Submission No 2

INQUIRY INTO ENVIRONMENTAL PLANNING INSTRUMENTS (SEPPS)

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Dear Regulation Committee:

Re: Inquiry into Environmental Planning Instruments (SEPPs)

We would like to thank you for the opportunity to make a written submission in connection with your inquiry into the making of environmental planning instruments (SEPPs) under section 3.29 of the *Environmental Planning and Assessment Act 1979*.

By way of introduction, we would reiterate the important role played by the Regulation Committee in providing parliamentary oversight of delegated legislation. The Committee noted in its October 2020 inquiry report into the making of delegated legislation in New South Wales that the parliamentary scrutiny of delegated legislation strengthens the lawmaking process and in turn promotes public confidence in the institutions of government.[1] We agree.

The scrutiny work carried out by this Committee is essential to upholding the integrity of lawmaking in a democratic society founded on the rule of law. It helps to ensure accountability and transparency when the executive branch exercises delegated lawmaking powers and protects Parliament's constitutional role as lawmaker-in-chief.[2]

Delegated legislation is the principal form of lawmaking in New South Wales. In 2019, 94% of the total number of new legislative instruments made in the state were in the form of delegated legislation. In the same year, delegated legislation made up 87% of the total number of new pages of legislative text. The complete reliance on delegated legislation calls for appropriate parliamentary scrutiny to prevent executive overreach and maintain a balance in lawmaking between Parliament and the executive.

We are pleased to see the Committee take up this inquiry into an important field of law to ensure that lawmaking in this area meets appropriate standards of accountability and transparency that we expect in a democratic society.

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1 Regulation Committee, *Making of Delegated Legislation in New South Wales* (Report 7, October 2020) at viii.

2 Parliament is constitutionally vested with general legislative power: *Constitution Act 1902*, s 5.

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Our comments focus on the legislative scheme under which SEPPs are made in New South Wales (and similar instruments in South Australia). We have not considered the merits, or substance, of any particular planning instrument or planning policy.

The Regulatory Framework for SEPPs

Section 3.29 of the *Environmental Planning and Assessment Act 1979* provides:

> **Governor may make environmental planning instruments (SEPPs)**
>
> (1) The Governor may make environmental planning instruments for the purpose of environmental planning by the State. Any such instrument may be called a State environmental planning policy (or SEPP).
>
> (2) Without limiting subsection (1), an environmental planning instrument may be made by the Governor to make provision with respect to any matter that, in the opinion of the Minister, is of State or regional environmental planning significance or of environmental planning significance to a district within the meaning of Division 3.1.

Section 3.30 purports to impose consultation requirements in relation to SEPPs and reads as follows:

> **Consultation requirements**
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> (1) Before recommending the making of an environmental planning instrument by the Governor, the Minister is to take such steps, if any, as the Minister considers appropriate or necessary—
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> (a) to publicise an explanation of the intended effect of the proposed instrument, and
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> (b) to seek and consider submissions from the public on the matter.
>
> (2) Before recommending the making of an environmental planning instrument by the Governor, the Minister must consult with the Greater Sydney Commission if—
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> (a) the proposed instrument relates to land within the Greater Sydney Region, and
>
> (b) the Minister is of the opinion that the proposed instrument is likely to significantly affect the implementation of a strategic plan affecting that Region.

While the section is entitled “Consultation requirements”, it does not impose any concrete minimum standards of consultation for SEPPs outside of those affecting land in the Greater Sydney Region. For all other SEPPs, it is entirely within the Minister’s discretion as to whether any consultation (or even publishing an explanation for the new law) would be “appropriate or necessary”. In the case of SEPPs that relate to the Greater Sydney Region, the section requires consultation only with one body – the Greater Sydney Commission – where the Minister is of the opinion that the SEPP would “significantly affect the implementation of a strategic plan” relating to the Region. This section cannot therefore be characterised as imposing any genuine consultation requirements with individuals likely to be affected or members of the community in relation to SEPPs.

It is clear from a reading of the Act that SEPPs – and indeed all forms of environmental planning instruments – are extremely powerful. They can significantly and directly implicate the rights and interests of individuals.[3] Under section 3.14, SEPPs are permitted to regulate the environment, control development, reserve land, regulate affordable housing, regulate animals and plants, regulate advertising, and zone land with certain limitations (among other powers included elsewhere in the Act or in other legislation). SEPPS are also permitted to include provisions for “controlling any act, matter or thing” in relation to the powers specified in section 3.14.

The broad legal effect of SEPPs can also be seen in other parts of the Act. For example, under section 1.4, SEPPs are permitted to prescribe “affordable housing”, impose “development standards” and determine a “prohibited development”. Under section 1.6, SEPPs may exempt development from the ordinary requirements for consent, environmental impact assessment, infrastructure approval and building and subdivision certification.[4] District strategic plans must have regard to any applicable SEPP under section 3.4(4).

What is remarkable about SEPPs, however, is the Henry VIII provision that is included in section 3.16 of the Act. This section permits a SEPP to exempt the subject-matter of the instrument from *any other law in New South Wales*, including primary legislation enacted by Parliament. In our view, a Henry VIII provision is one that authorises the executive to counteract, countermand or amend the legal effect of primary legislation through the exercise of discretionary delegated power. Such provisions elevate executive lawmaking above ordinary statute law enacted by Parliament. To be clear, this provision allows a SEPP to take legal priority over any other law in the state except for the Act, flipping the ordinary legal hierarchy on its head. This section goes well beyond placing a SEPP on an equal footing with legislation enacted by Parliament, it transforms a SEPP into a ‘super law’ that operates *above* all such legislation. In a sense, a SEPP is authorised to have a quasi-constitutional status. In

[3] SEPPs are one of two kinds of environmental planning instrument, the other being a local environmental plan (LEP): s 3.13(2). This section therefore reviews select provisions of the *Environmental Planning and Assessment Act 1979* that refer to ‘environmental planning instruments’ that would include both kinds of plans.

[4] Further rules relating to these concepts are included later in the Act.

our view, this provision raises serious constitutional concerns about the rule of law, the separation of powers and parliamentary sovereignty.[5]

The sole accountability mechanism prescribed for the breathtaking power in section 3.16 of the Act is that the Governor must approve its use before the SEPP is made (s 3.16(3)), which can only take place with the consent of the minister responsible for the administration of the law that will be disapplied by the SEPP (s 3.16(4)). This mechanism is completely unsatisfactory to minimise the risk of executive overreach for one key reason: it involves the executive checking the executive.

Other provisions of the Act impose requirements as to the form of a SEPP (s 3.20) and "regular and periodic" review, although a specific timeline is not set out in the Act (s 3.21). Even with no advance notice or the publication of draft legislative text, SEPPs are permitted to come into legal force on the day they are posted on the NSW Legislation website (s 3.24(5)).

Notably, for the environmental planning instruments made by a local authority, the Act imposes more onerous requirements that include the preparation of explanatory material, details of community consultation and a more robust review process: see division 3.4.

The Use of SEPPs

It appears that SEPPs are a favoured instrument of the government as they are used frequently. The NSW Legislation website provides a numerical snapshot:[6]

- 2021 – 11 SEPPs were made (as of writing)
- 2020 – 50 SEPPs were made
- 2019 – 28 SEPPs were made
- 2018 – 42 SEPPs were made
- 2017 – 22 SEPPs were made

In 2021, 2020 and 2019, there were more SEPPs made in New South Wales than statutes enacted by Parliament.

SEPPs have been used to extensively regulate a tremendous variety of matters including subdivision in the Sydney Harbour, inland rail, trading hours on New Year's Eve, mining properties, air and noise, advertising and signage, child care, vegetation, housing codes, affordable housing, container recycling, development projects on particular estates, catchments, amusement parks, senior and disability housing, cladding and decorative work, garden centres, artisanal food and drink, boarding houses, coastal management, hospitals, water and emergency services, artificial lakes, data storage, energy storage, koala habitat, bush fires, outdoor dining, water treatment, restaurants and bars, arts and culture, dog-proof fences, outdoor events, warehouses, health services and shipping containers.

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[5] See the recent and powerful discussion by Justice Côté of these kinds of constitutional concerns in the recent judgment of the Supreme Court of Canada in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [222-295].

[6] These numbers include SEPPs that were made to amend or repeal an existing SEPP.

Disallowance, Scrutiny and Sunsetting of SEPPs

SEPPs are not subject to the ordinary rules for delegated legislation relating to disallowance, systematic parliamentary committee scrutiny, or sunsetting (automatic revocation or expiration).

(a) Disallowance

Section 41 of the *Interpretation Act 1987* provides an important parliamentary accountability mechanism for delegated legislation as it allows for the disallowance (revocation) of 'statutory rules' by either House of Parliament through a simple majority resolution. A 'statutory rule' is defined as a "regulation, by-law, rule or ordinance" made by the executive or a rule of court (s 21(1)). This disallowance procedure therefore does not apply to an environmental planning instrument, which is separately defined by the Act as incorporating the definition in the *Environmental Planning and Assessment Act 1979*. The conclusion that SEPPs are not disallowable is confirmed by section 5(6) of the *Interpretation Act 1987*, which lists certain sections of the Act that do apply to an environmental planning instrument. Section 41 (disallowance) is not included in that list.

(b) Parliamentary scrutiny

Because SEPPs are not disallowable under the *Interpretation Act 1987*, they cannot be scrutinised in the ordinary way by the Legislation Review Committee. There is therefore no systematic parliamentary oversight of new SEPPs that are made. This is because section 9(1)(a) of the *Legislation Review Act 1987* tasks the Legislation Review Committee with scrutinising "all regulations while they are subject to disallowance".

While section 9(1)(b) of the *Legislation Review Act 1987* permits the Legislation Review Committee to draw to Parliament's attention "any … regulation on any ground", the definition of "regulation" in section 3(1) means a "statutory rule, proclamation or order that is subject to disallowance", which does not include SEPPs.[7]

(c) Sunsetting

Section 10(2) of the *Subordinate Legislation Act 1989* provides a default sunsetting period of five years for all newly made delegated legislation. Because this section only applies to a "statutory rule", defined in section 3(1) to mean a "regulation, by-law, rule or ordinance", it does not apply to SEPPs.

[7] Under the current definitions of "regulation" and "statutory rule" in s 3(1) of the *Legislation Review Act 1987*, environmental planning instruments would be excluded from scrutiny by the Legislation Review Committee even if they were disallowable under the *Interpretation Act 1987*. These definitions would need to be changed if SEPPs were to be scrutinised by the Legislation Review Committee.

Approach to SEPP equivalent in South Australia

In South Australia, the legislative structure is set up differently to that in New South Wales. In particular, there exists parliamentary oversight of some policy documents and the ability for Parliament to disallow policies in certain circumstances. The South Australian system for controlling the use and development of land and the systems for pollution control, vegetation clearance controls and natural resource management are separate although linked through various referral processes. In discussing the South Australian system, we focus on two pieces of legislation – the *Environment Protection Act 1993* and the *Planning, Development and Infrastructure Act 2016* – because it is in those statutory schemes that there is provision for parliamentary review of some policy documents created by the executive.

(a) Environment Protection Act 1993

The *Environment Protection Act 1993* is the state's principal pollution control legislation. It creates a general obligation to act in a way that will not cause environmental harm and sets up a process whereby prescribed activities of environmental significance must be licensed to operate by way of an environmental authorisation. The Act contains an extensive set of objects in section 10, which seek to ensure that environmental harm does not occur and that the principles of ecologically sustainable development are paramount in all decision-making processes.

The regulatory authority under the Act is the Environment Protection Authority (EPA). Environment Protection Policies (EPPs) may be made by the EPA for any purpose contemplated by the legislation or for any purpose directed towards securing the objects of the Act (s 27(1)). The policies may set out requirements, standards, goals and guidelines, the matters that need to be taken into consideration when applications for an environmental authorisation are made or when environmentally significant development proposals are referred to the EPA by the relevant planning authority for EPA input and sometimes direction. EPPs may also specify that certain standards or requirements within a policy are mandatory.

The current set of EPPs are:

- Environment Protection (Air Quality) Policy 2016
- Environment Protection (Movement of Controlled Waste) Policy 2014
- Environment Protection (National Pollutant Inventory) Policy 2008
- Environment Protection (Noise) Policy 2007
- Environment Protection (Used Packaging Materials) Policy 2012
- Environment Protection (Waste to Resources) Policy 2010
- Environment Protection (Water Quality) Policy 2015

EPPs are not regulations but they have the characteristic of something which has more weight than the usual policy document. They are central to the effectiveness of the regulatory scheme established by the *Environment Protection Act*. The Act provides the framework for the regulatory system, but the detail and intricacies of the day-to-day operation are found in the EPPs.

There is a process set out in section 28 of the Act for the making of EPPs which requires preparation of a draft policy by the EPA, consultation with the Minister, at least two months of general public consultation, review of the public submissions and, if deemed appropriate, amendment of the policy and finally approval by the minister before a declaration is made in the *Gazette* by the Governor to the effect that the EPP is authorised.

Within 14 days of the declaration of an authorised EPP, the minister must refer the EPP to the Environment, Resources and Development Committee of the Parliament (ERD Committee) and within 14 sitting days cause the policy to be laid before both Houses of Parliament (s 30(1)). The ERD Committee can resolve to suggest amendments to the policy, which the minister may or may not agree to.

If either House of Parliament passes a resolution disallowing the policy, the policy ceases to have effect. There are time limitations within which a notice of motion for disallowance can be made (s 30(5)).

(b) Planning Development and Infrastructure Act 2016

Under the *Planning Development and Infrastructure Act 2016* (PDI Act), there are four key types of policy documents:

1. a state planning policy,
2. a regional plan,
3. the Planning and Design Code, and
4. design standards.

These are described as 'designated instruments' under section 70. As with EPPs under the *Environment Protection Act*, there are a range of requirements for the preparation and drafting of the initial policies and then subsequent amendments. These importantly include consultation with various government bodies and most importantly, the community, in accordance with a Community Engagement Charter (s 73).

The designated instrument most akin to SEPPs is the Planning and Design Code. It is the policy document against which development proposals must be assessed (s 102(1)(a)). It is within the Code that one finds land use zoning designations, the policies indicating the desirable form of development and a wide range of both quantitative and qualitative requirements for development. The full version of the Code only became operational in March 2021. Leading up to its operation it was heavily scrutinised by industry groups, local government and the community sector.

There is a very similar system for the referral of designated instruments to the ERD Committee as that which applies to EPPs. Time frames do differ. For example, the minister must refer the designated instrument to the ERD Committee within 28 days after the instrument takes effect. The Planning and Design Code has been designed to be used as an online policy tool and takes effect once published on the South Australia Planning Portal (s 73(12)(b)).

Once the ERD Committee receives the designated instrument it has three options:

1. Resolve not to object to the instrument;
2. Resolve to suggest amendments; or
3. Resolve to object to the designated instrument.

If the ERD Committee resolves to object to a designated instrument, then copies of the designated instrument are laid before both Houses of Parliament (s 74(11)). The designated instrument will cease to have effect if either House of Parliament resolves to disallow it. There are time limits within which any notice of motion for disallowance must be made.

There is, in the PDI Act, the ability to circumvent these parliamentary oversight provisions. The minister can consult with the ERD Committee before the designated instrument is finalised, and if the ERD Committee so resolves, no further consultation will be required once the designated instrument is authorised (s 74(15)). Obviously, this means that Parliament as a whole will not have the opportunity to consider disallowance in those circumstances.

South Australia's system for review of certain environmental and land use policies by the ERD Committee is modelled on the system that applies under the state's *Subordinate Legislation Act 1978* (see below) for review by the Parliament's Legislative Review Committee of regulations made by the executive pursuant to regulation-making powers contained in state statutes.

It is a system which has been in place since at least 1993 when the *Development Act* and the *Environment Protection Act* were enacted. It was particularly important to have parliamentary scrutiny in relation to the land use planning policies developed under the *Development Act* because they were in a number of significant instances replacing controls which were previously contained in regulations, which had always been able to be reviewed by both Houses of Parliament.

A similar situation applied in relation to EPPs. The *Environment Protection Act* replaced a number of separate statutes dealing with waste, clean air, noise and water quality. With each of those statutes the relevant standards and measures were found in regulations under the specific statutes. These were put in EPPs under the new system and presumably Parliament considered that its oversight in scrutinising such controls should be maintained.

Recommendations

To further the core democratic goals of strengthening accountability and transparency in the lawmaking process, we would respectfully make the following recommendations in relation to SEPPs:

(a) Limit discretion by establishing clear statutory criteria and limits for SEPPs

The *Environmental Planning and Assessment Act 1979* should be amended to provide clear statutory criteria that impose meaningful limits on the availability and use of SEPPs by the executive.

(b) Make all new SEPPs subject to parliamentary committee scrutiny

The relevant legislation should be amended to ensure that SEPPs are subject to parliamentary committee scrutiny in the ordinary way.

(c) Make all new SEPPs subject to parliamentary disallowance

The relevant legislation should be amended to provide that SEPPs are subject to parliamentary disallowance in the ordinary way.

(d) Abolish or tightly restrict the availability of Henry VIII powers relating to SEPPs

The *Environmental Planning and Assessment Act 1979* should be amended to abolish Henry VIII powers relating to SEPPs. Alternatively, any such powers under the *Environmental Planning and Assessment Act 1979* should be strictly limited and their exercise subject to a process of heightened parliamentary scrutiny, such as an affirmative resolution procedure.

(e) Impose stringent consultation requirements before SEPPs can be made

The *Environmental Planning and Assessment Act 1979* should be amended to impose a stringent and mandatory consultation process with relevant stakeholders before a SEPP can be made.

(f) Require the publication of draft text and explanatory statements for SEPPs

The *Environmental Planning and Assessment Act 1979* should be amended to require the publication of draft text and explanatory statements for SEPPs to ensure meaningful consultation and to provide general public notice of a potential change to the law.

(g) Tighten up periodic review requirements for existing SEPPs through sunsetting

The relevant legislation should be amended to ensure that existing SEPPs are included in ordinary sunsetting provisions, which will necessitate their periodic review.

We would be happy to clarify or expand upon any aspect of this written submission.

Thank you again for the opportunity to contribute to this important inquiry.

Yours sincerely,

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