it seeks to address, and

(iii) the situation that it does not necessarily do any of these two functions exclusively, meaning there must still be reference to other planning instruments and other subject-specific legislation.

This situation is exacerbated by the now substantial raft of legislation related to planning in the natural resource management field. Under this legislation various agencies are empowered to both make plans (which, confusingly, are referred to by a number of different names), give approvals (which are also, confusingly, referred to by a number of different names), and establish assessment criteria.

As a 'customer' it can be difficult to be confident that one has established both the full range of legislation and the relevant plan and/or assessment criteria (if any) applicable to a particular proposal. Although the Register of Development Assessment Guidelines recently established by the Department of Planning provides an excellent resource in this respect, it does not (and cannot) provide easy assistance in establishing approval processes and plans that might need to be considered. There is no mechanism, for example, whereby a landowner or prospective applicant can obtain a single comprehensive (and legal) statement

detailing the natural resources/environmental management-orientated legislation applying to a particular piece of land (similar to, for example, the 'Planning Certificate' under the *Environmental Planning and Assessment Act 1979*).

The solution to these dilemmas must in itself be somewhat contradictory. On the one hand, users of the legislation are weary of the constant change in the legislative field. Such constant change:

(i) means that resources that would otherwise be spent in developing integrative strategies and on-the-ground implementation must be spent simply keeping abreast of such changes, and

(ii) generates uncertainty (and accompanying stress from the resultant lack of confidence) about the correctness of advice as to necessary approvals and processes.

However, on the other hand, a number of solutions will necessarily mean further change, thus exacerbating, at least in the short-term, the concerns expressed above.

The following suggestions for appropriate change are made.

(i) a 'plain language' re-draft of the *Environmental Planning and Assessment Act 1979*

Even if it is determined there should be no future policy change to the NSW planning legislation, there is a need for a re-draft of the *Environmental Planning and Assessment Act 1979* to express the existing policy settings in a simpler, clearer manner. Such a re-draft would:

(i) clearly state the objectives of each provision

(ii) remove the increasing plethora of sub-clauses and provisions which require difficult, confusing and often intricate reference to other clauses in order to interpret meaning

(iii) draw on the now extensive amount of case law in respect to the Act

(iv) be expressed in 'plain language' and include reference notes, drawing on the drafting techniques now adopted in more recent legislation (including the current re-draft of Part 3 of the Act).

(ii) review of Part 5 of the *Environmental Planning and Assessment Act 1979*

The current planning reforms have increased the range of development that does not require consent. In turn (unless the development is defined as 'exempt development'), there will be an increasing use of Part 5 of the Act (relating to the need to carry out an environmental assessment).

However, while the extensive procedural requirements of a Development Application are avoided for matters that are 'activities', the requirement that the environmental assessment in Part 5 be 'to the fullest extent possible' plus the extensive list of matters to be considered (in the Act and the Regulation) effectively means little variation between the assessment (as compared to the procedural) requirements of Part 4 (ie. development applications) and Part 5.

This is not in itself inappropriate. However, it is now time take a reformist review of Part 5 similar to that taken in respect to the other main Parts of the Act. This may also encourage a greater 'take-up' of Part 5 by Government authorities, many of whom – particularly local Councils – neglect to carry out the statutory environmental

assessments for minor and routine matters, even though the environmental implications of such matters may not be minor.

Particular issues are:

(a) there can still be confusion as to whether or not a matter comprises an 'activity'.

(b) although Part 5 seeks to take an encompassing approach, the matters set down for consideration in the Regulation are only referred to in respect to 'circumstances requiring an environmental impact statement' - rather than being referred to in terms of the overall 'duty' to consider environmental effect.

This too breeds confusion and also differences in interpretation as to the appropriate way to undertake the duty to consider environmental impact (with these different points of view reflected in different uses of the informal term 'review of environmental factors'). Some agencies see the task as an overall environmental assessment of the proposed activity (with the possibility that the review will conclude that the environmental impact will be 'significant' and therefore an Environmental Impact Statement (EIS) will be required). Other agencies tend to see the task primarily as determining whether any environmental impact will be significant, and as such whether any EIS needs to be prepared, rather than as an overall environmental assessment.

(c) the list of matters to be considered (Section 111 of the Act and Clause 228 of the Regulation) annoyingly overlap and appear as a 'grab bag' of considerations.

(d) assessments under Part 5 are becoming more complicated in that various planning instruments (particularly SEPPs and REPs) now include specific provisions in relation to 'activities' (when previously provisions in planning instruments tended to only relate to matters dealt with under Part 4). These provisions relate to:

- when a matter is 'exempt development' (and thus Part 5 does not apply)
- when an 'activity' does not need to be assessed under Part 5
- additional specific criteria that have to be included in any assessment, or with which an activity must comply.

(e) there are no current guidelines with respect to the operation of Part 5.

Confusion in respect to interpretation of the provisions of Part 5 can lead to increased litigation in terms of third-party appeals on procedural matters – which is an expensive and unsatisfactory way to resolve planning issues for all concerned. The following comments are made in respect to addressing these issues:

(a) the legislation should be re-drafted to be more precise so that different interpretations as to the fundamental nature of this Part do not arise. The informal term 'review of environmental factors' – or some similar term - should be defined within the Act itself.

(b) the list of considerations should:

- be clarified in respect to the nature of the assessment to which they relate
- be made more precise and reduced in number
- refer to the possibility of additional considerations being contained within planning instruments (if this practice is to continue).

(c) an up-to-date set of guidelines should be published. The earlier (1995) guideline '*Is an EIS Required*?' should not simply be repeated. The primacy given to Environmental Impact Statements in the title (even though the bulk of the document is actually about environmental assessment under Part 5 in

general) may have led to the confusion amongst some practitioners that the sole purpose of an environmental assessment under Part 5 is to determine whether an EIS is required.

(iii) integration of planning and natural resource management processes

Different models of integrating planning and natural resource management objectives and implementation processes to also achieve customer-focussed objectives should be explored. Two broad possibilities are suggested here:

1. The establishment of a single access point for all State Government approvals required under the various pieces of natural resource/environmental management legislation. Such a single access point could adopt the following potential roles:
   (a) at minimum, advice as to the plans, approvals and assessment criteria existing for a particular piece of land and/or proposal (*interpreter* role)
   (b) act as the receipt point for all required applications (preferably by way of a single submission) for referral to each relevant approval agency (*mailbox* role)
   (c) co-ordination and liaison between the applicant and the relevant approval agency/s (*facilitator* role)
   (d) issue required determinations (approvals or refusals) utlising the existing resources of each approval agency to carry out the required assessments (*determination* role)

2. An integrated piece of legislation – either as a single Act, or as a set of co-ordinated legislation - that will draw predominantly on existing policy settings in order to minimise the amount of re-learn required by users. However, the very act of such a drafting process would identify the presence of existing unnecessary overlaps that could then be removed and allow the establishment of clear, integrated objectives. In particular, by establishing such a simpler overall system, proposals that are of a routine nature can be more easily identified and assessed, with the intention that planning resources are better focussed on resolving matters where there are inevitable conflicts in terms of values and needs (similar to the current development of State-wide 'Codes' for 'exempt development' and 'complying development'). Such integrated legislation:
   (a) would draw on the existing experiences of the 'integrated development' provisions of the *Environmental Planning and Assessment Act 1979*
   (b) should refer to the current work being undertaken by the Local Government and Shires Association.
   (c) should refer to and learn from the implementation of the integrated processes in the New Zealand *Resource Management Act* (not mentioned in the Discussion Paper)
   (d) could utilise the recent introduction of the Standard (LEP) Instrument and the forthcoming reforms to Part 3 of the Act allowing for authorities other than local Councils to prepare local environmental plans to integrate the natural resource plan (and strategy)-making processes of Government agencies and local government into one document made under the *Environmental Planning and Assessment Act 1979*. The Standard (LEP) Instrument could be amended to add new 'Parts' dealing with for instance

fisheries matters, native vegetation matters, water resource matters (with such Parts remaining empty under each heading if the matter is not relevant within a particular local government area). Such a single (LEP) document would resolve many of the issues mentioned here about both the difficulty of being certain about the existence of necessary plans and approvals, and for the potential for conflict to arise between different legislation as a result of separate drafting. Incorporation within one document would force agencies into the discipline of ensuring consistency between provisions.

Term of reference 1(b):

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

The six 'development pathways/tracks' identified in the Leading Practice Model for Development Assessment may be suitable for adopting in a more overt manner than is currently the case in any re-draft, as suggested above, of the existing legislation.

Term of reference 1(c):

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

The 2007 Bilateral Agreement between NSW and the Commonwealth appears to be a good way to address potential overlap if it is necessary to have two levels of legislation. The list of matters of 'national environmental significance' appended to the Agreement is useful and action should be taken to ensure it is kept up-to-date. The Agreement could also be better 'signposted' on the Department of Planning website.

Similar consideration should be given to other Commonwealth legislation, for instance that dealing with telecommunications facilities and that dealing with 'dumping' at sea

Term of reference 1(d):

Climate change and natural resources issues in planning and development controls

Care should be taken in linking these two matters (climate change and natural resource management) in the one term of reference. Although climate change will have direct implications on natural resource matters, this is not the only area that climate change will impact on; and there are a large number of issues other than climate change that impact on natural resource management.

It is becoming apparent that climate change issues are significant and will require substantial State resources to address.

Term of reference 1(e):

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

Greater recognition of competition policy matters within land use planning and zoning, as is currently being advocated by certain groups, will mean a significant shift in current approaches. Any such change will need careful consideration and public discussion.

In particular, there could be significant impacts for the planning, development and design of civic precincts, public domain areas and other infrastructure, including the increasing emphasis, within the suite of Regional Strategies, on 'centres' as a way of:

(i) efficiently delivering community infrastructure

(ii) reducing travel movements (with the consequent environmental and social benefits that can result)

(iii) creating a sense of 'place' and thus community.

Any perceived benefits in reduced costs of private goods and services through increased competition through a relaxation of current land use strategies needs to be carefully weighed against any increase in the monetary and non-monetary costs in these areas.

In addition, any 'free-ing' up of zoning regulations to allow ad-hoc siting of new commercial developments can harm existing businesses and break down the certainties as to future potential competition that individual businesses can now derive from zoning strategies.

If effect on competition is to be given greater importance, any evaluation is better done at the strategic land use stage (and consequently reflected within land use zonings and other provisions within local environmental plans) rather than at the stage of assessing individual development applications. Establishing a policy position in this way (ie. in the strategic plan and the local environmental plan) will give greater certainty and up-front advice for individual landowners and applicants. It is noted that this is generally the situation at present.

Term of reference 1(f):

Regulation of land use on or adjacent to airports

It would seem to be imperative that the impact of non-aviation development within airports be subject to State planning requirements in order to:

(i) properly assess implications on local land use and infrastructure planned and developed to accord with local and regional objectives

(ii) generate the certainties as to future potential competition that individual businesses need.

The need for these public 'goods' should outweigh the non-aviation activities of airport operators and should this be reflected in the relevant Commonwealth legislation.

Term of reference 1(h):

Implications of the planning system on housing affordability

Reducing up-front costs for home purchasers is important (in order to reduce the purchase price that is then also subject to mortgage interest rates). However, it needs to be recognised (by all – the Government, the community at large and by individual ratepayers) that home-owners invariably still demand a certain level of public infrastructure and amenity. This has to be paid for in some way. Traditionally this has been through the Council rating system. The pegging of rates has conceivably been in large measure the cause of current high levels of development contributions for example. Any reduction in contribution levels may well have to be accompanied by a review of the practice of pegging local government rates.

Concern is expressed in relation to current moves, as nominated in the Metropolitan Strategy (*City of Cities - A Plan for Sydney's Future*, 2005), to amend strata title legislation to facilitate the redevelopment of older and/or low density strata title property as a way to assist housing affordability through increased supply. This action appears to ignore two important points:

(i) such property often provides a much-needed resource of affordable housing within the private market

(ii) forced sale/purchase of strata units can generate significant social and economic disruption to any existing occupiers unwilling to sell/re-locate. Sydney has already experienced examples of the harassment that can occur in such situations when, particularly in the 1970s, the minimum allotment size set for new residential flat development, as established in Council codes, required allotment amalgamations. There is a substantial risk that this dis-honourable, if unintended, outcome of planning policies will be repeated.

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