Submission No 10

INQUIRY INTO ENVIRONMENTAL PLANNING INSTRUMENTS (SEPPS)

Organisation: Timber NSW

Date Received: 21 June 2021

TIMBER NSW

18 June 2021

Regulation Committee
NSW Legislative Council
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Dear Members of Legislative Council Regulation Committee

Timber NSW submission to the NSW Legislative Council Inquiry into Environmental Planning Instruments (SEPPS)

Thank you for the opportunity for making a late submission to this inquiry. We were not aware of this Inquiry yet it was the major issue impacting the industry and broader agriculture in 2020.

Timber NSW was established in 1906 and comprises over 50 member companies. Together, they utilise over two thirds of native hardwood and cypress timber (all grades) produced on State forest and private property within NSW. The production and manufacturing activities of our members generate economic activity valued in the hundreds of millions of dollars and support diverse range of jobs in rural, regional and metropolitan centres.

Yours faithfully,

Maree McCaskill
Chief Executive Officer

Inquiry into Environmental Planning Instruments (SEPPs)

TERMS OF REFERENCE

1. That the Regulation Committee inquire into and report on:

(a) the making of environmental planning instruments (SEPPs) under section 3.29 of the *Environmental Planning and Assessment Act 1979*,
(b) whether SEPPs should be disallowable under the *Interpretation Act 1987*, and
(c) any other related matters.

2. That the committee report by the first sitting day in August 2021.

SUBMISSION

A State Environmental Planning Policy

'SEPPs can be described as an oligarchical process within an elected government, being without transparency, accountability or oversight'.

Parliament's Authorisation

The Environment Planning and Assessment Act 1979, (EP&A Act (NSW)) section 3.29 forms part of Part 3 of the Act which establishes 'Planning Instruments'. This term can mean one of three planning instruments; 'strategic planning' (SP), 'State Environmental Planning Policies', (SEPPs) 'Local Environmental Plans' (LEPS) and 'Development Control Plans' (DCPs). The last two are associated with Local Government Authorities. Collectively, these 'planning instruments' are referred to as 'environmental planning instruments' (EPIs).

An Executive Tool: a carve out from Parliamentary oversight.

Parliament created EPIs, and then handed total control of their creation and approval to the Executive, being Minister for Planning and particularly the planning and environmental departments.

There is absolutely no oversight, transparency, accountability or good governance or management when it comes to the creation of a SEPP.

There should be a difference or distinction established between environmental planning instruments. LEPs and the DCPs are nowadays different instruments to SEPPs. The former two are created by Local Government Authorities. Local Government is established under the Constitution Act 1902 (see Part 8) and is a construct of the NSW State Parliament. Whilst the preparation of an LEP or a DCP is done by a Local Council, and the final approval sits with councillors of the relevant Council, the content of these instruments is closely monitored by the NSW Department of Planning in whatever form it might take. There is mandated consultation in the process of the formation of these instruments.

SEPPS do not have this form of mandated community consultation of an LEP and DCP. Instead, the lack of mandated involvement confirms the DPIE as a quasi-independent body with total independence in the creation of a SEPP

Timing of consultative processes and a released final product is not stated. Sometimes a SEPP may have a consultative period. Such consultation might close for a particular SEPP but it can be gazetted years later after the consultation, as occurred with Koala SEPP 2019. This is unsatisfactory in comparison to the open and transparent passage and process that Parliamentary bills follow. This is important as a SEPP is analogous to an Act of Parliament in its impact.

Essentially, and not putting the issue at too high a level, a SEPP can be described as an oligarchical process within an elected government, being without transparency, accountability and oversight.

This is why this Inquiry and the terms of reference are an important issue for the community of NSW. The review is of some very odd legislation and procedures in an elected constitutional representational democracy. A constitutional parliamentary framework supposedly sponsors strong workable checks and balances in the interests of the voting public. Section 3.29 of the EP&A Act (NSW) as an Act of Parliament handing to the Executive discretionary administration of SEPPs is contrary to this principle and really sits as an unfettered authority limited only by section 31 of the Interpretation Acts 1987 (NSW).

The Making of a SEPP

Section 3.29 of the EP&A Act states the Governor may make a SEPP.

The process for the formal making a SEPP is through making a recommendation to the Governor in Executive Council. (See Section 3.30 EP&A Act and Division 1 and 2 of the Constitution Act 1902 NSW.)

Section 3.30 of the EP&A Act sets out possible steps the Minister may take before making a recommendation to the Governor - one being possible consultation. These are Ministerial discretionary steps only.

Section 3.14 of the EP&A Act sets out the scope of a SEPP. The scope is extremely wide and covers most if not all issues to do with planning and the environment. These are matters of policy which would be expected to be debated in a parliamentary context. That the Executive can 'legislate' without Parliamentary oversight or involvement through the use of the SEPPs, is extremely exceptional. Particularly when one looks to the legislative oversight the Parliament has over regulations. (See the Subordinate Legislation Act 1989[1].

Section 3.21 of the EP&A Act sets out some provisions concerning inconsistencies between SEPPs but is silent on any inconsistency between a SEPP and a Parliamentary Act and its Regulations.

It has been suggested that section 3.29 of the EP&A Act 1979 (NSW) is a Henry VIII provision . A Henry VIII provision actually sits in section 3.16 of the EP&A Act 1979 (NSW).

A reference from the UK Parliament assists:

> 'Henry VIII clauses' are clauses in a bill that enable ministers to amend or repeal provisions in an Act of Parliament using secondary legislation, which is subject to varying degrees of parliamentary scrutiny.

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1 Subordinate Legislation

As well as Acts, laws are also made by subordinate legislation, also known as 'statutory rules'. Statutory rules are laws made under the authority of an Act of Parliament, not required to be passed by the Parliament. These include regulations, by-laws, ordinances and rules of a court.

All statutory rules must be tabled in both Houses within 14 sitting days after being published on the NSW Legislation Website. Either House may disallow a statutory rule, by way of a motion passed by a House, so long as the notice of motion is given within 15 sitting days after the rule has been tabled. If a "disallowance" motion is agreed to, the rule is revoked.

Extracted from the NSW parliamentary web page:

https://www.parliament.nsw.gov.au/la/proceduralpublications/Pages/Factsheet-6---Making-Laws.aspx

> The Lords Delegated Powers and Regulatory Reform Committee pays particular attention to any proposal in a bill to use a Henry VIII clause because of the way it shifts power to the executive.
>
> The expression is a reference to King Henry VIII's supposed preference for legislating directly by proclamation rather than through Parliament.
>
> https://www.parliament.uk/site-information/glossary/henry-viii-clauses/

As does an extract from a Submission of the NSW Parliamentary Counsel's Office to the Inquiry into the making of delegated legislation in New South Wales of the NSW Legislative Council's Regulation Committee – 25 May 2020:

> 2.1 The term 'Henry VIII clause' is generally used to describe a clause in a principal Act of Parliament that allows for the making of subordinate, or delegated, legislation, and confers the ability for the delegated legislation to amend the principal Act of Parliament. The term is usually used pejoratively and recalls the Proclamation by the Crown Act 1539[1], which gave the named monarch's proclamations force 'as though they were made by act of parliament'. Despite containing the caveat that the proclamations 'shall not be prejudicial to any person's inheritance, offices, liberties, goods, chattels or life', the delegation was sufficiently wide- ranging that it is understood as representing the height of executive power unchecked by, indeed enabled by, the legislature.
>
> 2.2. However, almost all modern legislation involves delegations to the executive of power to make delegated legislation. A standard regulation-making power is included in most Acts, in the following terms—
>
> > The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
>
> 2.3. This is necessary for the efficient functioning of government in complex societies, and avoids precious parliamentary time being absorbed with trifling matters. In a sense, all delegated power confers the ability to amend legislation, even if it be only to change a time period by which an event must occur, or update penalty amounts for infringements imposed by the primary legislation. Under a broad definition, all delegated power could be viewed as a Henry VIII clause, and the term is unhelpful. However, this is not what is generally meant by the term.

https://www.parliament.nsw.gov.au/lcdocs/submissions/67982/0007%20NSW%20Parliamentary%20Counsel%27s%20Office.pdf

Division 3.2 of the EP&A Act is a worst case scenario than a Henry VIII clause.

The EP&A Act 1979 (NSW) allows the Minister and his Department to create and gazette an instrument of which Parliament has no oversight.

The NSW Parliamentary Counsel's Office submission (above) sets out modern practice with the NSW Parliament's practice of drafting principles for legislation. The point to be made is that SEPPs are well outside these principles.

Recommendations

- SEPPs as an 'instrument' under section 3 of the Interpretation Act 1987 NSW or as an 'Environmental Planning Instrument' under section 1.4 and Part 3 of the EP&A Act 1979 (NSW) need to be separated out into their own legislative definition and category in both these Acts.
- If this legislative change is not endorsed by the Executive, then within the NSW Legislative Council 's Standing Orders, Sessional Orders or other procedural methods must be found to cause oversight of this extraordinary quasi-legislative power of the Executive.
- As a matter of principal, the Executive should be accountable to the Parliament at regular intervals as to why any legislation with a Henry VIII provision is required. This should not be restricted to just these clauses.
- The Executive should be accountable to the Parliament at regular intervals on the making of any SEPPs by tabling them before they can be gazetted.
- Such a mechanism should also apply to any power allowing the Executive to originate other legislative style instruments. Even in times of a NSW State emergency. This does not prohibit these types of legislative mechanisms, but it does permit accountability and transparency on this seemingly unfettered Executive power.

Consultation:

Section 3.30 of the EP&A Act states:

(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—

(a) to publicise an explanation of the intended effect of the proposed instrument, and

(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—

(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.

The Greater Sydney Commission has at least the possibility of being consulted IF the proposed SEPP relates to land within the Greater Sydney Region AND the Minister is of the opinion that the SEPP is likely to significantly affect the implementation of a strategic plan for the Greater Sydney Region. In these circumstances it is mandatory for the Minister to consult with Greater Sydney Region. Note there is a discretionary power embedded here as the Minister or, more likely an Officer of the Department of Planning, has to form an opinion of 'likely to significant affect'.

How does Parliament have oversight of this exercise of administrative power? It does not. Placing this instrument on the Table of a Parliamentary Chamber would at least cast some light on the process.

For any other SEPP, (Excluding Greater Sydney Region) the Minister is to take such steps, IF ANY, as the Minister considers appropriate or necessary to publicise an explanation of the intended effect of the proposed instrument and to seek and consider submissions from the public on the matter. This is entirely a matter of Ministerial discretion.

Again, how does Parliament oversee this exercise of administrative power? It does not.

It is noted that in section 3.25 of the EP&A Act 'the relevant authority' MUST consult with the CEO of the office of Environment and Heritage, in the opinion of the relevant authority, critical habitat or threatened species, populations or ecological communities, or their habitats, will or may be adversely affected by the proposed SEPP. Why is consultation regarded as discretionary based on an 'opinion'? There should be a consultation process for all SEPPs without an opinion being formed to commence the process. This way both the private sector and the public sector can participate.

Timber NSW has had the opportunity to see the University of Adelaide's submission. This submission states the following which is very instructive and enlightening:

It appears that SEPPs are a favoured instrument of the government as they are used frequently. The NSW Legislation website provides a numerical snapshot (These numbers include SEPPs that were made to amend or repeal an existing SEPP).:

- 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.

Aside from possibly a GIPA Request it is difficult to ascertain how many of these 153 SEPPS were subject to public consultation and inter-departmental /agency consultation and how long was the date of gazettal from the cessation of any consultation? The DPIE website does not give any information.[2] So what consultation was recommended and not approved by the Minister, or not recommended and not suggested by the Minister, is at large. But if 2020 saw 50 SEPPs there was certainly no consultation for one fifth of these. If there was, then there was no public notices. A further example of why Parliamentary oversight is required.

Consultation should be notified not just on the website of the Department but also in newspaper advertisements of the major metropolitan papers whilst they still remain in production. If Government agencies can advertise programmes and employment opportunities in this way, it is appropriate for proposed SEPP consultations to follow suit.

The consultative process should have as one of its primary documents, apart from the text of the SEPP, an explanatory memorandum that is not a summary of the text of the SEPP. It MUST be like the former explanatory memorandum for Parliamentary Bills that sets out an independent statement of policy. A process that would greatly assist the understanding and implementation of a Bill if it became an Act.

[2] A GIPA request will only achieve information if the right question is asked otherwise a round of correspondence will occur as the applicant tries to second guess the question that will deliver the information. (A GIPA request is a mind exercise deserving of 'Yes Minister' regardless of what Department is issued with the request.)

Recommendations:

- At the very least, it should be mandatory for the Minister to publish with a SEPP an explanatory memorandum of the SEPP to be approved in Executive Council at least 21 days before the actual approval. (For 'Executive Council', see Division 2, Part 4 The Executive, Constitution Act 1902 (NSW)).

- It should be mandatory for the Minister to consult with the public and accept submissions from the private and public sector over a two month period.

- The SEPP should then be presented to the public twice, a final draft within 6 months of the close of consultation and a final copy 21 days before being recommended to the Governor. These exposure events are in addition to any Tabling the parliament might require for Parliamentary debate or consideration.

- The call for submissions should not just be on the Departmental website but also advertised in major newspapers. Notification of the two final dates of: a final draft within 6 months of the close of consultation and a final copy 21 days before being recommended to the Governor, should be notified in the same manner.

Scope of an Environmental Planning Instrument

Section 3.14 of the EP&A Act states:

3.14 Contents of environmental planning instruments

(cf previous s 26)

(1) Without affecting the generality of section 3.13 or any other provision of this Act, an environmental planning instrument may make provision for or with respect to any of the following—

(a) protecting, improving or utilising, to the best advantage, the environment,

(b) controlling (whether by the imposing of development standards or otherwise) development,

(c) reserving land for use for the purposes of open space, a public place or public reserve within the meaning of the *Local Government Act 1993*, a national park or other land reserved or dedicated under the *National Parks and Wildlife Act 1974*, a public cemetery, a public hospital, a public railway, a public school or any other purpose that is prescribed as a public purpose for the purposes of this section,

(d) providing, maintaining and retaining, and regulating any matter relating to, affordable housing,

(e) protecting or preserving trees or vegetation,

(e1) protecting and conserving native animals and plants, including threatened species and ecological communities, and their habitats,

(f) controlling any act, matter or thing for or with respect to which provision may be made under paragraph (a) or (e),

(g) controlling advertising,

(h) such other matters as are authorised or required to be included in the environmental planning instrument by this or any other Act.

(1A)–(3) (Repealed)

(3A) An environmental planning instrument may make provision for any zoning of land or other provision to have effect only for a specified period or only in specified circumstances.

(4) An environmental planning instrument that makes provision for or with respect to protecting or preserving trees or other vegetation may make provision—

(a) for authorising the council (or other person or body) to determine the trees or other vegetation included in or excluded from the relevant provisions, and

(b) for requiring a permit, approval or other authorisation to remove or otherwise affect trees or other vegetation that is granted by the council (or other person or body), and

(c) for an appeal to the Court against a refusal to grant any such permit, approval or other authorisation.

This section seemingly merges the scope of LEPs and SEPPs. Clauses 1(c), and 3A contain material that would normally be found in an LEP and not a SEPP. If SEPPs are to be separated from EPIs, then the contents of this section will need to be separated into categories associated with the various instruments making up EPIs.

Previously, SEPPS that were issued were mostly to do with urban or peri urban areas of the State. Section 3.14 makes it clear that a SEPP has no geographical limitation.

NSW land management outside urban and peri-urban area is an area of NSW State Government policy which sits with difficulty within the SEPP regime. It has its own statutory regime under the Local Land Services Act 2013 (NSW). Forestry is included in this land management oddly by a legislative carve out of forestry into its own legislative framework within the agricultural land management legislation. This does not remove forestry from greater legislative coverage overall.

Relevant legislation for forestry is :

- the Local Land Services Act 2013, (NSW)

- the Biodiversity Conservation Act 2016 (NSW),
- the Forestry Act 2012 (NSW),
- the Regional Forest Agreements Act 2002 and (Cwlth), and the
- Environment Conservation Biodiversity Protection Act 1998 (Cwlth) .

Relevant statutory regulatory instruments are:

- Private native forest plans or private native forestry codes of practice,
- Integrated forestry operations approval (IFOA) (358 pages) , and
- Bi-Lateral Commonwealth-State Regional Forest Agreements.

Overall, there is considerable legislative and regulatory coverage. For forestry in NSW, it is the most highly regulated forestry industry in the world, not just Australia. Experience has shown that SEPPs do cut across this legislative framework.

Parts of section 3.14 of the EP&A Act (NSW) show the possible scope of a proposed SEPP relevant to forestry, are:

> (a) protecting, improving or utilising, to the best advantage, the environment,
>
> (e) protecting or preserving trees or vegetation,
>
> (e1) protecting and conserving native animals and plants, including threatened species and ecological communities, and their habitats,
>
> (f) controlling any act, matter or thing for or with respect to which provision may be made under paragraph (a) or (e),
>
> (4) An environmental planning instrument that makes provision for or with respect to protecting or preserving trees or other vegetation may make provision—
>
> (a) for authorising the council (or other person or body) to determine the trees or other vegetation included in or excluded from the relevant provisions, and
>
> (b) for requiring a permit, approval or other authorisation to remove or otherwise affect trees or other vegetation that is granted by the council (or other person or body), and
>
> (c) for an appeal to the Court against a refusal to grant any such permit, approval or other authorisation.

Significantly for this Inquiry, all of the legislative and regulatory measures listed above do address the issues in the extracted subsections of section 3.14. Therefore, what a SEPP does to deal with these issues is cut across a legislative regime unless it

is identical to what is the legislation is in words and affect. Importantly, this then means the SEPP is inconsistent with the legislation.

Recommendations

- The scope of EPIs should be separated into different scopes for a SEPP, LEP and DCP using the contents of section 3.14 of the EP&A Act (NSW). (This is an aspect of the recommendation that SEPPs as an 'instrument' under section 3 of the Interpretation Act 1987 NSW or as an 'Environmental Planning Instrument' under section 1.4 and Part 3 of the EP&A Act 1979 (NSW) need to be separated out into their own legislative definition and category in both these Acts).

- As a means for ensuring that a SEPP does not cut across a Parliamentary approved operation in respect to non-urban and non-peri-urban land management, section 3.14 of the EP&A Act to be limited to urban or peri-urban areas.

- For rural, regional or non-urban and peri-urban, a new section might be recommended that provides that the same scope contained in section 3.14 where relevant for a SEPP, be directed at these areas of the NSW State. It is submitted that the form of consultation set out above would apply to this measure of adopted.

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Inconsistencies Between Instruments

Section 3.21 of the EP&A Act states:

3.28 Inconsistency between instruments

(cf previous s 36)

(1) In the event of an inconsistency between environmental planning instruments and unless otherwise provided—

(a) there is a general presumption that a State environmental planning policy prevails over a local environmental plan or other instrument made before or after that State environmental planning policy, and

(b) (Repealed)

(c) the general presumptions of the law as to when an Act prevails over another Act apply to when one kind of environmental planning instrument prevails over another environmental planning instrument of the same kind.

(2), (3) (Repealed)

(4) Nothing in this section prevents an environmental planning instrument from being expressly amended by a later environmental planning instrument, of the same or a different kind, to provide for the way in which an inconsistency between them is to be resolved.

The first interpretative challenge in regard to section 3.21, is the use of the word Inconsistency'. This word is not defined in the EP&A Act (NSW) and it does not have any particular legal meaning. The ordinary meaning is then applicable and this is the comparison of two things with one item 'not in keeping, discordant or incompatible'[3] and 'from another source; 1. lacking in harmony between different parts or elements; self-contradictory, 2. lacking agreement, as one thing with another, or two or more things in relation to each other, at variance, 3. not consistent in principles, conduct etc. 4. Acting at variance with professed principles.'[4]

Subsection 3.28(1)(c) states that the general presumption of law prevails when an Act prevails over another Act is the principle to be applied as to when one EPI prevails over another. (One needs to read 3.28(1)(a) into this 'general presumption') However it is not as clear cut as this, as the section 3.28 leaves a significant issue at large.

In respect to inconsistencies between laws of a Parliament (the same parliament), the general presumption of law is that a Parliament will not pass a law in conflict with another law. The legal commentary in all texts about inconsistency between laws has to do with Commonwealth laws and State laws and laws between differing States. Where these is not a constitutional provision, such as clause 109 of the Commonwealth Constitution, the Courts have used a kitbag of different approaches to find workable solutions. But these cases do not involve the laws from a particular State Parliament. The late Mr Justice Hill wrote this in regard to a means of resolving inconsistencies between different Australian State statutes

> However, I do propose an alternative method, which I call the 'minimalist' approach. On that approach:
>
> 1. a conflict between state statutes would be confined as narrowly as possible, so that a 'true conflict' would not arise unless it was impossible to obey or give effect to both statutes simultaneously; and

[3] The Australian Concise Oxford Dictionary
[4] The Macquarie Dictionary, Third Edition.

2. in those exceptional situations when there is a true conflict between the statutes of different states, that conflict would be resolved by giving effect to *neither* state's statute to the extent of the conflict.[5]

What His Honour did was take the approach of general presumption of inconsistency between the laws of the same State Parliament and applied it as a minimalist approach. His words clearly set out the same parliamentary general presumption not stated in section 3.28 of the EP&A Act. This is, in respect of an inconsistency between laws of a Parliament (the same parliament), the general presumption of law is that a Parliament will not pass a law in conflict with another law. An inconsistency will only exist between the two Acts when there is no way or means to interpret them in such a way that they can operate together.

In effect, it is very difficult to find an inconsistency between Acts as a Court will seek to uphold the principle that a parliament will not legislate against itself. Taking this principle forward to subsection 3.28(1)(c) what appears to be the practical impact, is that it will be extremely difficult to find an inconsistency between two SEPPs. Then the challenge arises that if there is a real world inconsistency that creates real world problems, how is this resolved? Without the intervention of the Executive to amend one of the SEPPs, although highly unlikely, a private citizen would need to ascertain if they could approach a Court. Anyone wishing to do this, if they have the right of standing, would need considerable financial resources as the defendant would be the State Government.

The Parliament needs to contemplate a system of notification of inconsistencies between SEPPs to itself or a third party entity to ascertain the complaint and then establish a mechanism that will amend one or both of the SEPPs.

When a SEPP is inconsistent with an Act of the NSW Parliament, it is just as difficult as two SEPS being inconsistent. The EP&A Act (NSW) is silent on the point.

The general presumption is that an Act will take priority over a SEPP. But the problem arises that the words of the SEPP and the Act must be a direct opposite for the presumption to apply. This is by reason of the application of the principles of statutory interpretation. The inconsistency is a legal matter. What happens when the effects of both the SEPP and the Act in an operational way, are in conflict? The serious issue is the impact that the competing instruments have in their respective

[5] http://www.austlii.edu.au/au/journals/MelbULawRw/2005/2 html

intent and application in the world of commerce and citizens. The Parliament might seek to address this point to ensure that the problems as suggested above with a notification, determination and resolution mechanism over which it has oversight.

Two examples are provided where the Department of Planning appears not to have argued that no inconsistency existed between a SEPP and an Act of Parliament. . If the impact on operational procedures approved under one Act are effectively prohibited by a SEPP, then the ground shifts considerably. This is one explanation as to why environmental advocates will suggest the SEPPs are not inconsistent with an Act ,whilst business people will say it has a dramatic impact.

It is submitted that given particularly the Macquarie Dictionary definition of the word 'inconsistency', section 3.28 of the EP&A Act (NSW) requires attention.

In recent times the NSW Government has issued two SEPPS which have been inconsistent with legislation enacted pursuant to the government policy. It is well known that sections of the NSW Public Service did not agree with the policy as settled by the NSW Cabinet. It may be a matter of 'interpretation' but it is very evident in the administration of Government policy, divergent views exist around rural and regional policy. With these SEPPs, it easily arguable that the impression was given that land management legislation did not exist and parts of the Executive did not like the policy enacted. For people attempting to adhere to land management practices, compliance is a real challenge. It also highlights the existence of policy oligarchies within the Executive that appear to display contempt for the Parliamentary process. If this was not the case, then why do inconsistencies arise between SEPPs and legislation?

The SEPPs with inconsistencies were the Koala SEPP 2019 and the SEPP (Coastal (Management) 2018. The Koala SEPP 2019 effectively disabled private native forestry. The private native forestry code of practice has specific measures regarding koalas. The private native forestry operation immediately stops and is prohibited if a koala is seen in the area to be harvested.

The definition of koala habitat was so broad that any new applications for a PNF operation were halted. Successive Governments have viewed private native forest operations as the means to replace native forest timber supplies with greatly reduced areas of available State Forests. This was a SEPP that ran counter not only to State Government policy but ignored existing measures.

In the SEPP (Coastal Management) 2018 its impact prohibited the operation of 'allowable measures; for fence lines available under the Local Land Services Act 2013. One day the fencing clearing operation is approved under legislation, approved by Parliament in 2013, the next it is prohibited by a SEPP (Coastal Management) 2018 of that has no Parliamentary involvement or oversight.

If there is an Act under which a regulatory regime operates for land management or private native forestry, then this should take priority. This is what the Parliament enacted. A SEPP is what the Executive has decided without any Parliamentary scrutiny. There is no general presumption at law that an Executive generated instrument should override the intention expressed by Parliament in its legislation.

How does a business operator confront inconsistencies when it impacts day to day business operations? What do they do when a letter arrives from the EPA threatening fines yet their industry associations and even Council Officers advise that their activity was approved?

Recommendations:

- Section 3.28 of the EP&A Act be amended to acknowledge a SEPP might be inconsistent to an Act of Parliament in words and affect and what is to occur in this event.

- In the alternative, a fast review of any notification be undertaken by an independent tribunal with the power to cause a SEPP to lapse on any adverse finding of a direct or operational inconsistency. The Tribunal Member should be a suitably qualified person in the area of inconsistency. This would necessitate a panel of suitably qualified persons. The appointment of a Tribunal member should be subject to scrutiny by the applicant to the Tribunal on the grounds of appropriate qualification. For example, with a forestry issue, a forest scientist and not an environmental scientist should be on the Tribunal. There is a substantial difference in the scientific disciplines between the two professions.

- In the alternative, a formal pre-check of a SEPP that might be Tabled in Parliament would be an assurance that there is no conflict with the operation of the NSW land management regime, and

- If such a pre-check is found to have missed an inconsistency, through submissions to the Parliament, the SEPP should immediately lapse to allow rectification.

- Parliament might also consider how notification might occur if Parliament is not involved as currently there are no rights of appeal against the creation of a SEPP.

- That Section 3.28 of the EP&A Act (NSW) be amended as follows:

  ADD a new subsection:

  3.28(5) (a) In the event of an inconsistency between the state environmental planning policy and an Act the details of the inconsistency can be notified to a nominated Standing Committee of the Legislative Council by a citizen of NSW or a Member of the Legislative Assembly or the Legislative Council.

  (b) In addition to what is provided in this section, in the event of an inconsistency between the state environmental planning policy and another state environmental planning policy the details of the inconsistency can be notified to a nominated Standing Committee of the Legislative Council by a citizen of NSW or a Member of the Legislative Assembly or the Legislative Council.

  (c) This Committee will cause a hearing to be conducted and its findings are to be handed to the Minister with the delegated authority of the operation of the Environment Planning and Assessment Act 1979 who will implement the findings in the relevant state environment planning policy with 90 days of the receipt of the Committee's Report.

Review of a SEPP

Section 3.21 of the EP&A Act states:

3.21 Review of environmental planning instruments

(cf previous s 73)

(1) The Planning Secretary shall keep State environmental planning policies and councils shall keep their local environmental plans and development control plans under regular and periodic review for the purpose of ensuring that the objects of this Act are, having regard to such changing circumstances as may be relevant, achieved to the maximum extent possible.

(2) Every 5 years following such a review, the Planning Secretary is to determine whether relevant State environmental planning policies should be updated and a council is to determine whether relevant local environmental plans should be updated.

A SEPP should cease operation every five years and not just be reviewed at the end of a five year period. Any review that takes place would be "behind closed doors" and there is absolutely no accountability of transparency in such a process.

Recommendations

- Every SEPP should have a fixed period of operation.

- The Subordinate Legislation Act 1989 (NSW), section 10(2) allows for a default sunsetting period but this Act applies to delegated legislation and not to EPIs and therefore SEPPs. However, the principle should extend to all SEPPs.

- If the Executive wishes to retain a SEPP, then a transparent and open review of the SEPP must occur in sufficient time for the remaking of the SEPP, following the same procedure as when it was originally created. This will be argued to be an unwarranted period for consultation. However, the most effective curb on the power of the Executive when it comes to SEPPs, and to maintain the authority of Parliament, is to have thorough consultation in a transparent process.

Disallowance of Statutory Rules

An 'instrument' is defined under the Interpretation Acts 1987 (NSW) , section 3(1) to include 'a statutory rule' or 'an environmental planning instrument' (EPI) (which includes a SEPP).

Disallowance under the Interpretations Act 1987 (NSW) sits in section 41 which only applies to a 'statutory rule'. To apply to an EPI ,this section would need to refer to an 'EPI" or 'an instrument'.

Section 31 and section 32 of the Interpretations Act 1987 (NSW) are the only sections in the Act that uses the term 'instrument'. The term 'EPI' is not in the text of the Interpretation Act 1987 (NSW).

Section 45A of the Interpretation Act 1987 (NSW) refers to tabling 'instruments. This by definition in section 3 includes an EPI. However, the enabling Act, the EP&A Act 1979 (NSW), does not require the tabling of the 'instrument' in Parliament.

It is, as though there is a complete carve out of EPIs from this legislation, all other legislation dealing with regulations, the Parliamentary process and oversight.

The SEPP is solely a tool of the Executive.

The Executive is an interesting concept in constitutional representative democracy. It technically means the Ministerial arm of Government. However this is not correct and examination of Part 7 of the Constitution Act 1987, 'Administrative arrangements confirms this.

Recommendation:

- SEPP's need to be included into the terms of section 41 of the Interpretation Acts 1987.

- Part 3 of the EP&A Act (NSW), possible a new section 3.29A, that provides:

  3.29A(1) "Twenty one days before the recommendation to the Governor to make a State Environmental Planning Policy occurs, the proposed SEPP will be tabled in the Legislative Council.'

  3.29A(2) 'Six months from the date of the closure of consultation for a proposed State Environmental Planning Policy, the text of the proposed State Environmental Planning Policy will be tabled in the Legislative Council for a period of 28 days.

Additionally we suggest the following amendment:

3.30 (1) current text be amended in the following manner:

After the word 'instrument' in the first line inset the word "except for an state environmental planning policy"

ADD a new subsection 3.30(3):

3.30(3) Before recommending the making of an environmental state planning policy by the Governor, the Minister will take such steps:
(a) to publicise an extensive explanation of the intended effect of the proposed policy, and
(b) to seek and consider submissions from the public on the matter.

- Disallowance of a SEPP is a blunt instrument, but it should be available to the Parliament.

- Disallowance might, however, be at the last item in a list of procedures such as Tabling and notification of inconsistencies and a period of rectification of any notifications.

Other

While not part of the terms of reference there is one remaining issue with EPIs where inconsistency with an Act of Parliament, is relevant to regional and rural land owners.

The Local Land Services has a thorough application and compliance regime for private native forestry operations. Under the relevant legislative provisions, the EPA have both a role in the approval of policy and applications criteria and a sole role in regulatory compliance with the Private Native Forestry Code of Practice.

An LEP is an EPI. It operates from the Standard Instrument – LEP (see Government legislation website). This Standard Template is created by the Department of Planning, Industry and Environment in which the EPA is located.

The Standard Template in its Land Use Table has the following Direction.

Direction 6

Zone RU1 – Primary Production

The following must be included as either "Permitted without consent" or "Permitted with consent" for this zone—

Environmental protection works
Farm buildings
Intensive livestock agriculture
Intensive plant agriculture
Roads
Roadside stalls

Forestry under Part 5B of the Local Land Services Act is not included in this list so it may be placed in whatever the Council may elect of these two categories.

Zone RU2 – Rural Landscape

The following must be included as either "Permitted without consent" or "Permitted with consent" for this zone—

Environmental protection works
Farm buildings
Roads

Forestry under Part 5B of the Local Land Services Act is not included in this list so it may be placed in whatever the Council may elect of these two categories.

Zone RU3 - Forestry

The following must be included as either "Permitted without consent" or "Permitted with consent" for this zone—

Roads

Permitted

Uses authorised under the *Forestry Act 2012* or under Part 5B (Private native forestry) of the *Local Land Services Act 2013*

When this material is adopted by a Local Government Authority into its LEP, it can be in direct conflict with a PNF approval issued by the Local Land Services.

The land owner holding the PNF approval can be faced with what amounts to 'dual consent' from the Local Government Authority to exercise the rights obtained under the PNF approval.

It is highly unlikely the Local Government Authority will have suitably qualified persons to deal with a PNF operation being an expert in forestry. The Local Land Services does have this. The Local Government Authority has no requirement to follow the processes that sit within the Local Land Services. The Local Government Authority can elect to require whatever it wishes for Land Use approval.

It interesting that the Standard template has not been amended to acknowledge the approval under Part 5B of the Local Land Services Act in either Rural Land RU1 and Rural Land RU2. It is even more intriguing when it is the same department that looks to both measures of the Standard Template implementation and the issuing of SEPPs but has the right under the Local land Services Act to approve the terms of the PNF Code of Practice.

This is yet another example of how independent the administration of EPIs is at the Executive level from the directions of Parliament.