REPORT ON PROCEEDINGS BEFORE

REGULATION COMMITTEE

ENVIRONMENTAL PLANNING INSTRUMENTS (SEPPS)

CORRECTED

At Macquarie Room, Parliament House, Sydney, on Monday 7 June 2021

The Committee met at 10:00.

PRESENT

The Hon. Mick Veitch (Chair)

The Hon. Mark Banasiak
Ms Abigail Boyd (Deputy Chair)
The Hon. Catherine Cusack
The Hon. Greg Donnelly
The Hon. Scott Farlow
The Hon. Ben Franklin
the Hon. Peter Poulos

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The CHAIR: Welcome to the hearing of the Regulation Committee's inquiry into environmental planning instruments. This inquiry is focusing on State environmental planning policies, or SEPPs. We are examining how SEPPs are made and whether the current requirements for making and scrutinising SEPPs are adequate, including whether they should be disallowable by Parliament. Before I commence, I would like to acknowledge the Gadigal people, who are the traditional custodians of this land. I would also like to pay respect to the Elders past, present and emerging of the Eora nation and extend that respect to other First Nations people present.

Today we will hear from a number of legal groups and peak and environmental bodies as well as the New South Wales Government. Before we commence I would like to make some brief comments about the procedures for today's hearing. Today's hearing is being broadcast live via the Parliament's website. A transcript of today's hearing will be placed on the Committee's website when it becomes available. In accordance with the broadcast guidelines, media representatives are reminded that they must take responsibility for what they publish about the Committee's proceedings.

While parliamentary privilege applies to witnesses giving evidence today, it does not apply to what witnesses say outside of their evidence at the hearing. I therefore urge witnesses to be careful about comments they make to the media or to others after they complete their evidence. Committee hearings are not intended to provide a forum for people to make adverse reflections about others under the protection of parliamentary privilege. In that regard it is important that witnesses focus on the issues raised by the inquiry's terms of reference and avoid naming individuals unnecessarily.

All witnesses have a right to procedural fairness according to the procedural fairness resolution adopted by the House in 2018. If witnesses are unable to answer a question today and want more time to respond, they can take a question on notice. Written answers to questions taken on notice are to be provided to the Committee secretariat within 21 days. To assist with audibility, please speak clearly into the microphones. As we have a number of witnesses in person and via videoconference, it may be helpful to identify who questions are directed to and who is speaking. Can I also ask everyone to turn their mobile phones to silent. That includes the Chair.

CORRECTED

LORNE NEUDORF, Associate Professor, Adelaide Law School, University of Adelaide, before the Committee via videoconference, affirmed and examined

The CHAIR: Would you like to start by making a short statement? If you can, please keep it brief.

Dr NEUDORF: Yes, with your indulgence I would like to make a short opening statement. I would like to thank the Committee for inviting me to appear today in connection with this inquiry into State environmental planning instruments, also called SEPPs. This inquiry importantly considers the way in which SEPPs are made in New South Wales. I would begin by noting that my views are not related to the merits of any particular SEPP or planning policy. They are instead focused on how SEPPs are currently made and potential reforms that can improve and strengthen the process. I also note that I am appearing without the benefit of my colleague Paul Leadbeter, who has expertise on similar planning instruments in South Australia. In New South Wales SEPPs are a flexible regulatory tool used by the Government to make binding rules in relation to a wide range of matters. The Environmental Planning and Assessment Act 1979 makes SEPPs extremely powerful. SEPPs have been used to regulate everything from child care to trading hours, koala habitats to dog fences and recycling to railways.

In each of the past three years more SEPPs have been made than statutes enacted by Parliament. SEPPs directly affect the rights and interests of individuals and communities across the State but despite this ability to affect rights and interests, there is almost no meaningful statutory guidance on the content of a SEPP. This means the Government has exceptionally broad discretion. SEPPs can be made quickly and in the absence of any consultation with stakeholders and they can come into force immediately. They can apply across the State or they can be limited in scope to a particular geographic location. SEPPs are exempt from the ordinary requirements that apply to regulations for parliamentary disallowance and sunsetting. They can even overrule other laws, including acts made by Parliament—a truly breathtaking power that would be sure to please Henry VIII. The current framework for how SEPPs are made is inadequate and deficient in a democratic society founded on the rule of law. SEPPs do not meet minimum standards of accountability and transparency in lawmaking.

As discussed, the Environmental Planning and Assessment Act confers exceptional legislative powers on the Government while sidelining Parliament by eliminating meaningful parliamentary oversight. This approach is incompatible with Parliament's constitutional role as lawmaker-in-chief. The South Australian example shows that it does not need to be this way. There can be appropriate parliamentary oversight of SEPPs along with legislative consultation requirements, and these controls, in my view, do not threaten planning certainty. If anything, the ease by which SEPPs are currently made itself creates uncertainty and unpredictability in the law. Reforms to the framework for making SEPPs are needed to restore a proper balance between the Government and an elected parliament. Thank you and I look forward to your questions.

The CHAIR: My question goes to the parliamentary scrutiny aspect of SEPP making and the implementation of SEPPs themselves. A number of submissions say that they do not want the disallowable element being applied to SEPPs, so I would like to talk about the parliamentary scrutiny aspect. In your mind, what would be a good model for parliamentary scrutiny of SEPPs if you do not have the disallowable instrument aspect?

Dr NEUDORF: I think that the ordinary process for regulations is not a perfect process with scrutiny and the potential for disallowance. It is quite a blunt instrument. I think this Committee took that view in its earlier inquiry looking at the framework for making delegated legislation in New South Wales. But I think, as a starting point, that is where we should be with SEPPs in terms of that oversight of the Legislation Review Committee scrutinising on technical principles. The possibility of disallowance itself without actually having to disallow hopefully many of these is usually enough of an incentive to actually get appropriate drafting and to fix up any issues that may be identified by the scrutiny committees.

It is a bit of a blunt instrument, there is no question. But I think it is an important stick to hold essentially and for Parliament to have that to be able to have that oversight. Now, that said, there could be a special kind of regime in some cases. We do see this, for example, in some other jurisdictions. You can look at New Zealand as a jurisdiction, where Parliament has the ability to go in and actually amend without repealing. So you can actually kind of do more of a soft-touch approach, which could be—if there are concerns about this kind of bluntness of the disallowance process and kind of the nuclear option, there could be a special regime created in some cases for certain categories of regulations like SEPPs if this Committee was of the view that that would be more appropriate.

The Hon. BEN FRANKLIN: In terms of that comment about the opportunity or the possibility of Parliament amending without necessarily repealing or not having the capacity to repeal but amend, what is to stop in that sort of jurisdiction amending to such an extent that it actually undermines the entire intent in the first place? Is there some sort of provision put in so that cannot happen?

Dr NEUDORF: That is a really good question. Obviously the point of the process of scrutiny is not to gut the regulations and change the policy completely. Scrutiny, as we do it in this jurisdiction, is focused on technical principles. So we are not bringing into question the whole policy underlying the regulation but rather seeing whether there is defective drafting maybe exceeding the powers granted under the enabling legislation—questions of that nature. So, yes, there is a concern. Of course, Parliament could gut the provision or change it so radically that it does not resemble at all what the original provision was. But I think we have to have faith in the institutions of Parliament. Ultimately, as lawmaker-in-chief Parliament could enact any statute that it wanted to nullify any regulations that it would like. That possibility always exists as well. I think we have to just deal with that in the sense of having faith and confidence in this institution, that it will look at it from a technical point of view and modify or amend the regulation perhaps as may be needed.

Ms ABIGAIL BOYD: You very helpfully put the South Australian regime as a kind of contrast to what we have here. As you say, the powers given to the Executive in relation to SEPPs are incredibly broad. How does this compare to other jurisdictions in Australia other than South Australia in terms of any instrument that has that sort of broad power?

Dr NEUDORF: I confess I have not done a full comparative study on this particular area of lawmaking in relation to planning instruments. But just from my general background and knowledge and looking at delegated legislation and the research I have done, these kinds of powers tend to be quite broad. You do see a lot of discretion being given to the Executive. What I found particularly surprising in New South Wales was this kind of what I described as a Henry VIII power, which allows these instruments essentially to override other laws. That is something that I have not seen in other jurisdictions and other places—such a sweeping or breathtaking ability to essentially override existing rules with really no parliamentary oversight of the use of that power.

I would suggest, however, a comparative exercise looking at other jurisdictions—I know a submission was made from Victoria and there are other States, of course, that would have different kinds of regimes—to see how the power could be limited in some way that would make it more meaningful. I think it would provide more certainty for all the actors out there to say, "Look, this is what these instruments are designed to do. Here are some conditions that have to be attached to them before that power can be exercised, such as consultation and things of that nature." I think you can constrain those powers appropriately, but again I have not done a full comparative study of all six States in Australia to be able to give you the definitive answer on that.

The Hon. CATHERINE CUSACK: Thank you for your submission. I have been very surprised by the scope of the SEPPs. I did not quite appreciate that, so thank you for spelling that out. Is it your understanding that this is a feature of the original Act in 1979?

Dr NEUDORF: Thank you for the question. I have only looked briefly at the history of this legislation because I have looked at some cases in the courts where they have interpreted the legislation, and it seems to me the legislation has changed quite a bit over time. Some of the provisions that we see now were not in the original version of the Act, and so there have been amendments over the past several decades. But looking at it in terms of whether the scope of the power has changed, I cannot say with certainty. I would have to actually look at these very particular provisions and compare them to the text that you would see in those earlier versions. But I know that the legislation has shifted quite significantly over time from what I see in the cases that discuss the legislation as it was written historically.

The Hon. CATHERINE CUSACK: I guess the key issue is the Henry VIII provision. Do you feel that has been there since day one?

Dr NEUDORF: Can I take that question on notice? I would be very happy to look at that to see where the origins of that provision came from and when it popped into the Act—if something similar to it has been in the Act from the beginning or whether that was added later. I would be happy to take that on notice if that is okay.

The Hon. CATHERINE CUSACK: Thank you. It is a genuine question because of the context in which that occurred. If that did occur in 1979, I think attitudes towards consultation and engagement in legislation have changed a lot since 1979.

The Hon. MARK BANASIAK: Just to go back to that process of parliamentary scrutiny that we were discussing in the initial questions, do you think there could be a stepped-out process that sort of steps up in terms of level of severity or consequences for SEPPs? There may be a motion of intent to amend or disallow where you outline the concerns around a SEPP, which then gives the bureaucrats or whoever is designing the SEPP a chance to respond. If that response is not satisfactory to the Parliament then that motion of intent to disallow or amend could then be put forward, and then have the debate that way. Do you think that could be a potential way of handling it?

Dr NEUDORF: Absolutely. Thank you for the question; it is a really important question. I think you cannot look at the notice of disallowance or revocation in isolation from other ways that committees can have an impact on getting things fixed up or addressing concerns that they have identified. If you look at the Commonwealth Senate committee on delegated legislation, for example, it has a range of tools in its toolkit. And yes, disallowance is one of those—the real blunt instrument. That is the big jackhammer, I guess, in the toolkit. But there are a lot of other things that can be done leading up to that process, and that is exactly what that committee does. For instance, it will communicate with the Minister and it will raise the concerns and it will put that notice of motion in train or in process, so the Government knows that there is some backstop to this concern and that if it does not act or address the concern then things will progress toward that disallowance.

I think that is absolutely right—kind of an escalating series. Not all of this needs to be spelt out in legislation; I think a lot of this can be the practice of the Committee. I do not want to use the word "informal", but it can be kind of informal in that sense—the Committee communicating with the Minister and with the department and raising those concerns. If they are not followed up and if there is not a satisfactory resolution then we can escalate that to the next stage. I think that is absolutely appropriate and often a very effective way of dealing with concerns.

The Hon. MARK BANASIAK: Noting that you said that it would not necessarily have to be part of legislation, do you think perhaps it being written into the standing orders or sessional orders of Parliament would be a better way of handling that escalation of process?

Dr NEUDORF: You would have to look at it in a number of ways. I think that part of this could be legislated. The ability to have Parliament scrutinise and the potential for disallowance need to be in the legislation, but then absolutely the standing orders can be amended to provide for the process for the Committee. And then, informally, the Committee just has its practice. The Committee can within its powers decide for itself how it will exercise those powers and how it will approach that. Of course it would be a good idea for consistency, for the Committee to do what it does on a consistent basis. As members come and go from the Committee, it would be important to maintain that. But I think not all of it needs to be set out in legislation and you are absolutely right that there are different ways of dealing with this kind of escalation process, as you have described it.

The Hon. SCOTT FARLOW: You have outlined the proliferation, so to speak, of SEPPs and how they have been used in New South Wales. I think you say in your submission they seem to be the instrument of choice. I have a suspicion that if we looked across all regulation, as this Committee has done from time to time, we would probably see similar expressions of the amount of regulations that are made in New South Wales as well. I am interested, in terms of other jurisdictions and any of your information as to where SEPPs may be disallowable instruments, whether you believe that has any impact on slowing their usage, so to speak.

Dr NEUDORF: Thank you for the question. I can only really speak to the South Australian experience, but I think it does slow down the process in South Australia by having parliamentary scrutiny and oversight of the planning instruments that are made in the State. For instance, when we look at one of the Acts that I have outlined there, the environmental planning legislation, there is a 28-day consultation period. Of course when you have that built in and legislated as part of the requirement, that consultation will slow the process down. But again, it is finding the balance between being able to act decisively and appropriately to respond to changing circumstances while making sure stakeholders have a chance to have their views heard and you make the law the best it can be—you get a high-quality legislative product at the outcome.

I think you do see in places like South Australia that there is a bit of a slower process, but I would argue that process is very important to put all the actors on notice that there is a potential change coming to the law. Given the scope of the power that we are talking about here and the potential for these SEPPs to regulate a tremendous range of matters, there are a lot of people whose interests can be affected by a new SEPP. The other thing I would say about that if I may, just very quickly, is that another reason why I think slowing it down a little bit is good is that every time the law is changing you are potentially inviting challenges in the courts. People may want to know what the particular wording of the SEPP means and a judge may have to make a ruling on that, interpreting the language. There is a long lead time on that sort of thing. When the law changes, it might be months and years before a court will make a ruling on how a certain phrase or word will be interpreted. I think really taking care at the front end and making sure that it is a quality product and that it does what it is intending to do is worth that time and worth that investment.

The Hon. GREG DONNELLY: Thank you, Professor, for making yourself available and thank you for your very helpful submission. Can I go to page 9 of your submission, which is the recommendations, and specifically recommendation (f)? My question follows on directly from what you were just talking about with respect to the matter of providing information. It says there:

> The *Environmental Planning and Assessment Act 1979* should be amended to require the publication of draft text and explanatory statements for SEPPs …

In this area, as you have just correctly said, the matter of the specific meaning of the SEPP and some of its phrases and terms and other relevant matters can all be subject to a relevant tribunal determination. When you say "explanatory statements", are you thinking of what is the standard form of explanatory statements that normally come out with respect to either draft legislation or legislation? Are you intimating something more broad than that, which might even try to war-game some of the differences and to flesh out what might be some of the matters—to really open the discussion right up and to maximise what might be the interest and import in it so that it can be more thoroughly looked at than just the standard explanatory statement, which is used and seen as just what we do when we look at a piece of legislation?

Dr NEUDORF: Thank you. That is a great question. I absolutely would prefer the latter of those two options. I think the pro forma, standard boilerplate language that is often used in these explanatory statements is not always very helpful. It does not clearly identify why the law is changing, why it is thought to need to change and what prompted this action. I think it really would be useful to have that discussion, to open it up for stakeholders as you say and to have a more meaningful consultation process.

All the actors should be on notice of what actually is going on here. I have to say—I say this as a lawyer and someone who reads legislation and cases—it is really hard to read this stuff sometimes. It is very technical language. I am afraid that the average person out there or the average actor out there—they have a hard time digesting what this actually means for them. And so I think we could enhance the quality of that explanatory statement to say, "Look, this is the current state of the law. This is what we are introducing to change law and these are the likely impacts it is going to have. This is what we are trying to achieve," and really spell it out. In a sense, plain English would go a long way to enhancing, ultimately, that consultation and hopefully a better product at the end of that process.

The Hon. GREG DONNELLY: Certainly in the context of that particular area of law, the before-and-after scenarios are very significant, aren't they, for obvious reasons? Grasping or imagining in one's mind's eye what the actual difference between the past and the future would look like can be very speculative.

Dr NEUDORF: Can I just add one comment on that, with the indulgence of the Chair?

The CHAIR: Yes.

Dr NEUDORF: I would just say that what is interesting about delegated legislation and regulations in general is that because it does not go through the normal parliamentary process of the three readings, the debate that we have and the votes, in a sense that before-and-after picture you are talking about with that explanatory statement—sometimes that gets fleshed out more in the ordinary parliamentary process because there is that debate and that richer discourse on the new legislation that is being proposed, but we do not have that with delegated legislation. I think this is a really terrific idea to bulk up that explanatory statement, because you are really missing that process, that parliamentary process, for these new laws that are being made. This could be one way of addressing that concern about the lack of accountability that you do get in that normal process, so I think that is a very good idea.

The Hon. MARK BANASIAK: Just on a follow-up from the Hon. Greg Donnelly about that explanatory statement, would you like to see some sort of measurable outcomes included in that, or some key performance measures, so when a SEPP is reviewed in five years, 10 years, or wherever it is reviewed, it can be done up against those intended measurable outcomes and see whether it has actually met those outcomes?

Dr NEUDORF: I think that is a great idea, but from my point of view that would be a revolution in terms of thinking ahead.

Ms ABIGAIL BOYD: A good one.

The Hon. MARK BANASIAK: I am happy to be called revolutionary.

The Hon. GREG DONNELLY: It is not the first time he has been called a revolutionary.

Dr NEUDORF: Having some kind of standards—this is the thing. The Government probably is not going to want to pin themselves down to super concrete and detailed metrics, but some kind of standard to say, "Look, this is what we are intending to achieve." You are absolutely right that if these SEPPs were subject to a five-year sunsetting, which I think they should be, that would really give a chance for everyone to look at that fresh again and say, "Is it really accomplishing what it set out to do? Has it morphed into some other kind of purpose now? It is doing something completely different." I think that is really good, actually—and also to provide more meaningful consultation at that five-year review as well, where the actors themselves or the stakeholders say, "Wait a second. This planning decision didn't really work out and it didn't accomplish what it set out to do."

I think that would be a valuable thing. How concrete can they be? How detailed can they be? That is the question. But I think aiming for something would certainly be an improvement.

Ms ABIGAIL BOYD: I am just thinking about the attitudes we sometimes see towards better consultation and investigation around regulation. From the short period of time I have been in Parliament, I have experienced time and time where there has been a bit of legislation brought to the upper House that—once we look into it, there are actually a number of ways that it can be improved to the satisfaction of everybody there. In your experience with the way SEPPs or the SEPP equivalent is processed through the South Australian Parliament, what benefits do you see to that? Are there examples where that regulation or instrument has been bettered from the position that it was originally put forward?

Dr NEUDORF: Thanks for that question. I would have to defer to my colleague who co-authored this submission with me, Paul Leadbeter; he is much more of an expert in that area than I am. I do just note in the submission—it talks about, on page seven, the Planning, Development and Infrastructure Act 2016 in South Australia. As part of that new legislation there was a Planning and Design Code that was brought in, and that code was subject to very heavy scrutiny with a variety of stakeholders, government bodies, the community and many others.

From what I understand from that process, the code actually reflects the views that were raised by the stakeholders, and the legislation was itself strengthened to come out of that process. And so, I think that could be one example that we can look at to say that is a success story of where consultation actually does result in a strengthened product at the end of that. It is a big piece of legislation, by the way; if you try to download the Planning and Design Code, you crash your computer because the PDF is very, very long indeed. But, again, it was subject to that scrutiny and I think that process does enhance the outcome; it resulted in changes to the code.

The Hon. CATHERINE CUSACK: I just want to come back to the Henry VIII provisions and the scope of SEPPs again. If a SEPP was used in one of the examples to affect the regulation of a health service or a childcare centre, for example, using that Henry VIII effect, how would the childcare centre or the hospital become aware of that Henry VIII piece of regulation in a SEPP? How can we find out how many Henry VIII provisions are operating across our body of law in this State?

Dr NEUDORF: That is a great question. One of the problems with SEPPs is that they do not require any advance notice. They can come into legal effect—come into force—on the very day that they are made, and so there really is not any opportunity for advance notice. Now, all of them, of course, are published online, so they can be accessed on the New South Wales legislation website. That is a great resource, but I am not on there every day—I should be, maybe—downloading every new piece of legislation that has been made. So you are absolutely right. This is a problem. How do people know that—

The Hon. CATHERINE CUSACK: Just to pin it down really specifically, say I am running a hospital and I am trying to follow the health legislation for running the hospital. How am I expected to know that the planning Minister has passed a SEPP that intrudes on or changes some of that health legislation? Is there any process for spelling out those effects—not even consulting about it, but just telling people that that is what has happened?

Dr NEUDORF: The only way that you would be able to know that that has happened is by reading the SEPP. The SEPP would have a provision in it that would basically set out which Acts it is disapplying or essentially overruling and to what extent that is done. That has to be approved by the Governor—that is the process that exists—and there is some kind of internal consultation with the responsible Minister for those Acts. But once the SEPP is made and published and comes into force, that hospital would just have to read the SEPP and it would say, "This Act does not apply in these circumstances for the purpose of the SEPP." And so, the only way to do it and to be notified about it is to essentially be up to date with every new instrument that is being made and monitor whether any changes that affect you have come into force.

The CHAIR: There is a bit of interest in this. With the indulgence of Committee members, we might go a little bit over time.

The Hon. PETER POULOS: I will be very quick. Thank you, Professor, for your input. In relation to recommendation (e), "Impose stringent consultation requirements before SEPPs can be made," could you expand on how you see imposing stringent consultation would work? The 28 days that you mentioned—is that sufficient or would we require something more?

Dr NEUDORF: Thanks. That is a great question, and it is really a question of finding the balance. I cannot say that there is one prescriptive answer for every jurisdiction and every State in Australia, but I think a 28-day period is a good starting point that does allow the draft legislation to be looked at and to be digested by those who might be affected by that change in the law. I think 28 days is normally probably a pretty adequate

period because, again, there are competing interests here, right? The Government may want to roll out their policy through a SEPP. They want to make a change, maybe statewide. There is some important situation they are responding to. We see them in relation to bushfires, safety issues with fencing—things like that. You do not want to sit on this stuff forever, of course; you need to get things moving and get things going. But you need to have that kind of balance between what is appropriate for that consultation type.

I think the South Australian model of 28 days to my mind sounds like an adequate time period. If you look at, for example, judicial review actions when it comes to challenging administrative decisions, there is often very short time periods in relation to planning decisions and for that reason it can hold things up. You want to get things moving. We do not want this uncertainty hanging over our heads: What are the rules? What are they going to be? That is the question we have to answer. I think that is a good starting point. I am not sure I can say that universally that is the correct answer, but I think it is a good place to look at in terms of just a benchmark.

The Hon. SCOTT FARLOW: My question follows on from that of the Hon. Peter Poulos. In New South Wales last year a lot of the SEPPs were used for things particularly that were urgent with COVID—for instance, outdoor dining restrictions and the like, and to intervene in planning policies there. Are you aware of, particularly in the South Australian legislation, where there is an ability to circumvent that consultation process in an emergency provision, or something like that?

Dr NEUDORF: This is a big question. It is a great question. When it comes to the pandemic and the COVID restrictions, there are a number of pieces of enabling legislation that will authorise the Government to make emergency regulations, and planning law or this kind of an Act is only one of those. There will be special health legislation, border restriction legislation that will be enacted, policing legislation, and they will have various delegated powers that can be used to respond essentially to the pandemic to make regulations. Your question was can parliamentary scrutiny be circumvented? Absolutely. In some of these pieces of legislation, it is not allowed; it is exempted from parliamentary scrutiny, it is exempted from disallowance. If you look at the Commonwealth—for instance, the Biosecurity Act—that is exactly what you see. Those regulations being made under the Biosecurity Act are completely exempted from the parliamentary scrutiny process, from the potential of disallowance.

Again, it is trying to balance these competing interests. Of course, in an emergency there has to be decisive action taken. No-one is saying that should not happen. But the question is: How do you find the balance? When it comes to ordinary planning matters, we have maybe more of a lead time. When it comes to a pandemic situation, maybe we do not even have to use this Act, we can use other emergency legislation to impose those kinds of restrictions. There can be different ways of skinning the cat, so to speak, in terms of addressing that issue or that problem. I hope that helps to answer your question.

The CHAIR: That will draw us to a close. Thank you, Professor Neudorf, for attending today. It has been very stimulating and quite interesting. I think you took one question on notice. The Committee has resolved that answers to questions taken on notice be returned within 21 days. The secretariat will be in touch with you regarding the question you took on notice.

(The witness withdrew.)

(Short adjournment)

RACHEL WALMSLEY, Head of Policy and Law Reform, Environmental Defenders Office, affirmed and examined

RACHEL CHICK, Solicitor, Environmental Defenders Office, affirmed and examined

The CHAIR: I now welcome our next witnesses. Would either of you like to make a brief opening statement?

Ms CHICK: Yes. I will. The Environmental Defenders Office [EDO] welcomes the opportunity to appear before this Committee. State environmental planning policies [SEPPs] are powerful legal instruments which are given effect under the planning Act. They affect how land is developed and how natural resources are used, managed and conserved across New South Wales and it is vital that they are made in a consistent and transparent manner, are evidence based and have appropriate parliamentary scrutiny. This is currently not always the case.

Historically, certain SEPPs have been used to effectively put in place important environmental protections. However, more recently SEPPs have been used to redefine development pathways and, in some cases, reduce environmental protections and community rights. As a community legal centre specialising in public interest and environmental and planning law, the EDO has made numerous submissions on various SEPPs in recent years where there have been opportunities to do so. We have engaged directly with the planning department on various review processes of varying quality in terms of detail, transparency and timeliness.

There has been no consultation on some SEPPs and never-ending review on others. Our submission to this inquiry discusses the need for improvements to the process of making SEPPs and makes the following recommendations: first, that the process for making SEPPs must be clear, consistent and transparent, include community consultation and also include oversight mechanisms; second, SEPPs should be disallowable; third, there must be reasonable opportunity—at least 28 days—for public comment on both the explanation of intended effect and the proposed draft SEPP; fourth, public comment that should be demonstrably taken into account when drafting and making the SEPP; fifth, the evidence-based rationale for the SEPP should be made clear; and, sixth, SEPPs must be consistent with the principles of ecologically sustainable developments, which is the object of the planning Act.

SEPPs should also be subject to review after five years. The public consultation should take place as part of the review process. Since we made our submission the EDO has also considered further that there may be exceptional circumstances in which a SEPP may need to be made swiftly by the Executive—for example, to prevent imminent environmental harm. When such a process is applied there would need to be strict criteria around its use and a 12-month review or sunsetting clause in lieu of disallowance. EDO supports steps as necessary for consistency and to provide clear guidance on statewide planning, environmental and natural resource management issues. In fact, we have long advocated for new SEPPs on critical issues, such as climate change. However, as instruments can have far-reaching and significant consequences, there is remarkably little oversight to their making or implementation. This should not be the case. We refer the Committee to our recommendations to reform the SEPP-making process. Thank you.

The CHAIR: Before opening up to Committee members for their questions, I have a question that relates to page 4 of your submission. It relates to removing the merits appeal rights of community members. You are saying that that is "contrary to ICAC recommendations that third-party merits review rights be expanded over a range of projects, including those that are significant and controversial." I would like you to expand on that, if you could. What do you mean by that? How do you see that working?

Ms WALMSLEY: Thank you. The issue there is that SEPPs are really powerful instruments. They can categorise development into certain streams. Part of that categorisation can actually impact on community rights. That is not fully understood by the community when you are looking at a technical planning policy or an amendment to a technical planning policy. So in respect to merits review in particular, if development is classified in a certain stream—say it is State significant development or State significant infrastructure—if the Independent Planning Commission [IPC] is the consent authority and if they hold a public hearing, then merits review rights are extinguished. If you look at most of the major mining projects now—and the expansions—they are all sent to the IPC. There is always a public hearing and thus merit rights for community are essentially extinguished.

To do that through a SEPP is actually extinguishing a really important accountability check. What the ICAC said is that the existence of those rights is really important in the planning system. They are not often exercised, particularly by third parties, so there is no floodgates and there is no risk of stymieing development by constant court cases. They are rarely used rights but the very existence of those rights in the planning system makes for better decision-making. That has been recognised by ICAC and other bodies. What we are saying is

that if you are going to impact community rights, that should be in the head legislation. That should be debated by Parliament and be scrutinised. Doing so through subordinate instruments such as SEPPs can have great impacts on communities.

The CHAIR: I will open questions up to my fellow Committee members, the Hon. Mark Banasiak and Ms Abigail Boyd.

The Hon. MARK BANASIAK: Just picking upon your comments and the question of the Chair, obviously SEPPs can cut both ways: It can allow more development but it can also inhibit development, particularly on individual people's land. With the koala SEPP, some landholders were facing $20,000 to $25,000 to appeal how that SEPP was applied on their land. Would you support a lower-cost dispute resolution process to allow for how those SEPPs are applied on an individual scale, and for the matter to be heard at an administrative review tribunal rather than having to go to the IPC and it costing $25,000 and ending up in the Land and Environment Court and absolutely costing a fortune?

Ms WALMSLEY: I think your question goes to a really critical point here about the evidence base for SEPPs because with the koala SEPP, for example, I am not sure where that information comes from—that it would cost $25,000 to actually contest the application. One of the issues with the koala SEPP is that it was really unclear how it was going to apply to a farmer's land. There was a lot of misinformation about that SEPP. It got highly politicised and so in the actual application of the SEPP there was actually legally incorrect information about how that was going to apply to land. So I would question the idea that it would cost $25,000 to challenge the application of that SEPP.

What we are talking about is a process where there is a really clear evidence base for a SEPP so you talk about the koala SEPP. This is the scientific evidence. This is what it needs to do. You do full consultation so that all stakeholders, including landowners, community and scientists are all involved in that. Then you have a really clear SEPP so everyone knows how the rules apply. If you look at some of the SEPPs now, for example, the non-rural vegetation SEPP is incomprehensible. It is almost impossible to see how the rules apply under that one. So if you are talking about a SEPP that impacts on farmers' land or urban land or any development rights, it has got to be absolutely clear. You have got to be able to see what the pathways are if you need to challenge the SEPP or, if you want to challenge the SEPP, you need the evidence base.

You need the clarity and you need the scrutiny. There is so much speculation about consequences, particularly in relation to the koala SEPP. That was very over politicised. What we need to do is to get back to an actual clarity, evidence-based policymaking where it is really clear to landowners what that SEPP actually means because the implications of the SEPP were not as reported in some media.

The Hon. MARK BANASIAK: To take it back to the original premise of the question, would you support those individual decisions being able to be reviewed at an administrative review tribunal rather than the IPC?

Ms WALMSLEY: We absolutely support people being able to exercise review rights. That is what we are saying earlier. We do support that for proponents and that is also, importantly, for third parties. At the moment proponents have more review rights than do third parties, so that is not disputed. But what ICAC is saying and what we are saying is that there needs to be fair accountability measures that include review rights for third parties and also includes disallowance by Parliament just to make sure you have got these accountability measures in place. That does not mean they are going to be used all the time but the very existence of those measures makes for better policymaking.

The Hon. CATHERINE CUSACK: May I just follow that up? It is a really interesting idea—this concept of a low-cost method of appealing the detail of any SEPP. How would you see that working? The Land and Environment Court is a very expensive process, if I can put it like that, and for certain matters, particularly relating to an individual's rights, low-cost access to an administrative decisions appeal—is it possible to draw some sort of a line where low-cost matters can be resolved in that way?

Ms WALMSLEY: It would be great if there was such a facility for a quick, low-cost review. That has actually been in the Federal context in the recent review of the Environment Protection and Biodiversity Conservation Act. Professor Graeme Samuel suggested the up-front rapid merits review process for decisions under that Act. He said there needs to be something up front, low cost, that can quickly resolve an issue for decisions under that Act. So there is investigation into that type of thing. It does not currently exist, but I think if there was something up front that was low cost that would be good. But I would have to take that on notice and talk to the admin litigators in our team and see if they are aware of other jurisdictions that have a model that is working.

The Hon. CATHERINE CUSACK: Thank you. That is a really interesting idea.

Ms ABIGAIL BOYD: Good morning to both of you and thank you for your submission. Just coming out of that, we have had submissions that say, for example, that we do not need to have a disallowance or parliamentary scrutiny because we have this court process that people can go through. How hard is it to go through the process of challenging a SEPP and, versus that, what are the benefits of instead having a consultation process and scrutiny?

Ms WALMSLEY: There is no single solution. What you need is a suite of accountability measures. Bringing court cases is never done lightly; it is expensive and it is time consuming. For a local community group trying to protect a bit of environment, it can be emotionally draining and it can take years. It is a big commitment and it is very rarely done. You need to have the legal grounds to do it. You need to have a whole lot of support. It is not as simple as saying, "Oh, well, we do not need disallowance because someone can bring a court case", because there is not always that option available. As we have just said, sometimes your review rights are actually excluded. You do not have the review rights. Sometimes there is not that option available. So what you need is a suite of accountability measures. Disallowance is part of that. That is one option for the Parliament, albeit that is an imperfect tool because, you know, it can depend on the numbers in the upper House, on various things. You have review rights but if you start the process better from the beginning, with consultation and proper evidence-based analysis of the policy objective, then you would have better policy put in place and less need for the review rights.

Ms ABIGAIL BOYD: In your experience, how difficult is it for people to know when there has been a SEPP that would infringe their rights or be relevant to them? How easily can the community find out and how do they find out about those things?

Ms WALMSLEY: I would say from our experience it is very difficult. The average person would not know what a SEPP was because they do not come across a SEPP unless you are actually doing a development and you are told that your land is in this area so therefore these rules apply. It can be quite opaque. Unless you get some information from the department or you go to an EDO workshop that explains what laws apply to this type of land, there is not a really clear way to know. Sometimes it can be difficult when amendments are made to a SEPP overnight; it can be very difficult. I do not know if the department has a formal way of notifying affected parties when there is a SEPP amendment made or if it is assumed that people will read the gazette and notice in the gazette there is an amendment made. It is unclear what the process is. As Ms Chick said in our opening statement, SEPPs are powerful instruments and they can impact rights. I think you asked an earlier witness a question about how would a hospital know if a SEPP had changed. There would be some responsibility on their corporate counsel, I guess, to keep abreast of legal requirements that the hospital has to meet. But, again, there is no fail-safe notification system that I am aware of.

The Hon. BEN FRANKLIN: Thank you both for being here today. I appreciate that you acknowledge that there will be a need from time to time to implement a SEPP urgently and that necessarily will pull back some of the processes that you refer to. For example, pulling back from a five-year reassessment to a one-year reassessment seems like a sensible idea to me. In terms of the public consultation though, obviously, by its very nature, when you are talking about protecting something environmentally in an urgent way or even something around the pandemic, obviously the consultation process is going to be much more difficult—public consultation to do in any really meaningful way. Can you comment on how you think that could be handled from your perspective to be effective but still to ensure that the urgency can be implemented with speed?

Ms WALMSLEY: As Ms Chick said in our opening statement, we have had some further conversations since we put in our first submission on, kind of, an exceptional circumstances clause. We would be happy to put in a short supplementary submission describing this because we have had conversations last week—

The CHAIR: That would be most welcome.

Ms WALMSLEY: Obviously our preference is disallowable, but sometimes SEPPs are an available instrument that need to be made quickly and they can be done for a good purpose. The important thing is creating the structure of how you would do that. What you would need is really clear criteria of when the exceptional circumstance provision could be used to make a SEPP without the procedures of the mandatory consultation—the 28 days and so forth. So you would need to set out really clear criteria and when the criteria could be used.

For example, the criteria could be to prevent imminent environmental harm; it could be where there is no other option available, like a stop work order or there is no other instrument that could bring in that kind of level of protection. And, importantly, because you are bypassing disallowance and you are bypassing the public consultation, you would need to put in place a 12-month sunset clause or review clause whereby that is in place for a short time and then gets reviewed at that point to enable a bit of scrutiny so you can see how it has been functioning. I think that has been applied to some of the COVID measures brought in under the planning system.

But you just need to be really clear in your criteria of the exceptional circumstances when you can sidestep disallowance and public participation.

The Hon. BEN FRANKLIN: In your supplementary submission, if you wanted to, perhaps give us some ideas from your perspective of what those criteria might be or some of those frameworks, that would be helpful.

Ms WALMSLEY: We can do that. I also note that historically SEPPs have been useful in that regard—to bring in SEPP 46 to stop panic clearing before the Native Vegetation Conservation Act came in and to stop canal estates in wetlands. Historically, SEPPs have been brought in—and they have also been site-specific SEPPs that have been brought in to protect specific sites at certain times. There has been a role for that kind of instrument that is not to be found elsewhere in the planning system—like getting a stock work order for a site can be difficult. If it is a broader issue than that, SEPPs still have utility in that respect. Our preference is that you have well thought through, consistent statewide SEPPS, but I think they still have potential to apply from a site-specific protective basis. I imagine the department will say that there has been a move away from site-specific SEPPs in recent years to general ones, but the tools still could be used for site-specific SEPPs. Amendments are made in relation to particular projects, so clearly the move away from site specific is not set in concrete. I think there is real application to have a general disallowance requirement, but this is the exceptional circumstances rule. What we could do is just put in a short page on the criteria for this Committee to consider.

The Hon. MARK BANASIAK: Just following up on that, given that you are going to put in an additional submission, have you had conversations around, perhaps, creating categories of SEPPs—so, obviously, having emergency ones and certain requirements for them but then also having ones around environmental protection and having greater scrutiny or greater requirements of scrutiny over those. In your one-page submission, could you maybe touch on your thoughts in creating almost a tiered approach to SEPPs, recognising that there are some, like the health orders, that would require less scrutiny perhaps than environmental protection.

Ms WALMSLEY: I do not think that we would advocate too much complexity. We wouldn't want it then to be arguable which category your SEPP comes in. You could argue, "Actually, this is a low one. It does not need much scrutiny because it is just a minor technicality." Sometimes those minor technicalities can have implications. For consistency, all SEPPs should meet the 28 days and have a clearer evidence base and so forth and just have one category of exceptional circumstances. I see your point, but I think creating tiers of SEPPs might be confusing for the community and also might be a bit open to negotiation for an industry to lobby that their SEPP is just minor or technical so it can avoid some scrutiny. I think it would be better to have really clear, consistent rules on scrutiny.

The CHAIR: Thank you. I am not sure that you were listening to Professor Neudorf's testimony just before you arrived but in his submission he talks about the need for the publication of a draft text or explanatory statements for SEPPs. I would be keen to hear your thoughts on that suggestion.

Ms WALMSLEY: We just heard the last 10 minutes of the testimony but I think we also make a similar recommendation in our submission. As Ms Chick said, we have done a lot of submissions on SEPPs over the years when there has been the opportunity to do so. Sometimes the Government will just do that consultation based on the explanation of intended effects and those documents can be highly variable. But as lawyers, we always want to see what the actual SEPP will look like and what the drafting will look like. Because you can have a general statement of intended effect that can be relatively high level but until you actually see the wording of a proposed SEPP you will not know what the exemptions are or what the application is specifically.

I think it would really improve the rigour of public consultation if a draft SEPP was exhibited. Then it is also easier to see if anything changes following that public consultation. If there is a draft SEPP and there are 30,000 submissions raising concern about a clause and that clause is unchanged then there needs to be that scrutiny. There needs to be a statement of reasons why that has not changed—to what extent things were taken into account. That would just give more clarity and more transparency to the process.

Ms ABIGAIL BOYD: I guess one of the questions I was asking Professor Neudorf before was really about the benefit that you get through consultation. I think we hear a lot about consultation slowing things down or perhaps not having the outcome that certain proponents would like. Can you talk a little bit more about the process by which the words in the legislation or in the SEPP get applied to various circumstances through community input and what the benefit of that is?

Ms WALMSLEY: I think there are a range of benefits from doing consultation properly. I think if you can fully explain the logic of what you are trying to do up-front to the community and get the community's buy-in from the start you are going to have less controversy. People are not going to want to exercise review rights if they are actually consulted from the start, understand the rationale and have a chance to input. There are a range

of benefits of that. I think one of the problems at the moment is when talking about a planning policy the department sees their key stakeholders as local council, property, industry and private certifiers—the professionals who work in the industry. That is kind of the main audience for them when they are doing these policies, and they do not necessarily think of what it means for the community and the importance of the community understanding what the SEPP is doing. For example, with the new proposed design SEPP the audience for that is very much squarely developers and there is a lot of discretion in that. But if you actually think about what that could mean for a community, the development approval process for a community and the outcomes in that community, there is a different layer that needs to be brought into that conversation on that particular SEPP.

There is a whole body of literature on the benefits of doing public participation and public consultation well. I think that needs to be better considered in the context of making SEPPs in New South Wales. I think there was a question to the former witness about whether 28 days is enough. Generally that might be enough for a straightforward SEPP; it depends how complex the SEPP is. But if you have got a SEPP that would actually affect the rights of Aboriginal people, for example, you need to do consultation in a different way. You might need to spend longer doing it if it is a remote area. There might be different ways to engage to actually properly get that feedback from the community, and if you do get that feedback and people have some buy-in and contribute at the start of the process there is a lot less controversy and review and there is better implementation. If people know the rules that are going to apply to them and they understand it there is going to be less controversy and less misinformation like we have seen in recent politicised SEPPs.

The CHAIR: If I could just ask, some of the submissions say that making SEPPs a disallowable instrument—that "disallowable" tool can be a pretty blunt instrument. Are there other forms of parliamentary scrutiny that you may have given consideration to, other than the disallowable capacity of Parliament?

Ms WALMSLEY: In our submission we reproduced some of the rules about the guidelines for making regulatory rules and some of the steps involved in doing a regulation impact statement in a comparable sense. I think there are some elements there that could be brought to bear in a guideline around making SEPPs. I think we would make some amendments to those. I think it talks about socio-economic costs; obviously in an environmental policy you would need to do environmental costing as well. But I think there is some detail in those comparable rules that we have set out in our submission that could be applied.

The CHAIR: Do you think there is value in the Minister making a statement with regard to SEPPs to the Chamber?

Ms WALMSLEY: Absolutely. I think that would be one way of increasing the scrutiny. When you have got a controversial issue, if you can have debate on the floor of Parliament and you can have scrutiny and amendments then that is a much higher bar than the issues that are sometimes put in delegation that perhaps should not be. As I said at the start, I think the important thing is that where rights are affected or where there are key changes they should be done in the head Act, where there is that kind of scrutiny, to avoid the confusion of things that are pushed through in delegated legislation.

I think one of the issues about SEPPs is there is, I would say, a bit of community distrust at the use of SEPPs these days because they are used to kind of categorise development and fast-track certain developments. There is not that same level of scrutiny—particularly, for example, after the Bulga decision with the fact that the mining SEPP was amended to direct decision-makers to prioritise economic interests. That was an amendment related to a specific court case and it was actually inconsistent with the principles of ecologically sustainable development [ESD]. We have got a key head Act with ESD in the principles; that tinkering to the SEPP made under that Act was actually inconsistent with the head Act.

When amendments like that are made the community really loses confidence in what the Government is doing with these minor policies that get made very quickly with limited scrutiny. That policy was obviously just changed in lieu of a court case. Similarly, in 2019 there was a change—again to the mining SEPP—to extend the period for the Bylong mine. When the community sees the Executive just tweak this tool with no scrutiny for the benefit of certain projects it really undermines faith in the planning system. The recommendations we are making are to restore that faith and restore that rigour, and then you have the accountability checks in Parliament as well.

The CHAIR: If there are no other questions we will draw this to a close. Thank you for your submission and for attending today. I do believe you took at least two, if not three matters on notice. The Committee has resolved that answers to questions taken on notice will be returned within 21 days. The secretariat will contact you in relation to the questions that you have taken on notice.

(The witnesses withdrew.)

CHRIS GAMBIAN, Chief Executive Officer, Nature Conservation Council of NSW, sworn and examined

JACQUELYN JOHNSON, Strategy and Operations Director, Nature Conservation Council of NSW, affirmed and examined

The CHAIR: I now welcome our next witnesses. Would either of you like to make a brief opening statement?

Mr GAMBIAN: Yes, just a short one, Mr Chair. Thanks to the Committee for the opportunity to say a few words on this important topic. Like all legal instruments, State environmental planning policies [SEPPS] are not fundamentally good, nor are they fundamentally bad. Like an Act of Parliament or a regulation made by a Minister, they serve the values and priorities of their makers and we hope that, in time, some good comes of them. But the manner in which they are made is critically important. The long-term ramifications of planning decisions are enormous and, in many cases, permanent. We rarely get a second chance to get it right when it comes to approvals of developments and never get a second chance when it comes to impacts on biodiversity. Sydney is littered with monuments to poor planning choices over many generations and has, by comparison, very few examples of better sense prevailing.

As it stands, a SEPP can be made and unmade by the Minister at the Minister's discretion. On the face of it alone, this would stand at odds with our system of parliamentary democracy. On deeper analysis, we see that considerable difference exists in the decision-making processes for adding or removing a SEPP. Koala SEPP 19 was introduced last year after considerable public consultation and scientific evidence-gathering. The process for arriving at koala SEPP 19 was rigorous and thoughtful. But it was removed and replaced with the previous SEPP 44 in an afternoon. Without wishing to reopen that debate, it is unreasonable in a Westminster democracy that this level of unchecked Executive power is possible. Right now the department is in a detailed consultation process in relation to a proposed new Design and Place SEPP. Its ramifications will be enormous and will impact the built environment in New South Wales as well as the natural environment for generations. The consultation process is detailed but it has hardly rated a mention in the news media. It has hardly been a discussion in the Parliament and, unless something goes terribly wrong and we see Koalagate 2.0, it will probably never be discussed.

We believe this is antithetical to good governance. We believe the process of consultation should be mandated and we believe the Parliament should retain the discretion to disallow a SEPP in the same manner in which a regulation might be disallowed. I do not want to give the impression that the conservation movement regards this Minister or the Government as inherently requiring parliamentary supervision of their planning or environmental policies. Nor do I wish to suggest that the Parliament flawlessly represents some higher standard of environmental stewardship. We accept that all governments will propose good and bad policies. We know that the Parliament has a mix of those who care deeply for nature and those who seem to delight in finding an opportunity to destroy it. But the principles of parliamentary democracy are worth defending even if we must also accept that sometimes we will win and sometimes we will lose.

The CHAIR: I think you may have missed the Environmental Defenders Office's testimony but I did ask them a question. In their submission they talked about the merits of appeal rights of community members being able to—or third-party merits review rights being expanded over SEPPs, which is in line with previous ICAC recommendations. Do you have any views about that?

Mr GAMBIAN: I think there is probably very little to separate our views from those of the EDO. In terms of any kind of third-party rights, we think that anything that opens up a discussion and gives people the right to be a part of the process is fundamentally a good thing. We recognise that sometimes that needs to be balanced out with the efficiency of the system. But in principle we would say, yes, certainly we would support that.

The CHAIR: In your submission on page 3, you say, "The evidence-based rationale for the SEPP should be made clear." Can you expand on what you mean by that and how you would see that working? Is this up-front prior to the consultation process or is this the end of the process and the rationale for the SEPP? How do you see it working?

Mr GAMBIAN: I think the easiest way to think about this would be to think about the process by which a piece of legislation might be made, which is that from the earliest moments the Minister introducing the piece of legislation would make the argument for it, describe its scope and describe some purpose. The benefit of a parliamentary debate, of course, is that the Minister and other proponents of the legislation can talk to both detail and merit. It is not inherently necessary for that to be the case for SEPPs at the moment and I think that is a weakness in the system. The making of koala SEPP 19 is a good example of how a process can and should work.

By recognising that there was some benefit to be gained from reviewing the way in which that SEPP 44 operated, being informed by good scientific evidence and speaking to stakeholders from across the spectrum, the process was quite rigorous.

Now, that is not necessarily the case. It is the case when the Government decides that that is the process it would like to go through. We would think that there would be a lot of benefit if people more broadly, both parliamentarians and in the wider community, could understand what is the logic of a SEPP, what is its goal and what is the scientific basis for its provisions—if there is a scientific basis—or some other basis for those SEPPs that are not about biodiversity. That would, I think, go a long way in helping people understand even if they disagree with its terms, which will often be the case. I think having a process that people can have some faith in, that has got rigour to it, and that is not merely an instrument for a particular vested interest or a particular part of the community, be they conservationists or developers or anybody else—I think this works on all sides—would inherently make the system better and give the public a lot more confidence in it.

The Hon. BEN FRANKLIN: We have had some evidence this morning that a sunset clause would be a good idea. Generally the accepted idea was a five-year sunset clause for all SEPPs except for urgent ones, which may be shorter because they have less consultation. What are your views about sunset clauses for SEPPs?

Mr GAMBIAN: I am a bit agnostic about sunset clauses. I can see why sometimes they would provide a benefit, particularly if it has been an acrimonious process to arrive at the SEPP in the first place. I can see why that might give proponents and detractors some confidence that there is going to be a sort of systematic review. I do not think that a process that has been good and has arrived at a very good conclusion should necessarily require a sunset. I do not think that is fundamentally necessary, but I can see that there would be value. I think that, if there was a more transparent process for making these things, sunset clauses may very well become a feature. They are a good tool for compromise. But should there automatically be one? I do not really have a view on that, I am sorry.

Ms ABIGAIL BOYD: I was interested to read in your submission about the Gosford City Centre SEPP. As a resident of the Central Coast I am familiar with that particular SEPP but also the process that was decades in the making. The former Gosford council led a series of consultations with community and business across the local government area and came up with a very well understood agreement as to what development in the city centre would look like. To then have the Government sort of override the decades of consultation with this SEPP, which just changes the agreement—what do you think that does to people's ideas of government and their feelings of living in a democracy?

Mr GAMBIAN: Look, I do not want to make a lot of comments about local government because there are probably people far better qualified to talk about it. But, for what it is worth, I think that there is a risk that, if local governments that have been democratically elected—again, for better or for worse—that have gone through democratic processes can have all of that overridden with the stroke of a pen, that does fundamentally erode the faith that people have in both local government and State government. There will be times when it is in the collective interest of the State for the decisions of a particular local government area or local government generally to be overridden because there is a higher purpose. There is some higher priority that needs to be served. Local government does not have the same status as State government and we accept that.

But when we are talking about processes that affect people in their local communities day to day that are not abstract for people in their local community—decisions that will have permanent ramifications—then there is a real problem if the State Government can, without any kind of parliamentary process, come and ride sort of roughshod over what a local council has decided. As I said in my opening statement, we all know examples where the wrong call has been made either by a State government or by a local government. They are everywhere. I live in Hurstville. You do not need to drive very far around Hurstville to know where some bad choices have been made. But having community involvement in the process is always going to make the process better. Having some transparency to the process is always going to make the process better.

Ms ABIGAIL BOYD: I will come to one of your recommendations, or one of the questions you raise, around whether SEPPs should be location specific. As much as I do not like it, I can see the argument for the idea that a particular area should be opened up to resource extraction or that there is a need for a waste facility to be located somewhere as being in the interests of the State as a whole, as opposed to that city there needs to have more development from developers and we are going to take away the restrictions. Where would you draw the line if we were to try to amend the power there?

Mr GAMBIAN: I think really the test needs to be—and perhaps this is a test that the Parliament itself applies rather than there being a black-letter line drawn—does this issue go to the interests of the whole State? It is, after all, a State environmental planning policy. Is this about something that the State as a whole needs, as you say—be it resource extraction, some land use issue or even a large commercial development or infrastructure

development or whatever? Is this genuinely in the interests of the State, or is this a vehicle to override the decision-making of locals because the government of the day happens to not particularly like the decision of the locals? As I have said before, it cuts both ways. This could mean a local government deciding to block overdevelopment or large-scale development, but it could also mean decisions that are taken the other way.

The Hon. MARK BANASIAK: Just touching on the Chair's comments to previous witnesses about the bluntness of a disallowance, would the Nature Conservation Council support a stepped-out process before it became a motion to disallow—where the Minister may be first compelled to explain the intended outcomes of the SEPP and then he would have a chance to respond to the concerns of the Parliament and obviously the community about particular elements of the SEPP before a disallowance motion could be put?

Mr GAMBIAN: Yes, I think that would be incredibly helpful. I would go as far as to say that that should be true for SEPPs and should be true for any number of regulations as well. The most recent discussion around floodplain harvesting, for example, would have been better if the private discussions that had been held with the Minister and the department had been on the public record. One of the ways that we can disinfect some of these processes is with a bit of daylight.

The Hon. CATHERINE CUSACK: Thank you for your evidence today. We heard earlier that in 2021, 2020 and 2019 there were more SEPPs made in New South Wales than statutes enacted by the Parliament. Intuitively I would think that must be quite overwhelming for the Minister. In terms of the transparency and the consultation that many are calling for, how would you cope as an organisation with consultation around all of those? Would there perhaps need to be some way of distilling out the key issues upon which you want to be consulted without necessarily making that discretionary? I am just trying to get my head around it. I know you are making so many submissions to all of our inquiries that it must seem like an awful lot of work even for you as an advocacy organisation.

Mr GAMBIAN: Yes. There is a reason Ishbel Cullen is not here. She is unwell from overwork, I suspect. It is a fair point. There is no question that trying to keep up with the business of this place does leave an organisation like ours, which is not publicly funded in any way—that is a challenge. There is no question of that. But we would never not take the opportunity to be involved, because that is how important we think this place is to the wellbeing of nature and climate action in New South Wales. I think that being able to have open processes would probably have the effect of changing the nature of the SEPPs in the first place. It would probably change the number of SEPPs, certainly, because it is a hell of a lot harder to have an open and accountable process that needs to be defended publicly—as a piece of legislation does—than it is to effectively just issue an order. I think that transparency would change the nature of the system fairly substantially. Would it place a big challenge for organisations? Likely yes, it absolutely would, but I do not see that as an argument against having opportunities for locals and people who care deeply about issues to participate in the process.

The Hon. CATHERINE CUSACK: Do you think that the scope of the SEPPs, the range of subjects that they cover, is too broad and maybe other forms of relation would be more appropriate for dealing with some of those issues?

Mr GAMBIAN: Yes, I do. There are two topical ones that we have talked about in our submission: the koala SEPP and the proposed Design and Place SEPP. These are big-ticket items. Protection of any kind of biodiversity does really deserve its own legislation. Having processes that people feel that they can comply with and support—whether you are a developer, a farmer, a conservationist or anybody—is a big process. It does probably deserve something better than a SEPP. We would definitely support a more thoughtful piece of legislation, regulation or something else that would serve those interests. They are big interests. The Design and Place SEPP is another one, and in some ways the ramifications of the Design and Place SEPP are so huge that we should be having a large public discussion. If this Design and Place SEPP works, it should set the tone for development in this State for the next 30 years. As it stands I am not criticising the way the Minister or the department are handling the process at all but it is something worthy of a conversation—particularly in a State like New South Wales where property development has historically been a very complicated, vexed issue.

The Hon. CATHERINE CUSACK: If it is setting the tone for the next 30 years, is a SEPP really the appropriate instrument for that conversation?

Mr GAMBIAN: Quite possibly not.

The Hon. SCOTT FARLOW: Just picking up on the Design and Place SEPP, I understand your substance issues with it but it seems like this is one of the areas where the process might be right in terms of what the planning Minister is doing. It is out for public consultation. It is doing what you were talking about before and consolidating SEPPs into one. At this moment it might not necessarily be where you would like it to be in terms of substance, but it seems like the process might be right on that. Is that a fair assessment?

Mr GAMBIAN: Yes, that is a fair assessment. We would say that for the process followed for the development of the koala SEPP—that is SEPP 19—the process for this Design and Place SEPP should be the model. That is not just because the Minister and the department choose to make it the process, but it should be the model that we mandate and that the Parliament broadly accepts. If the Minister is going to exercise a discretion of this scale, there should be a responsibility to go through the kind of steps that they are going through right now. You are right that there are elements of the Design and Place SEPP that we do not support, or broad concepts, but I do not think that it would be fair to say we are not getting a good hearing.

The Hon. GREG DONNELLY: Thank you both for coming along today. In your submission can I please take you to page 9, the second last page, at point 5 about the drafting of SEPPs. You make a point that I think is probably not contested by anyone about the complexity of these documents—to the point where you use the language "incomprehensible", which I think some people would agree can sometimes be the case. This might appear to be a naive question, but what are your thoughts about how one can take matters that are almost incomprehensible in terms of the way in which they are currently drafted and make them into something that is understandable to a layperson or to people who do not have a legal sophistication?

Mr GAMBIAN: Wow, I wish I knew.

The Hon. GREG DONNELLY: Sorry, I do not mean to ask a silly question.

Mr GAMBIAN: No, I do not take it as a silly question at all. I think you make a fair point, which is the accessibility of these systems is a very big issue. I think that in a more sober moment—if we were all thinking back to the excitement of last year and the koala SEPP, a lot of the problem there was a misunderstanding about what was being proposed and what was being required. It was a hard thing to understand; I know because I was constantly trying to work it out and make sure that I was not getting it wrong. It is not easy to understand if you are a practitioner in the space of public policy, let alone if you are a person in the community who is just trying to comply with it. I think that one of the things a Minister and a department that understood that there would be more public scrutiny on their documents might choose to apply would be a layman's test.

The Hon. GREG DONNELLY: That is sometimes embraced by the phrase "do it in plain English".

Mr GAMBIAN: Sure.

The Hon. GREG DONNELLY: Beyond the phrase "plain English", are there other ways in which the preparation of these—the lead-in preparation or precise drafting—will enable them to be better understood, other than just using the phrase "plain English"?

Mr GAMBIAN: Perhaps, but if the goal is that people understand it, one of the things you have got to do is make sure that the people are actually understanding it. It is not sufficient to put information out into the public and convince yourself that it is understandable. I think the test needs to be: Is it being understood? If it is not, then you need to go back and work on it. That includes once the SEPP has been made or once a piece of legislation has been made—as we would happily do on other things—taking the time to explain it and explaining its implications. To use the koala SEPP as the example, I think there were a lot of people who were upset about a lot of its content, partly because they thought that it said things that, frankly, it did not.

The Hon. MARK BANASIAK: I have a couple more questions touching on Greg Donnelly's comments. Under the good regulation guide, you should have a regulatory impact statement. Do you think that should be mandated for SEPPs as well?

Mr GAMBIAN: Yes, I think that would be very useful.

The Hon. MARK BANASIAK: Not to reopen old wounds of the koala SEPP, but do you think an issue with that koala SEPP process was that the details of the SEPP were released without actual guidelines of how that was going to be applied, so there was that gap where there was a bit of confusion or that allowed confusion to reign?

Mr GAMBIAN: I think the koala SEPP is an interesting one because it was made without particularly any note or public—those people who were involved in it got to have a discussion about it. It got released. It existed for a while until it became the discussion of a big political debate, so it probably is a slightly different set of circumstances. But I think what we saw was absolutely the consequence of a failure to explain it in terms that people who were going to be affected by it, people who perhaps had not been following the Parliament House website as closely as I do, people who might see themselves as being affected by it in the future, rather than in the present, suddenly taking an interest and the tools available for explaining it were not necessarily fit for purpose by that point.

The Hon. CATHERINE CUSACK: Without going over the content of the SEPP, the process about stakeholders with different perspectives making input to a department, are there opportunities perhaps for stakeholders to actually get together and prioritise what their concerns are as opposed to thinking that Government is a godlike organisation with the wisdom of Solomon? Maybe organisations can themselves have conversations.

Mr GAMBIAN: I think that would be enormously valuable. Again, without wanting to reopen the old wounds—

The Hon. GREG DONNELLY: I think it is about time someone reopened these old wounds.

Mr GAMBIAN: I am sure they will be reopened at another time. We will help reopen them at some point. On the day that the Minister made some fairly significant announcements about koala policy back in probably February, we were having lunch with the National Farmers' Federation trying to do exactly that. We were trying to work out what a pathway forward was because by that stage we had lost confidence that politicians in this place were adequately talking to each other. I think overall our democracy in New South Wales will be an awful lot stronger if people with different perspectives, but not necessarily different final views or even different values, can come together and share those.

I think that makes democracy all the stronger and I think it gives MPs a much better basis for the decisions that you make. As you rightly say, it is unreasonable to expect people in this place to have the wisdom of Solomon. If you can be informed by a thoughtful, sensible public discussion that is held in good faith, then we will get better laws. We will get better regulations. We will get better SEPPs. Unfortunately, as it stands, a lot of these processes do not exist. We are attempting to fix that by sitting down with some of our counterpart organisations, like the Farmers and the National Irrigators' Council and others, but I would love to see a time when Government and the Parliament thought that that was a sufficiently large priority that it would facilitate those kinds of discussions.

The Hon. PETER POULOS: Thanks, Mr Gambian, for your input and participation. Broadly speaking around the framework of SEPPs, are there a number of fundamental principles that you consider sacrosanct, such as ecologically sustainable development or other themes that need to be aligned with any future SEPPs?

Mr GAMBIAN: Yes. Congratulations on your appointment. I would say that across the board, having regard to the impact that the decisions this Parliament makes and this Government makes for both the present and the future, having regard to science, having regard to evidence, having regard to what the vast community sentiment is, they should be regarded as sacrosanct. Of course we say, and I would hope everybody would say, that when we make choices about developing property in New South Wales we do have a strong regard for ecological sustainability. There is not so much nature left in New South Wales that we can afford to be rampantly destroying it. But I do not want to give the impression that we are opposed to development or opposed to the ability of people to go about their business. But having some flaws around the core purpose being protecting ecosystems and protecting the nature that we all have to live in it should be pretty fundamental, yes.

The CHAIR: What is your view about explanatory statements being tabled in the Parliament around each of the SEPPs?

Mr GAMBIAN: I think that would be incredibly helpful. It would be helpful for an explanatory statement. I think it would also be helpful for there to be a process of questioning. I do not think it should just be estimates that is the process to ask Ministers questions about things, and question time certainly fails that task. Having formalised processes where a Minister can account for regulations they are making or SEPPs that they are making would be a very healthy thing.

The CHAIR: Thank you very much for your attendance today and for your submission. I do not think you took anything on notice.

(The witnesses withdrew.)

NICK SAVAGE, Policy Director – Environment, NSW Farmers Association, sworn and examined

BRONWYN PETRIE, Member, NSW Farmers Association, sworn and examined

The CHAIR: Welcome. Would you like to make a brief opening statement?

Mr SAVAGE: Chair, I will give an introduction to our conversation and then pass over to Mrs Petrie for some detail around the broad concept that I have introduced. Thank you for the opportunity. From a NSW Farmers point of view, we are a membership organisation that represents around 6,000 members around New South Wales. Our policy positions are directed by our members. In relation to State environmental planning policies [SEPPs], I think we would like to introduce some broad concepts to the Committee for your discussion around the interactions of SEPPs with agricultural land. The SEPPs obviously have a broad role in informing policy, long-term policy positions for local government around the State and, in particular, I think how they interact with agricultural land we found can be quite problematic. Although we do not have a bias against a SEPP, it is really liked to get a better understanding, or give the Committee an understanding, about how it can affect agricultural land.

The Primary Production and Rural Development SEPP made a number of high-level aims—that is, to support investment in agriculture; to reduce land-use conflict; to facilitate an adaptive approach to new and emerging agricultural practices, technology and industry; and to protect environmental values. They are all very important things in agricultural land. I guess what we would try to get into a discussion about is whether that is effective on its own in managing agricultural land. The developments across the State in urban and peri-urban land uses are very different to development in agriculture. There are some sort of permanent effects obviously in building a shopping centre or a hospital or a housing development, as compared to what a development on agricultural land could be.

Agriculture really requires I think a long-term view, obviously operationally it needs a short-term facilitation of regulations and what governs it, but it needs a long-term view on how you can balance productivity and environmental issues. In trying to balance those with instruments like SEPPs we found—and Mrs Petrie will go into these probably in more detail—the interaction of a SEPP with governing legislation can be quite problematic in land ownership. Going into that in a little bit more detail, obviously native vegetation in New South Wales is governed by the Biodiversity Conservation Act and the Local Land Services Act, and that is the overall aim, I guess, of the government of the day in trying to balance productivity on land, allowing farmers to make the most in agriculture of the use of their land but to try and reverse a decline in biodiversity in New South Wales and to protect environmental assets.

Without going into the merits of that legislation, Mr Gambian before me mentioned the koala SEPP and it is certainly one that is an interesting example of interactions of SEPPs and governing legislation. I think Mrs Petrie will probably go into that in a bit of the detail. SEPP 46 was obviously a dramatic change in how agricultural land can be managed. It is that interaction, I think, that really brings into focus whether the SEPP is an efficient way of allowing farmers to understand the goals and how they can achieve productivity environmental balance on their land. I understand what Mr Gambian said, and we have had meetings with him around the koala SEPP at the time. Where we thought that fell down, without going to the merits of the SEPP, was that it did not take into account what could happen as a reaction to the settings in the SEPP around the ability to declare koala plans of management.

The uncertainty that created for landowners and the merits of those discussions have been debated. But the overall effect of it was that it created a great fear in landowners about their ability to invest in their land, what their effective productivity would be, what their asset value of their land could be. And those sort of concerns really go to the heart of managing agriculture, which is to make sure that you have a long-term plan—whether it is passing on the property to another generation or whether it is maximising the productivity and protection of environmental assets. There is much more awareness nowadays around, it is not just trees, it is the ability to retain carbon, it is the ability to adapt to climate change. There are a lot of things that happen now in looking at your long-term viability and economic and environmental balance, sorry.

That sort of juxtaposition of that SEPP and that legislation really demonstrated that in building SEPPs, they are done in the planning context without consultation with a whole-of-government approach and that is problematic, I think, in managing agriculture. You need to really understand how farmers go about managing their land, how farmers go about protecting their environmental assets, and how they do that within the current legislation. I think we saw in Queensland a few years ago the swings in liberalising land clearing and then tightening up on land clearing, about the detrimental effects of that, that it led to broadscale clearing where it was not actually necessary, and then a tightening of regulations that really went too far in a lot of ways, about functioning operations of land.

That sort of juxtaposition of SEPPs and legislation is a real concern for us, and it is certainly something I hope comes out of this inquiry, that examination of how they interact. Other simplistic examples in the exempt and complying SEPP, there is a limitation of, I think, five silos on a property, so your property could be 400 hectares or 40,000 hectares. You can have five silos without a development approval [DA] on your property. The aim of that SEPP is to facilitate development without red tape and without having to go into DAs, which is great. It is a terrific idea. But to have it limited like that shows sort of a real lack of understanding, I guess, of operation of farming properties.

The CHAIR: Thank you, Mr Savage. We will have to go to questions, but I think, Mrs Petrie, you wanted to say something as well?

Mrs PETRIE: Yes, please. Just as background, our son is sixth generation. The family has been on the property since 1860. We have got 25,000 acres, so I speak from experience. I am very proud to say we have got 13 endangered and threatened species on those places. The concern we have with State environmental planning policies—and we do realise most SEPPs are urban focused, but four come to mind that impact on rural land, and our biggest issue is lack of consultation with affected industries before these SEPPs come out, and obviously without practical knowledge of on-ground impacts and the interplay with other legislation that Mr Savage has referred to.

Very briefly, SEPP 46, a lot of what came in in SEPP 46, 10 August 1995, was good, but there were some components of it—particularly the 10-year regrowth rule—that created huge, perverse environmental outcomes. People could not therefore renew their pastures if they were, say, 12 years since they had last done it. What that resulted in is people then had to let weeds grow in to more than 50 per cent of their ground cover before they could actually do anything with those pastures. Those of us with a lot of trees, we would do our tree rotations 15 to 30 years. We would see which trees we want to keep that would create multiple habitats. And that captured a lot of land, made it unproductive where people had gotten rid of rabbits, had changed from sheep to cattle. They had this influx of regrowth and we therefore had 22 years of woody weed and great erosion, et cetera, and suicides from young people who had purchased properties cheap so they could get in and do the labour, and then those properties became worthless. That is that one.

The next one is wetlands, SEPP 14. That impacted our coastal farmers and that was perfectly fine, but it captured landowners where, for instance, the Pacific Highway created unnatural wetlands and farmers then were not able to prosecute a DA. One farmer then went to sell his sailing boat and his son got electrocuted as the mast, you know in the stress, dragging it, and the mast hit the electric poles. That then transferred into the coastal SEPP, nearly three years ago, which had no consultation with industry, it was an interdepartmental agreement and, for instance, that has now created dual consent, which was not required before because of the mapping. We have got sugarcane farmers who cannot properly clean out their drains, resulting in saltwater backup going through the soil. It has a huge impact on private native forestry.

Just in the North Coast we have got 133,000 hectares of privately owned forest. There is a company called Weathertex—highly awarded, 140 staff in Sydney. They require 10 per cent paperbark to make this fantastic, environmentally friendly product. That is under threat because some councils are going to be unpredictable or refuse or want to exclude private native forestry. That will have not only the detriment of losing the product, potentially, but also the social-economic impacts up north.

Finally, the koala SEPP—the fallout was never about not wanting to protect koalas. Like, who doesn't want to? I was actually at the koala hospital only 10 days ago at Port Macquarie and saw the fantastic job they do. It was about the impact on land management control jurisdiction as a result of the interplay with the Local Land Services Act. Now, unfortunately, the environmental movement very successfully persuaded some politicians and some gullible members of the public that this was about removing protections of koalas—far from it. The koala habitat protection SEPP came in or was signed off in December 2019. The public consultation was in 2016 on a completely different document. The Minister signed off on a document with no maps, no guidelines, no list of tree species. I hope that is a good lesson never to sign off on anything again sight unseen with the "Trust me, Minister" approach from senior bureaucrats.

When the maps came out, my house, my sheds and dams out in the Western Division and everything are now mapped as prime koala habitat. In vast areas the tree species went from 10 tree species to 123 use trees. Vast areas of rural land as a result of the maps and as a result of the tree species would easily slot into—by law there is a requirement that that becomes an E-zone and comes under council under the non-rural vegetation SEPP of 2017. The name alone should tell you why that koala SEPP was flawed because vast areas will come under a non-rural vegetation SEPP where your normal land management allowable activities would be severely confined and you would come under council, who are already floundering under the burden of what is coming from State Parliament already. I know you are pulling up.

The CHAIR: Yes. We have to go to questions. That would be really good.

The Hon. CATHERINE CUSACK: My question simply relates—and it is really important because we now have only 15 minutes left for members to ask questions. I do not wish to go over or re-litigate the koala SEPP issue but rather the governance issue for management of agricultural land. Is it the position of NSW Farmers that SEPPs should not apply to agricultural land?

Mr SAVAGE: I think I might have mentioned at the start we are a very democratic organisation and our members do not oppose SEPPs. They do not oppose the disallowance of SEPPs. Our focus really is on if SEPPs are created as an instrument, that there really is an integration of the goal of the SEPP and the workings of the SEPP with the existing legislation so there are not inconsistencies.

The Hon. CATHERINE CUSACK: So the move to remove SEPPs from agricultural land and reinstate protections in land management codes, is that an idea that is coming from NSW Farmers or is that an idea that is being put to NSW Farmers?

Mrs PETRIE: If you are talking specifically about what was proposed with the koala SEPP, that was—

The Hon. CATHERINE CUSACK: That was an example of it—

Mrs PETRIE: But if you are using that as an example—

The Hon. CATHERINE CUSACK: —but as a generic governance model because the coastal protection SEPP was caught up in that as well. I guess what I am trying to establish is: Is the mood favouring just getting rid of SEPPs off agricultural land and instead replacing that with amendments to the land services management Act? I would assume the rationale would be to reduce red tape for farmers or green tape, whatever you want to call it.

Mrs PETRIE: As Mr Savage said, we are not opposed to SEPPs. It is about where content within a SEPP is inappropriate when you apply it actually on the ground. That is why we feel that communication from departments or Ministers, whoever, prior to a SEPP coming into force—those four examples I gave you the moment, we read it we knew straightaway where the problems were. Had the consultation taken place, we could have said, "This is where it does not actually fit in with certain clauses within the Local Land Services Act." As Mr Savage has said, it is counterproductive; it does not work. We could have immediately pointed that out, and just like the coastal SEPP they went, "Oh, we hadn't thought of that." So we are not actually opposed to SEPPs is the point.

The Hon. CATHERINE CUSACK: I do understand that there are things in the SEPP that you do not like. But my core question is: Do you see codes under the Local Land Services Act as a superior method of regulating agricultural land?

Mrs PETRIE: Absolutely.

The Hon. CATHERINE CUSACK: Because that seemed to be the big idea behind that whole—

Mr SAVAGE: The codes are part of an integrated legislative approach, which basically looked at trying to increase productivity and to increase agricultural protection. There is a realisation in that legislation that that was not going to happen overnight. The biodiversity bounce effect and the impact on biodiversity at the start of the land management code would be greater but the ability to set aside land and actively manage land that was put into that land management code and those obligations was meant to—and it is a sort of 15- to-30-year measurement on increased ecosystems and increase the viability of remaining ecosystems. So it is not simply about a land management code being the governing instrument over land.

The Hon. CATHERINE CUSACK: Yes, because it is not principally designed as a regulatory Act of Parliament. Do you see what I am saying? I know it has been very difficult to amend because that was not the original intent of the Act. As to the applicability of SEPPs, if we are going down that track of trying to simplify, the "one-stop shop" is a term I sometimes hear used in relation to how we should be regulating agricultural land. I am very interested in this core concept of whether you guys are advocating actually changing the applicability of SEPPs so that they do not include agricultural land or in certain SEPPs are removed from coverage of agricultural land or if that is an idea is coming from somewhere else?

Mrs PETRIE: We already were working with the existing, say, koala SEPP 44.

The Hon. CATHERINE CUSACK: Which is in the process of going into the local land management code. That is a prime example.

Mrs PETRIE: I am just saying we already had the codes, which do regulate us. That is how our vegetation is regulated. But in addition we did have the koala SEPP 44 where you had a presence of a breeding

population of koalas and those 10 or whatever many feed species you might have had. That was in addition to your codes. Our issue with the change was some of the clauses and the maps and how that then interplayed with specific clauses within the Local Land Services Act and the Biodiversity Conservation Act. That is where the issue was. It was not about not wanting to protect koalas. Whether you have a SEPP or not, provided that it is appropriate and provided that it does provide those protections for whatever you are trying to protect, I personally do not have any particular problem with it, provided that it actually works and gets the outcome you want to have, such as, it might be coming into the local land services thing.

I do not see anywhere a condition that requires that where you do have koalas that you have to have low fuel load or vegetation underneath, not only so that koalas can move from tree to tree or go and get water but so that when there is a fire it does not go into the crowns and you are not hearing koalas screaming like babies as they are incinerated. That is the best condition you can put on any land vegetation where there happens to be koalas present and it is not in any document yet; neither is it in any condition that says when the RFS or national parks do a hazard reduction burn that they do not do it in the middle of the day so that they can go home at five o'clock, unlike farmers who do it into the night so you do have cool ones that do not end up in the crowns of the trees, and we therefore have living koalas. That is the condition that should be in there.

The CHAIR: Before we go to questions from the Hon. Mark Banasiak, I think the nub of your conversation today is actually about the consultation that should take place prior to the implementation. Would that be correct?

Mrs PETRIE: That is correct because, if we can have a consultation, we can sort out any unforeseen issues. I am presuming that people who draw these things up are well intentioned and they are not being deliberately manipulative and thinking, "Oh, yes, we'll be able to do this and that will knock out this particular clause of that Act", et cetera. With that good intention, if they could sit down with the people who are going to be impacted and we, knowing the legislation we are bound by or other things that we do in the land, can go, "Well, hang on. Yes, that's fine. That'll work" or "This won't work because of such and such", and find a resolution that way. Rather than saying no SEPPs at all or whatever—because sometimes, you know, if there is a short time frame or something, you might need something such as a planning instrument that can create a certain outcome. But consultation is key.

The Hon. BEN FRANKLIN: Can I just quickly follow up on that, Chair? I need literally 10 seconds.

The CHAIR: Okay.

The Hon. BEN FRANKLIN: And ensuring that there is no conflict between the SEPP and the legislation?

Mrs PETRIE: Correct.

The Hon. MARK BANASIAK: Currently, under the Environmental Planning and Assessment Act and obviously the subsequent SEPPs that sit under it, there is no avenue for, I guess, an appeal under the Administrative Review Tribunal for individuals who obviously want to appeal decisions. Would you support that being remedied through legislation and looping in decisions made under that Act or decisions made under the SEPP being allowed to be heard at an Administrative Review Tribunal rather than going to the Land and Environment Court?

Mrs PETRIE: I think it would be quicker and certainly less expensive. We have seen different decisions made where you wonder how those decisions could be made and have terribly adverse impacts on farming families.

The Hon. MARK BANASIAK: I know we have already talked about the conflicting nature of some SEPPs and particularly legislation, but do you think it is inherent of the problem that—I think Dr Neudorf mentioned—there are some SEPPs that actually flip the legal hierarchy on its head and essentially usurp legislation and provide that conflict? Do you think SEPPs should not be allowed to essentially usurp clauses in legislation? If there are going to be exemptions or conflicts or interactions between legislative instruments, do you think it should be done at the statute law level rather than doing it between a SEPP and a piece of legislation?

Mrs PETRIE: Correct. It should also apply to councils as well. The legislation should be the superior document and that is where we are finding we are falling foul of the State setting legislation and having a council erode that by wrongfully using that dual consent provision that should never be there. That was part of that local land services amendment—the removal of that dual consent provision on rural land, which I think is something you should all engage in fairly rapidly.

The CHAIR: I want to go to this issue which moves on a bit from the consultation processes prior to a SEPP coming into place. Again, Dr Neudorf in his submission—if you have not had a chance to read it—talks

about the need for the publication of draft text or explanatory statements for SEPPs so there is a greater understanding as to why they have been brought into effect and what they aim to achieve. What are your comments or views about that suggestion?

Mr SAVAGE: I would not call that window-dressing, but I guess the real concern for us is—just going back to your previous point a little bit—that we would like to see more consultation within government before there is consultation outside of government. I think that is, to us, where SEPPs can fall down. There needs to be a much more whole-of-government application of legislation around environment and agriculture. They are not separate things. They are things that are really joined together. If you look at planning instruments' unsuitability to just look at one facet, it really demonstrates that it just cannot be done without government really interacting with itself.

Mrs PETRIE: Can I add there that I have never, ever had a problem reading legislation or SEPPs or anything, so I actually have not found that to be an issue.

The CHAIR: The other aspect that has been raised in a number of the submissions is actually about the parliamentary scrutiny of SEPPs, or, in some cases, some submissions suggest a lack of parliamentary submissions on SEPPs. Some are proposing the disallowable instrument be a part of the arrangements for SEPPS. But if there was no disallowable instrument—if you have explored this at all—what sort of parliamentary scrutiny would you envisage would be applicable or suitable for SEPPs?

Mrs PETRIE: Certainly, as we have both said, it is that prior consultation before a Minister can simply put a SEPP out, as has happened to us on the ones that have caused us angst. As I have said, part of them have been perfectly fine to achieving what they want to do, but others have these consequences that are quite horrific. So the consultation prior to and in Parliament, I presume, you would also want to discuss it; that would perhaps be helpful for other issues that may arise. But, certainly, I think the key is really in that consultation prior, whether that is an internal consultation within Parliament the same as it would be with affected industries or landowners, or other parties for your urban ones. But somewhere there has to be consultation outside of what is happening currently.

The CHAIR: Mr Savage, did you have something to say?

Mr SAVAGE: I go back a little bit to the fact that agriculture needs long-term certainty. To have—as Mr Banasiak said—powerful instruments that can trump legislation that can then be disallowed can be problematic in agriculture. If you are going to look at having long-term settings, we would love to see a bipartisan approach to the management of agriculture and environment. That would be the ideal way to give agriculture certainty going forward. To go to having disallowable instruments that can be quite powerful can be problematic for agriculture. But, again, our members do not have a particular policy position against disallowability. But it is trying to have that longer term view we would encourage as the way to try and manage agriculture, rather than instruments that can be quite powerful that can be changed overnight.

The CHAIR: Do you think your membership would support the concept of greater parliamentary scrutiny even if it is not a disallowable element—a greater parliamentary scrutiny on SEPPs?

Mr SAVAGE: I think so. I think we would really encourage the word "scrutiny" be replaced with "cooperation".

The Hon. MARK BANASIAK: On that, do you think they would support a stepped-out process where the disallowance was the very pinnacle or the tipping point, but before that there were certain things that would have to occur before a disallowance motion could be put forward—so a Minister coming forward and giving the explanation and hearing the concerns of members and the community about how the SEPP should be amended before a disallowance motion would be put?

Mrs PETRIE: Can I just query, do you mean if a SEPP has come in and then you have a disallowance? But if we have a consultation process and parliamentary scrutiny before it can come in then you do not need a disallowance, do you?

The CHAIR: What you are saying there, Mrs Petrie, is that the parliamentary scrutiny occurs prior to the SEPP being implemented, which is an important conversation to have.

Mrs PETRIE: Absolutely. If you can have the communication and consultation with the affected people—people who are the primary affected people, whether that is urban or rural or whatever—who know what the consequences of that SEPP will be, good or bad, you have then got that information and you can put it into your parliamentary scrutiny before it becomes enacted. Once it is enacted you end up with exactly what we have seen in recent times. Isn't it better to fix it first and then if it is not fixable, it simply does not proceed. Whether you would call that a disallowance—I would say rather than even letting it become enacted, or whatever the word

is for SEPPs, it just does not even go there if it is found to have so many hairs on it that it is a useless planning instrument that achieves nothing except angst.

The CHAIR: Without putting words into Mr Banasiak's mouth, I think that is what he was talking about: some sort of process that you go through before you could—

Mrs PETRIE: Exactly.

The CHAIR: If there are no other questions, I thank you for attending the hearing today. I do not think you took any questions on notice. There may be questions on notice. I am not sure. We will see what happens.

Mrs PETRIE: Thank you for inviting us. We appreciate it.

Mr SAVAGE: Thank you, Chair.

(The witnesses withdrew.)

(Luncheon adjournment)

LAUREN CONCEICAO, NSW Deputy Executive Director, Property Council of Australia, affirmed and examined

ALLAN HANSELL, NSW Policy and Communications Consultant, Property Council of Australia, affirmed and examined

The CHAIR: I now welcome our next witnesses. Would either of you like to make a very brief, short opening statement?

Ms CONCEICAO: I would, thank you, Chair. I thank the Committee for the opportunity to appear today and present the Property Council's views on your self-referred inquiry. The central question before the Committee is whether the State environmental planning policies—otherwise known as SEPPs—ought to be a disallowable instrument under the Interpretation Act 1987. The Property Council believes that SEPPs play an important role in the planning system. The primary benefit they serve is that they provide a coordinated framework to deal with matters of State or regional environmental planning significance within New South Wales. SEPPs are a statutory planning policy and are not regulations. They are made up of various provisions and of development standards. Our experience in New South Wales is that SEPPs address a range of planning issues, including providing guidance on appropriate development and land-use practices around, for example, affordable housing, agriculture, hazardous and offensive development, advertising and signage. Other things covered by SEPPs include precincts and areas or other specific sites.

SEPPs are an important means by which consistency can be made and promoted across New South Wales and across the planning system. They are made on the recommendation of the planning Minister to the Governor. SEPPs give the planning Minister an important and truly transformative power to act quickly to implement positive planning guidance to consent authorities and other participants in the planning system so that, together, we can achieve great coordination to assist the delivery of appropriate environmental protection and development. The attraction of SEPPs is that a Minister can establish the tone of the planning and environmental settings in areas where there is pressing need to forge a consistent approach. The fact that this occurs without reference to the Parliament is a blessing and not a curse. We do not say this with the intention of offending the Committee, nor indeed the Parliament itself. We say it merely to make a point that our planning system already has a heavily democratic input. The New South Wales Parliament has 135 elected parliamentarians who pass legislation and can disallow regulations. SEPPs are not regulations. As the name suggests, they are policies, and we would suggest that, as such, they rightly sit with the Minister of the day.

In our view, there are two questions that the Committee needs to ask itself in determining the central question that is the subject of this inquiry. The first is: Do we need to have a disallowance power over SEPPs when SEPPs have been shown time and time again to be one of the genuine successes of the planning system in improving coordination across the State? The second question is this: Which of the current SEPPs in force is not up to scratch and should be the subject of a disallowance? The trouble with this question is, of course, that the beauty is in the eye of the beholder. In the same way that we have laws that are not perfect we also have SEPPs that are not perfect. Governments of both persuasions have worked hard to devise SEPPs that achieve an important balance that needs to maintain the important development across the State, generating the construction of homes, employment and entertainment opportunities that drive our economy while preserving the pristine and urban environments to sustain Australians for the future.

Although we do not agree that SEPPs should be disallowable instruments, we do believe that the process in making them can be further improved. We have made three key recommendations in our submission that go to this point. The first goes to providing information about how an instrument relating to the Environmental Planning and Assessment Act 1979 and existing policies is presented; more consideration and information about the impacts being provided during the public consultation period; and plain English guides that should be provided. The New South Wales planning system is complex and difficult to navigate; it is also slow and costly. Still, despite the efforts of the current Minister to improve both, we would submit to the Committee that any changes which make the system slower, less certain, more costly and less consistent should be strongly opposed. We believe making SEPPs disallowable would unfortunately exacerbate the worst features of the current system for no appreciable benefit. Less complexity of the law and regulation can only bring the various interests in the environment and planning system closer together for the benefit of the State's citizens through the protection of the natural environment, our heritage and in support of an appropriate built environment. Thank you.

The CHAIR: Thank you, Ms Conceicao. I have a couple of questions and then I will go to the broader Committee. Clearly the Property Council does not want to move down the disallowable instrument path, but what about greater parliamentary scrutiny of SEPPs themselves? At the moment there is none.

Ms CONCEICAO: Anything that slows down the planning system is something that the Property Council would not support in itself. The SEPPs by their nature are able to be established and delivered in a relatively quick turnaround time by the elected Minister of the day. That is actually one of the beauties of the SEPP system, and the complexities in the system slow down delivering for the State. While scrutiny exists through the parliamentary systems for the laws and regulations of the day, in the SEPP system we would not support anything that would slow the system down further.

The CHAIR: On page 8 of your submission you state:

> … the process for making SEPPs could be improved to require greater consideration of impacts (Regulatory Impact Statements) …

A couple of submissions to the inquiry have talked about the need for some sort of a ministerial statement across the top of the SEPP that would actually explain why the SEPP came into being and what it is intended to achieve. Is that the sort of thing that you envisage in your suggestion of a regulatory impact statement?

Ms CONCEICAO: Across our submission, both with the regulatory impact statement but also for the broader community we would strongly support anything that makes SEPPs more communicable to everybody involved in the system.

The Hon. BEN FRANKLIN: Could I go to your recommendation 2? It states:

> 2. When a proposed instrument (SEPP) is published on the NSW Government Legislation Website, related information is provided to indicate how the instrument made addresses of the EP&A Act or its relationship to existing policies.

I would like to use that as the basis to raise an issue that was raised by the last witnesses, who were from the NSW Farmers Association. They suggested that sometimes there is a tension between the SEPP and existing legislation and that the tension is sometimes unable to be resolved—in fact, they are contradictory. Have you had any experience of that? If so, what is it and how could that be resolved in a better way?

Ms CONCEICAO: I do not have any immediate experience of that issue on hand but I am happy to go away and look into those experiences across the organisation.

The Hon. MARK BANASIAK: Just picking up on the Chair's comments, is it the Property Council's view that they would be opposed to having mandated consultation periods, which has been flagged as a possibility? I think 28 days was mentioned as a possible mandated time frame that the community would have to consult with the proponents or architects of SEPPs. Is that something that the Property Council would be opposed to given that essentially, as you said, it would slow down the process?

Ms CONCEICAO: As it stands, we feel that the department goes through a fairly rigorous consultation process, where time allows for it. We are currently going through a number of consultation processes for SEPPs that are in development and we feel that the department is adequately consulting across those, in the main. Where we do not always reach agreement on the content within them, the department does have rigorous consultation processes. In terms of a mandated time frame, we do not have a specific position on that. However, we would seek to not implement systems that could slow down the process if there was a need to implement a SEPP. I think in the past 12 months COVID has proven that the need to implement different legislation, regulations or rules that have needed to deal with immediate issues at hand have proven that we need to have that flexibility to be able to react to situations as they occur, or the Minister of the day would need to have that flexibility. Implementing a system that mandates slowing down that process would not be consistent with that view. However, we do not feel it is a necessity in the current form given the consultation process.

The Hon. MARK BANASIAK: What is your understanding of the consultation process? We have heard varied views of it and its successes or failures. From the Property Council's view, what is the actual process of the planning Minister consulting on a SEPP? What does it look like?

Ms CONCEICAO: We are currently going through consultation on a range of SEPPs. An example is the Design and Place SEPP that is being posed for implementation. The explanation of intended effect has closed recently and we have been in strong consultation with the department and also with the Government architect about what that consultation looks like and what steps need to be undertaken before a draft is drawn up of that. That is a significant piece of work and has had input from a whole range of sources, including the Property Council. While we have not agreed up-front necessarily with the proposed elements within that SEPP, the Government has been extremely responsive to listening to that feedback and continues to work with us on different ways of approaching that consultation going forward. To date we have not had ongoing issues with consultation and, where we have had issues with consultation, the department has been very responsive from a Property Council perspective. Mr Hansell, is there anything in your—

Mr HANSELL: What I would add to that is we absolutely recognise that there are times when it is impractical for the Government to consult on a proposed SEPP. If there is a particular present threat that comes

into being as a result of a lack of coordination and a lack of direction around coordination of the environment planning system, then to prevent a particular threat to the natural or urban environment, it would be totally within—we would think that it is good practice for the government of the day to take action to provide better coordination that would result in those adverse effects occurring.

The Hon. MARK BANASIAK: It has also been raised through this inquiry that, under the Environmental Planning and Assessment Act and its subsequent SEPPs, none of those decisions is actually reviewable by the administration review tribunal. You either have to go to the planning commission at the cost of $25,000 or go to the Land and Environment Court. What is the Property Council's view on looping this Act into the administrative review tribunal so an individual property owner who has concerns about how a SEPP is applied to their land could have a probably low-cost appeal of that decision?

Mr HANSELL: To take a step back, the Department of Planning, Industry and Environment itself undertakes a review function of SEPPs. The department regularly undertakes a review of State environmental planning policies in its effort to deliver a modern planning system. Those reviews are helping to try and disentangle some of the regulation that we have seen. When examining existing policies, I understand the department considers whether or not a particular SEPP is still relevant and the need to update it or integrate it into a new SEPP or elsewhere. The review also intends to remove policy and controls that are duplicating strategies, regional plans and local environment plans. Once again, SEPPs are at the top of the hierarchy of these planning instruments and they play a very important coordination role.

The Hon. MARK BANASIAK: But that is a review of the SEPP in itself and not actually how that SEPP has been applied on an individual level, which is what the question is trying to draw out.

Mr HANSELL: As I mentioned before, that is really a matter for the Committee—whether they wish to have extended dispute resolution procedures in relation to SEPPs or other legal-type avenues. But I would probably repeat the point that we think that SEPPs in the main are doing the job that they are intended to do. There is no perfect SEPP. There is no perfect law. There will always be issues with both of those cohorts, whether it be legislation or guidance, and we think they should remain intact.

The Hon. MARK BANASIAK: You talked just then about the SEPPs being at the top of the hierarchy. From my understanding it was the original intent of Premier Greiner when he brought this in that SEPPs would actually sit below local environmental plans [LEPs] and actually probably be at the bottom of the ladder. From your understanding when did that deviate from Premier Greiner's original intent—that now SEPPs are actually at the top of the hierarchy rather than when they were sitting below LEPs?

Mr HANSELL: My understanding is that they help—they are at the top of that, as I said, pyramid or hierarchy. The reason why it is called a State environmental planning policy is because its role in coordinating brings under it things such as LEPs. So the SEPP is instructive to local councils and also to the division of LEPs. That is my understanding. I understand you have got the department in later on today. You might wish to check it with them.

The Hon. CATHERINE CUSACK: In your submission you referred to a potential area of improvement as explaining better how a SEPP complies with the objectives of the principal Act. Could you amplify how you think improvement could be made in that regard?

Ms CONCEICAO: Yes, certainly. We quite rightly understand the position of the Committee and this inquiry to be looking at how SEPPs are made, why SEPPs are made and where the powers sit in relation to that. We are empathetic to that consideration. In terms of communicating the purposes of the SEPP and how they fit into the broader Act, we believe, like you, that there should be greater communication about the delineation of how the Act informs the SEPP and, moving back to the conversation of hierarchy, making sure that there is a clear line of sight back through to the Act that is set by the Parliament. Where that clarity is missing it should definitely be outlined. I believe there is a website of the publication of SEPPs which gives some guidance and at times is lacking in that clear delineation back to the purposes of the Act. That central landing point should be far clearer in the explanation of the purpose of the SEPP and how it aligns back to the purpose of the Act.

The Hon. CATHERINE CUSACK: In terms of what that might look like—when the SEPP is up for review or consultation, perhaps that narrative needs to be given at that point. Would that be your suggestion? Sorry, I am not trying to put words in your mouth. It sounds like I am, actually. But I am trying to get a practical picture of how that could be achieved.

Ms CONCEICAO: Yes. At any time when sets of rules and governing documents are applied to a large proportion of people, whether it be at a local or State government level, it should be clear why those decisions are being made for everyone involved. As a consultation party representative of our members' interests, we would certainly like to be clear on why those changes are being made so that we can adequately consult with our members

and provide clear and communicable guidance back to the Minister of the day around whether we think that that direction is meeting the delivery.

The Hon. CATHERINE CUSACK: Like a statement of intent—would you want some kind of list of the objectives of the Act and how it complies with those objectives?

Ms CONCEICAO: That is a potential solution. We do not have a specific output that we have asked for at this point in time. We would be happy to work with you to look at what that would look like in practice, but we are supportive of further communications around the SEPPs at every stage of the process without delaying the process. Clear communication at the design and review process and for end users would certainly strengthen the SEPP system at every stage.

The Hon. CATHERINE CUSACK: We have also received evidence from a few witnesses that the SEPPs are required to be reviewed. The Minister is required to consult and there are various obligations conferred in the Act; however, they are not actually defined and therefore it is kind of in the eye of the Minister or the head of the department as to what that means and whether or not they have complied. I guess the suggestion is that perhaps there needs to be more guidance as to what that looks like. If there is a requirement to consult, maybe there needs to be some more meat around what a minimum requirement would be for that to be satisfied.

Ms CONCEICAO: As an association body, we always welcome the opportunity to consult on any formulation of rules or governing principles that may impact on our members. However, we would not move in the direction of consulting for the sake of consulting. There would be times when certain elements are due to be reviewed and updated with minimal change. To need to go through a rigorous process that may delay it for little to no benefit, if it is something that is rolling over, may not deliver the result that you are looking for. In terms of consultation, as I say, we always welcome the opportunity for consultation. But at each step of the process that may need to change depending on the documentation, the length of it and the urgency of the document as well.

The Hon. CATHERINE CUSACK: So you would be basically saying that the flexibility that exists is beneficial, is not being abused and should be continued.

Ms CONCEICAO: Absolutely. As I said a little while ago, we believe that when it comes to SEPPs they are working as planned. The department is heavily engaged in consultation both in the development and also in the review of SEPPs as it currently forms. We have no concerns at this point in time that SEPPs are being either implemented, reviewed or changed without in-depth consultation, and so therefore we would not support further regulation or delays to the system—

The Hon. CATHERINE CUSACK: That would slow it down.

Ms CONCEICAO: —that would slow it down.

The Hon. MARK BANASIAK: Just following up on Ms Cusack's comments before about what we would probably call a SEPP impact statement, on notice would you be able to provide some thoughts as to what should possibly go into that?

Ms CONCEICAO: I am happy to take that back.

The CHAIR: Talking about the review of SEPPs, it has been suggested in submissions that there be some sort of a sunset clause that triggers a review—like a five-year sunset clause. Do you see merit or would you be opposed to such a suggestion?

Ms CONCEICAO: On the premise, not immediately opposed to the suggestion. What would be opposed would be a rigorous consultation process where a SEPP is working adequately and is due for review—anything that would slow it down for that review process or slow down changes that may need to happen because you are following a rigid and documented process and do not have that flexibility. There will be cases—and again the Design and Place SEPP is an excellent example, where the *Apartment Design Guide* is heavily overdue and the Property Council has been calling for a long time for that document to be reviewed. It is being rolled in with the Building Sustainability Index [BASIX] review as well and collectively formulating the Design and Place SEPP, which in principle is an excellent piece of work that takes the *Apartment Design Guide* from individual apartment blocks into a precinct and looks at the liveability of areas.

As I say, on premise that provides for flexibility and delivering of lifestyle amenity for the individual. But it is a complex system. Going through a process of review is important in that system, which is why we are in a multiple-month-long consultation process that goes backwards and forwards as we look at different elements of the document—whereas other SEPPs may be reviewed and if we hit a five-year time period they may be working quite productively and serving the purpose as needs. We would be not supportive of going through the

same arduous, long-term review process where a SEPP is serving its core purpose and there are no immediate challenges with its purpose as it stands.

The Hon. CATHERINE CUSACK: Can I just clarify if the SEPP that you are referring to is the one that was exhibited in 2017?

Ms CONCEICAO: No, the Design and Place SEPP—the explanation of intended effect was exhibited earlier this year and the draft is due in the second half of the year.

Mr HANSELL: If I can just add to something that Ms Conceicao has said, as we said earlier the purpose of the SEPPs is to help the statewide coordination piece so that we do not have different parts of the system doing different things and working against each other, which results in poor planning decisions or environmental degradation. I will give you an example of a SEPP that probably does not need to be reviewed, just by talking about the aims of the policy: the State Environmental Planning Policy (Sydney Drinking Water Catchment). Its aims are:

(a) to provide for healthy water catchments that will deliver high quality water while permitting development that is compatible with that goal, and

(b) to provide that a consent authority must not grant consent to a proposed development unless it is satisfied that the proposed development will have a neutral or beneficial effect on water quality, and

(c) to support the maintenance or achievement of the water quality objectives for the Sydney drinking water catchment.

That to me sounds like something where there will not be a huge demand for that particular SEPP to change, because I would expect that everyone around this table agrees that the objectives of the SEPP are spot on. There will be numerous SEPPs that fall into that category. If you are going to have a set review period for each and every SEPP, the Parliament could waste a lot of time when things probably do not need to be looked at.

The Hon. SCOTT FARLOW: Just picking up further on the Design and Place SEPP, we heard from the Nature Conservation Council that they disagreed with the content of the Design and Place SEPP but actually agreed with the process. Would you say that is a good model process, as somebody who I take it from your comments was probably more supportive of the Design and Place SEPP in principle? Do you think that is a good process governments should employ for future SEPPs?

Ms CONCEICAO: The consultation process for the Design and Place?

The Hon. SCOTT FARLOW: Yes.

Ms CONCEICAO: We have had some initial challenges with the consultation around the Design and Place SEPP. We, as I say, in principle agree with the concept of designing for precincts and integrated design plans for the individuals. Where we have had those challenges, we have raised those with the department and with the Government Architect. They have been extremely responsive and continue to work with us on working groups and setting up ways to go about further consultation to alleviate the concerns and work with us on some of the challenges—which as I say include working groups, representatives of organisations that will have to work to this SEPP, modelling to look at what the implications of the SEPP will look like in terms of viability of development and a whole range of elements.

The Minister has approached this SEPP with a set of principles and values that we strongly support. They look at regional precinct development, flexibility in design, being able to implement the sustainability indexes and the liveability of areas that we are developing—which the State needs to develop. We are running extremely short on dwellings and houses. We need to be able to do that and do that in a sustainable way. Where the initial draft picked up on those principles but also delivered additional layers of complexity and confusion for those that are responsible for implementing that SEPP—whether it be at a local council level, a developer or anybody that is tasked with the responsibilities of reading and implementing what is in that document—concerns around those complexities have been raised with both the department, the Minister and the Government Architect. They are actively working to work through those with us and look at if our concerns are legitimate, what the implications would look like and how they can further ameliorate those concerns that might impede the intended intent of that document.

There is, as I say, a lengthy process. Drafts of that document are not due out until the back end of the year, and there is a process to go through to work through all those different elements to make sure that the end product is one that serves all of the parties that are looking to engage in the output of that document. In the actual process in itself, the level of engagement in consultation has been strong. We have not always agreed at every step of the way, but we have been heard and we have been worked with productively and collaboratively to address concerns. It is on that basis that we do not have concerns about the process currently being undertaken.

The Hon. GREG DONNELLY: Probably in some sense the answer has been given with respect to what has just been said but in terms of the drafting of the text and explanatory statements, what are the ways and means of making them more comprehensible to a broader group of people Obviously we know these can be quite dense and one needs particular expertise to be able to—well, not so much understand. You have to understand, at this point. But even just to read and comprehend can be quite challenging, particularly for a layperson, and obviously understanding requires some legal expertise. I am just wondering, in terms of thoughts around improving drafting around the text and explanatory statements, what could be done to enhance that? Is there a way of looking at this to see how this could be done and get it done?

Ms CONCEICAO: Look, planning in its nature is an extremely complex beast—I am learning this myself, coming into the property industry—as you would be well aware. It is the nature of the beast that allows for us to design and give flexibility to developers and people supplying dwellings and buildings to be innovative and to be free to develop, within the constraints required, for the benefit of the greater good. I think there is scope to make those documents far more readable. Our third recommendation talked about that from an output perspective. I do not see why there cannot be engagement in communications in simple, layperson's terms; I know I would definitely benefit from those, as well, without my esteemed team of planners and members who can assist me to work through those documents.

There is certainly scope for better communication at every stage of the documents, of the development of the review and at every stage in that process. We would strongly support that, without taking away from the depth of planning intel that is included. Where it is laid out up front, developers go in knowing the rules of the game, and that is the number one thing for developers. They are not obtuse to having the documentation set out, having the expectations of the State, the Minister, and the rules and regulations, and they will abide by those. It is the clarity up front that allows them to get on with the job of building the houses and the dwellings that our State needs, so we would support clarity at every step of the way.

The CHAIR: Thank you, Ms Conceicao and Mr Hansell, for your time here today and the submission that you have made to the inquiry. I believe you did take at least one question on notice. The Committee has resolved that answers to questions taken on notice be returned within 21 days. Our good friends here in the secretariat will be in contact with you in relation to the questions you took on notice.

Ms CONCEICAO: Thank you for your time. Best of luck with your inquiry.

(The witnesses withdrew.)

ANDREW ABBEY, Policy Director, NSW Minerals Council, sworn and examined

The CHAIR: Thank you. Would you like to make a brief opening statement?

Mr ABBEY: Brief is—not 25 minutes?

The CHAIR: That would be very helpful.

Mr ABBEY: Two pages, tops. I would like to thank the Committee for inviting the NSW Minerals Council to assist in its consideration on this issue. I do not have a great deal to add further to the submission lodged by the NSW Minerals Council, other than to emphasise the following points, and I think this is consistent with—Ms Conceicao's speech was much better than mine and more articulate, so I should have used hers. Firstly, consistent with many of the submissions to the inquiry, it is clear that State environmental planning policies [SEPPs] have an important role to play in the New South Wales planning system. They provide a consistent and certain set of rules across the State, covering a range of issues of importance to the State, including environment matters, housing, infrastructure, other types of development and some administrative or procedural related matters.

As noted in our submission, the mining industry relies on the mining SEPP to provide a consistent set of rules and certainty for the industry in terms of enabling applications to be assessed, or to enter the assessment process and to be assessed against relevant policies in certain areas of the State. The second point I would raise is once again consistent with most of the submissions—I went through the submissions—to the inquiry: The NSW Mineral Council agrees that there should be some minimum requirements that are adhered to when making SEPPs. These should include consultation and engagement requirements, which provide reasonable opportunities for interested parties and people to make comments and engage in the process. I think I would echo the Property Council's points about—there has been a push by the New South Wales Government to improve consultation generally; there were changes to the Environmental Planning and Assessment Act, et cetera. It is fair to say there has generally been increased emphasis on consultation for making planning instruments and the planning system generally, which NSW Minerals Council supports, but there is always room for improvement.

There should also be an explanation of how issues raised during the consultation period were considered through the process; I think that is important to close the loop on who made submissions and how they were dealt with. There should be publicly demonstrated adherence to the Better Regulation guidelines, particularly where the SEPP is substantive in nature, and this should include a robust cost-benefit analysis, particularly where it is substantive in nature. There should be a plain English explanation of the reasons why the SEPP is being made, as well as a plain English explanation of what the SEPP is actually doing, and there should be review periods where required. Where these conditions are transparently met, we question—similar to the Property Council's position and others that have made submissions—the benefit of any further or additional layers of regulatory oversight. When I say that—in particular, a veto role at the very end of the process, or some type of disallowance motion at the end of the process.

As outlined in our submission, our concern is that introducing disallowance powers may create some uncertainty if something has gone through a significant period of time in terms of development. I think we used the example of the design SEPP process. It has been through a fairly lengthy consultation process—explanations of intended effects, et cetera. If that was to go for a year and then it is disallowed in Parliament at the end of that process, that would create a significant amount of certainty. It is a blunt, "Stop. You have to start again." I do not have much more to add. The only part I would add, in terms of—SEPPs are also a very flexible tool and there are different types of SEPPs. In terms of those requirements that I read out, there would be some types of SEPPs that are minor in nature that arguably should not need to or have to go through an extensive consultation period, or the like, where it is correcting things—or adapting quickly, whether it be a development-related matter or an environment-related matter, et cetera. I do not have anything further to add and I hope I did not take too much time.

The CHAIR: No, Mr Abbey, that was very good. Thank you very much. I will open the floor to questions.

The Hon. CATHERINE CUSACK: Thanks very much, and thanks for referring to the Better Regulation process. I understand there is a step in that where alternative ideas—like, "Are there better ways of achieving a policy?"—can be considered.

Mr ABBEY: I have the principles here. I think there is a requirement that the agency putting forward the changes, or the like, should demonstrate—have alternatives been considered?

The Hon. CATHERINE CUSACK: Which I think is a wonderful inclusion.

Mr ABBEY: Yes.

The Hon. CATHERINE CUSACK: Everybody can see that our ideas were considered and why they were discarded, maybe?

Mr ABBEY: Yes, I agree, and that could also be fleshed out in the explanation of—why is the Government making the SEPP in the first place? Why are they doing it? That should be clear and articulated clearly, so people can understand it. Whether you agree with the outcome—I think somebody mentioned the design SEPP. One of the organisations, maybe the Nature Conservation Council, did not necessarily agree with the outcome, but they found the process okay. That is a great outcome. There is going to be somebody who does not like the outcome and somebody who does like the outcome—as long as the process is transparent and robust and defensible. To your point—a long answer to your question—I agree. The Government should be looking at—well, why are they doing things?

The Hon. CATHERINE CUSACK: And so that Better Regulation process, which I think is to ensure that the legislation regularly comes up for review—and it does not always have to be reviewed. I think this point has been made in relation to SEPPs as well. It does give stakeholders an opportunity to give feedback on the performance of regulations. Do you think we should be looking at some ways of evaluating the performance of SEPPs, either individually or as a whole, over time?

Mr ABBEY: I think the gentleman Mr Hansell—I was listening to his answer about should there be a mandated period of review and should it be five years. I genuinely believe—sorry, not I, but there should be a review period of SEPPs on an as required basis. If something is working and it is working effectively—it is not causing too much fuss or bother—then does it need a belts and braces review? Arguably not. But if there are issues with things and they are identified, then I think it is reasonable that there is a review. That is consistent with the better regulation guidelines. I know the head of power in the Environmental Planning and Assessment Act, 3.29, whatever it is, does not mandate—sorry, relating to environmental planning instruments [EPIs]—generally does not mandate a review period, but it also talks about all EPIs should be periodically reviewed.

Ms ABIGAIL BOYD: I hear what you are saying. I think it has come through clearly from people about wanting more engagement and consultation, or perhaps having a more standard approach of consultation and engagement—minimum requirements for that—whereas at the moment it appears to be at the Minister's discretion as to whether that occurs.

Mr ABBEY: Yes.

Ms ABIGAIL BOYD: And also that there is some clearer explanation or plain English explanation around what the SEPP means.

Mr ABBEY: Yes.

Ms ABIGAIL BOYD: And to communicate it. But from what I understand you are not supportive of the idea of Parliament having scrutiny, or having the power at least to veto SEPPs. In the absence of parliamentary scrutiny, or the ability for Parliament to scrutinise, how do we get comfortable that the Minister is exercising their discretion in the right way?

Mr ABBEY: Yes.

Ms ABIGAIL BOYD: And also, if we do set minimum requirements, that they are actually being met?

Mr ABBEY: Yes, that is a fair point. I guess as a principal point of view, at the highest level—and we have said it ad nauseam, almost—we agree with a transparent approach to making the policy. Our view is there should be that transparency, clear explanation, clear buy-in with stakeholders, explain what the SEPP is doing, why the Government is making the SEPP—almost the better regulation guideline principles. Do all that stuff up-front, have the debate with the local communities. Now this is of course for substantive SEPPs, not necessarily all of them if they are minor, et cetera, but for the more substantive ones, or the ones that have greater impacts. Have that discussion and the debate up-front and air it transparently in the public world. To me that is the oversight or the scrutiny in terms of: Is the Minister doing a good job in making this SEPP?

At the risk of being asked a further question on it, I know one of the submissions talks about the significance of the resource SEPP back in 2013, then it was overturned in 2015. Without going into views about who supports what or whatever, when the SEPP was originally made in 2013 there was something like 1,200 submissions. I do not know the full detailed history of it; I was not involved in it. I do not know the extent of the material that was put out in the public world but, clearly, it was made publicly available and people had an opportunity to discuss it. When it was made there were a number of stakeholders who were vehemently opposed to it and there were a number of stakeholders that were supportive of it. In 2015 the newly minted Minister of the

day, they ran another consultation process and ultimately it was dropped, or revoked rather. I think there were 1,800 submissions to it.

That to me, putting aside your views on the detail or the outcome of it, it almost showed that the process worked, that there was a consultation period, people were afforded an opportunity to have a say on it, whatever. It got up in one guise, and it got revoked in another guise. Long answer to your question. In terms of the oversight, I think making sure that it is a very, very, very transparent process about how things are done and why the Government is doing it. That might involve some type of—I was watching some of the inquiry before—transparent checklist or a scorecard against a better regulation guideline principle that is made public.

Ms ABIGAIL BOYD: Just as a hypothetical, then, if you had a hyper-transparent process you could see what the Government was trying to do, you could look at the submissions that have come in and you could analyse that information for yourself. If, on the face of it, it was reasonable for someone to think that the wrong decision had been made on that SEPP, and that maybe something else was going on—because despite the consultation, despite the engagement, the SEPP that has come out seems to unfairly favour one interest, one stakeholder over another or whatever it happens to be—what is the mechanism then to take action on that to check that the right thing has been done?

Mr ABBEY: I guess I will break that down in two parts. If there is something untoward or inappropriate behaviour, I will put that aside, but that has its own set of circumstances and that should absolutely be taken to task. But if there is a very transparent process and people do not agree with the outcome of that transparent and robust process, then ultimately the Government of the day gets elected in and elected out, or other governments get elected in, in terms of how they have set their policy settings and the like. Just as an addendum to my long answer to your question before in terms of what we were talking about the regulatory oversight, a veto role at the end of a process where if you do—that design SEPP takes a year to make. It would be very discouraging if you are a stakeholder, including community members, to get to the end of that year-long process and then it gets just bluntly knocked out. It is not sort of go back, have another look, look at this or whatever; it is just a stop, go back and start again. I do not understand the exact nature of the disallowance motion powers, but my understanding is they stop for a certain period of time before you can actually start again.

Ms ABIGAIL BOYD: Just trying to narrow down on the point here, you talk about everyone participated that had this big process. That is sort of assuming that the end result from that process is what those people were expecting and foreseeing. It is always good to prepare for the worst possible scenario to make sure that we have rigorous checks against misuse of discretion and power.

Mr ABBEY: Yes.

Ms ABIGAIL BOYD: So if at the end of that set of consultation everyone says, "Well, this was clearly not going to lead to the result that it has resulted in", what is their power then to challenge why that has occurred?

Mr ABBEY: I guess if everybody disagrees with the outcome, it is a brave Minister that makes the outcome, I would argue, in terms of ultimately they will be taken to task on it. But assuming nothing untoward has happened then the process should be able to run. Assuming the boxes have been ticked in terms of what the better regulation guidelines, cost benefit analysis, consultation, et cetera, et cetera and so forth, in that context if the Minister makes a decision, then ultimately they have the responsibility and the ability under the legislation to make that decision. I am not necessarily sure there needs to be other checks and balances, providing nothing untoward has happened.

Ms ABIGAIL BOYD: I just want to get to the bottom of this. The first witness we had today was talking about ICAC's recommendation that the exercise of discretion in relation to this type of regulation be disallowable or scrutinisable by Parliament because you cannot guarantee that it is always going to be something that is above board. Can you foresee a situation where you would accept the idea of there being some form of scrutiny and disallowance by Parliament?

Mr ABBEY: If we are talking about corrupt behaviour, then that is abhorrent and should be weeded out at all costs. But once again, I am repeating myself, and I am not trying to avoid answering the question—far from it. I just have a different view that if you have dealt with that in such a transparent way up-front and if then there is a decision made that is just completely at odds with everybody's expectations, comments or the like, ultimately the Minister will be responsible for that. If we are talking about ICAC-related matters, there are processes to actually deal with that. If someone has got suspicions of something that is inappropriate or what, they can report it to ICAC.

Ms ABIGAIL BOYD: Maybe we do not find out about it because we have not scrutinised.

The Hon. SCOTT FARLOW: Picking up on your submission, it seems to me the whole tenor is effectively that disallowable SEPPs would lead to uncertainty for investment. You do not have the same quibbles, though, when it comes to an increased consultation process. Is that fair to say?

Mr ABBEY: In the context of that, you are dealing with the issues up-front and if you take the time to get the policy settings right up-front in a transparent way, because you are invested in the process you actually have the certainty of understanding where the Government is going with the policy setting or the like, so you start to embed that into your decision-making processes going forward. Once again, going back to the design SEPP example, if you as a developer or whoever is invested in that process and you start seeing it track in a certain way and you start thinking about investment decisions along those lines of where the policy is heading and then, at the end of that—I have got nobody else to throw to so that they can answer it. If, at the end of that process, they then bluntly knock it off or veto it, or whatever, that is uncertainty and that is the context of me making, or our submission making, the point about uncertainty.

The Hon. SCOTT FARLOW: With respect to the process that exists at the moment, your industry, as you outlined in your opening statement, is effectively impacted by SEPPs more than many of the other industries and has specific SEPPs that govern your industry as well.

Mr ABBEY: Yes.

The Hon. SCOTT FARLOW: Have you seen that increase over recent years? I think we have seen some of the evidence earlier today about the proliferation of SEPPs and the usage of SEPPs. Is that something you have seen in your industry as well?

Mr ABBEY: Having read some of the submissions, I furiously went through the legislation.nsw website about changes to the mining SEPP. Since 2009 I think there has been a dozen or so. Many of those or some of those are consequential. The majority have been actually excluding areas from where mining can occur in the State. Zero consultation on those. Then there was the significance of the resourcing. Changes have come up as the needs have arisen. In terms of the increased frequency I do not necessarily know if it is a lot more. There have been a couple of key changes: the gateway certificate process, the strategic regional land use process, installing minimum standards relating to environment matters et cetera. As a general comment, maybe there has been a slight increase, but nothing that sticks out as being this ramped up increase use of them. On SEPPs generally—and I know one of them, I think it was the South Australian entity, made a comment that there is this massive amount of SEPPs being made—a lot. I would guarantee that the vast, vast majority of those or planning instrument changes would be minor amendments, or consequential amendments—relatively minor amendments for the vast majority of those. Does that answer that?

The Hon. SCOTT FARLOW: Yes. It does.

The CHAIR: A lot of questions have been pitched today in front of us around a plain English version or a simpler less complex nature of the SEPPs. Does the Minerals Council have a view about whether or not that is an issue?

Mr ABBEY: We agree that if it is going on consultation, there should be, like, the 101 guide: What does this do? Why are you doing it? No question: We support the need for it. I also take the point, though—and I think it was in the Environmental Defenders Office submission—the actual SEPP itself should be put out so people, if they are affected, or stakeholders are affected, they can understand exactly what is going to happen. Some translations might get lost in the simple user, plain English guide of what that actual legislation does. So I think there is a happy balance, but there absolutely should be a plain English simple version of what this actually does as well as the detail of the regulation and legislation.

The CHAIR: Like an explanatory statement or something like that?

Mr ABBEY: Yes, and why it is being done.

The CHAIR: Thank you.

The Hon. SCOTT FARLOW: Just to pick up on another issue that has been raised today about the five-year sunset clause for SEPPs as well. What would be your view of a five-year sunset clause?

Mr ABBEY: Picking a number, in principle and consistent with the better regulation guidelines, we agree that that policy should be reviewed. In terms of picking a number of five years, I am loath to say, "Yes, five years is the number." I think there needs to be some discretion that they are dealt with on an as-needs basis almost. Maybe there is a cursory review of how various planning instruments are performing and then if they fall into a category of "We need to have a better look at that", then it is subject to a broad or better review. I am not trying to say, "No, we don't agree with five years", but I am just loath to say that five years is the number. It might be

10 years and we might never have to review a SEPP in earnest because it is working perfectly well. That is not an answer to your question.

The Hon. SCOTT FARLOW: No, I think that is helpful in terms of context as well. It might be horses for courses when it comes to that.

Mr ABBEY: Exactly.

The Hon. SCOTT FARLOW: And it might be something that was relevant for 10 or 15 years, particularly in your industry where you have certain investment decisions that are made under certain conditions, then you might be looking at a longer term.

Mr ABBEY: I was going to make that point about five years is not a long period of time. A development assessment can take five years. Five years is fairly short for certain types of industries, particularly the mining industry.

The Hon. SCOTT FARLOW: Thank you.

The CHAIR: Mr Abbey, do you think there is like a hierarchy with regard to the SEPPs? There are some that are quite substantial State environmental planning policy or State significant down to others that are—I do not want to say minuscule, but, you know—on the lower end.

Mr ABBEY: Pedestrian?

The CHAIR: Okay. I will use your word—pedestrian.

Mr ABBEY: I think absolutely yes. There are some steps that pull a lot more weight in terms of what they do and their outcomes are looked at.

The CHAIR: Such as the design SEPP.

Mr ABBEY: Exactly. Off the top of my head I cannot think of it but there are other ones that might not necessarily have as wide impacts or weight associated with it. So, yes, I do. It goes back to that horses for courses thing about reviewing SEPPs and the like. Whilst they might deal with statewide issues or statewide importance, some are arguably pulling a greater load than others.

The CHAIR: Thank you for attending the hearing today, Mr Abbey. I do not think you took any questions on notice so we do not have to worry about the secretariat pursuing you for your response within 21 days. Thank you for your submission.

(The witness withdrew.)

MARCUS RAY, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, affirmed and examined

The CHAIR: Welcome, Mr Ray. Would you like to make an opening statement? I note there is no submission.

Mr RAY: Chair, I would like to make an opening statement. I will try to keep it as brief as possible. I might read it rather quickly to give the Committee as much time as possible to ask questions.

The CHAIR: That is okay. If it is a written prepared statement, when you finish, if you could, hand it up to the secretariat. It will make Hansard's job a bit easier.

Mr RAY: Okay. It has got some of my own handwritten amendments, and my writing—I have been told I should have been a doctor. I hope it is helpful to Hansard. I would like to first thank you all for inviting me and I acknowledge the work of the Committee in this inquiry. The New South Wales planning system does play a crucial role in supporting the New South Wales economy but also society in providing certainty for investment and in particular the supply of housing, commercial development, infrastructure and public and open spaces. It supports better outcomes for the community through the creation of public and green space and focuses on sustainability, accessibility and good design.

The planning system is designed to be responsive and collaborative. The system has been deliberately built to ensure a shared responsibility across State and local government in consultation with communities and stakeholders. Environmental planning instruments, which are both State policies and local plans—so State environmental planning policies [SEPPs] and local environmental plans [LEPs]—have been important tools in the planning system for the last 40 years. Once made, they do provide investment certainty but the system does allow flexibility in updating them to changing circumstances. The evolution of planning policies within the system, which is founded on those environmental planning instruments, has provided a great deal of balance and has also been able to respond to changing circumstances and also for more calls from the community for consultation.

Integral to the confidence in the system are the checks and balances that greater community involvement, increased transparency and strong laws have provided. For SEPPs and LEPs, this means allowing the community and stakeholders to have their say on changes that impact them. It also means a clear legal framework has been provided. All LEPs and SEPPs are signed off before they are made by the New South Wales Parliamentary Counsel. The clear, legal framework of the Act has been moderated by a significant body of public law driven out of the New South Wales Land and Environment Court and the New South Wales Court of Appeal. This was established by what was then a novel but is now an entrenched open standing provision that allows any person or group the right to test the outcomes and processes about the making of environmental planning instruments.

Environmental planning instruments, SEPPs and LEPs do the same thing—they provide land owners and potential purchasers with clear information on the development capacity of their land and the surrounding land, including zoning, land use permissibility and other restrictions. The department's practice is to engage landholders, the community and other stakeholders in the development of any changes that are proposed. We aim to encourage disengagement and use the input of external experts and the community as part of developing planning policy. The department has a community participation plan which sets out the principles by which it engages and this process helps the department achieve a balanced outcome that meets the current and future economic, social and environmental needs of the community.

Finally, with reference to the particular item in the terms of reference about disallowance, I just would like to reiterate what some of the submissions have already said. On the question of disallowance, I think it would really need—the way SEPPs are both made or unmade, if you like. I think the Committee should think very carefully and look at the whole system. I would ask the Committee to look at the whole system in the making of the recommendations, rather than just particular parts of it. That is my statement.

The CHAIR: Thank you, Mr Ray. In your opening statement you spoke about the community participation plan. Is that publicly available?

Mr RAY: Yes.

The CHAIR: It is on the web.

Mr RAY: Yes, it is on the web. That was an initiative from the 2017 amendments. I think the big community participation plan was made available towards the end of 2018. All local councils are also required to have a community participation plan.

The CHAIR: During today's testimonies we have heard, I think, the Minerals Council raise the issue about the better regulation process and ensuring that when crafting or constructing SEPPs that the better regulation process—if that is followed—is a good model. Do all SEPPs go through that process?

Mr RAY: They do not go through the better regulation process that applies to regulations. They are not matters that the Subordinate Legislation Act deals with and those guidelines in relation to better regulation that are applied by New South Wales Treasury, they do not strictly apply to SEPPs. But there is a process that has gone on that is undertaken and that process is outlined in the first two divisions of part 3 of the Environmental Planning and Assessment Act, which set out the provisions that have to apply before any environmental planning instrument is made and then the special provisions that apply when a SEPP had to be made. Then, I think, division 3 is where you find the LEP provisions. I could get the numbers wrong, but roughly all those provisions are there. So it is not the same process, but, as I said before, it is a process that ultimately involves Parliamentary Counsel. There is a legal drafting requirement—they are skilled drafters—and there is a body of principles and approach in the drafting of environmental planning instruments now stretching back almost the 40 years that the environmental planning Act has been in existence.

The Hon. CATHERINE CUSACK: Mr Ray, how many SEPPs are there?

Mr RAY: That is a good question. I do not think I have brought the exact numbers with me. I think it is around about 48 or so, but I could get that number for you on notice.

The CHAIR: Just take it on notice.

Mr RAY: Sure. I will definitely get that.

The Hon. CATHERINE CUSACK: Is there a sense that there are too many SEPPs and also is there any effort to try and confine the scope of a SEPP?

Mr RAY: What I would say about that is this: When the environmental planning Act came in in 1980, both the State-level controls and the local council-generated controls were in the planning scheme ordinances and so this was a different model which actually said, "Okay, there could be some planning controls in SEPPs and some planning controls in the local council documents—LEPs." Consequently, SEPPs have grown over time because they have usually been introduced to respond to a specific issue where it seemed to the government of the day—whether that be a Coalition government or a Labor government—that there needed to be a more general policy that would apply across the board.

Certainly, I would say in the first 25 years or so of the operation of the Act, it was those issue-specific policies is what generated them, whether it be dealing with communes on the North Coast—there was a policy about that—to things like coastal protection. There have also been a range of other policies in relation to housing and various other things. That is what generated a broad range of SEPPs. There have been a lot of attempts to bring similar SEPPs together. Obviously, one of the most successful ones was the creation of the infrastructure SEPP in 2007. I think that got rid of more than 10 SEPPs. There was also the primary production SEPP, which was brought in, I think, at the end of 2018 or very early 2019. Again, that was trying to consolidate a range of different SEPPs that were out dealing with those sort of issues. So, yes, there is a general push to bring SEPPs together and put them in a group. Most recently ones that we are currently working on are relating to housing. We are working on that policy now.

The Hon. CATHERINE CUSACK: From memory, Bob Carr was the environment Minister, I think, when the principal Act was passed. Is that correct?

Mr RAY: No. I think he was the environment Minister towards the end of—during Mr Unsworth's government, so that was in the late eighties. I do not think he was environment Minister at the time.

The Hon. CATHERINE CUSACK: In 1979?

Mr RAY: Paul Landa was the environment Minister.

The Hon. CATHERINE CUSACK: Paul Landa. Thank you. Did the Henry VIII provisions apply in those early days or is that something that kind of grew into the Act?

Mr RAY: No. That provision, which I think is 3.16 now, used to be section 28. That has been in the legislation from the get-go.

Ms ABIGAIL BOYD: Thank you for coming along today and giving us the benefit of your experience. There were a few questions we had as we were going through some of the other witnesses The first one was this: Once a SEPP has been made, how does it get notified and when?

Mr RAY: All SEPPs have to be approved by the Governor in Council. The notification is organised as all notifications are for similar instruments, through the Parliamentary Counsel's office. That has been a feature—I think it used to be in the government gazette in the old days. It transferred probably 10 or so years ago to Parliamentary Counsel and that notification usually happens on a Friday.

Ms ABIGAIL BOYD: So they get notified in exactly the same way as a regulation or is it different?

Mr RAY: It is very similar, yes.

Ms ABIGAIL BOYD: So if I was a member of the public who was wanting to find out what SEPPs applied to my particular business, I could go to the parliamentary website and find that information.

Mr RAY: That would be a bit more difficult. The Parliamentary Counsel publish the environmental planning instruments as they publish regulations and there are PDF maps that are published. It is not possible to search on the website for a particular property—the PDFs are not searchable—but yes, you can see all the steps that apply generally. One of the initiatives that we are working on now through our ePlanning initiative is to replace those PDF maps with maps that will be on the NSW Planning Portal. You will be actually able to drill down through the planning portal and find which SEPPs apply to your land. At the moment you need to lodge an application for a planning certificate, and those planning certificates are required to be attached to contracts for sale. It is those planning certificates that outline the actual controls that apply to the land.

Ms ABIGAIL BOYD: Are there any proactive steps taken when a SEPP comes in if you know that it is going to impact on a particular group of, say, landholders? Are there proactive steps taken to notify those people?

Mr RAY: It depends on the circumstances of the SEPP in each case. Obviously there is notification on the website. The department also puts material on its website and tries to put explanatory material to make sure that some of the legal drafting is more accessible. For example, the department engages with stakeholders who represent those groups and often gets ideas about how best to communicate with those groups, whether it is through the stakeholders or not. Obviously in the COVID situation we have been holding lots of webinars and people can join in and discuss things. In some cases people are notified of the SEPP. People who have usually made submissions, particularly in relation to rezonings—because some SEPPs do not rezone; they might effect changes to controls but they do not rezone—but particularly in relation to rezonings I think the general practice is to actually notify the individuals. But I will come back on that question.

Ms ABIGAIL BOYD: That would be really useful to know exactly how that happens. We have heard that some of the SEPPs go out for consultation and have quite a lot of consultation, while other SEPPs do not have very much and some have none. Is there an internal policy that guides when you do a consultation or is it at the Minister's discretion?

Mr RAY: Ultimately the discretion is vested in the legislation, which requires the Minister to determine how a proposed instrument should be publicised. That is there. It depends on the nature of the instrument. For example, I mentioned the housing State planning policy. That went out on public comment for six weeks in, I think, July to September last year. Then there has been a range of different meetings with stakeholders as the policy has been developed. I notice the Minerals Council referred to the procedure for making the Design and Place SEPP. It can be quite detailed. There can be lots of engagement.

Ms ABIGAIL BOYD: Is there an internal policy document or guidelines that guide the Minister's discretion on which ones to put out for consultation in that way?

Mr RAY: No, there is not a—I do not think there is a set of written-down matters, but obviously the department provides advice in each particular case. For example, in relation to what I will call the "toilet paper SEPP"—the SEPP that was made once the COVID emergency became very clear and there were shortages of toilet paper and then pasta and other things—we did in fact make that SEPP without consultation because we were trying to deal with the issue very quickly.

The CHAIR: Mr Ray, if I was to ask you to in a sentence tell us why SEPPs are important, would you be able to do that? Are they important? What are they? Are they important strategic instruments?

Mr RAY: Chair, I probably could not say it in one sentence. I would probably say it like this, and I think this is an important point to make: Everything that a SEPP can do, an LEP can do. They are both environmental planning instruments and they do the same things in relation to development control. There is really nothing more that a SEPP can do that an LEP can do. What I would say is that of course they are important instruments. They are important instruments because they generally provide for a consistent policy position and set of controls in relation to an issue. For example, the Infrastructure SEPP provides how all of New South Wales State agencies can carry out their work within the planning system and what approval pathway they have to pursue, what the

requirements are for consultation and various other things—and whether that is for particular types of development and it is different to other types of development. Yes, they are important in that sense, but for other people the LEP might be the most important document for their set of circumstances.

The CHAIR: You mentioned earlier that you have taken the opportunity to avail yourself of the submissions that we have received.

Mr RAY: Yes.

The CHAIR: Professor Neudorf spoke about South Australia, and we received a submission from the Victorian equivalent of this Committee. Do you get much of a chance to reflect upon the other jurisdictions? Do you look across the border and think, "That is a really nice item they've got that I wouldn't mind cherrypicking and using in New South Wales"?

Mr RAY: Chair, that does happen from time to time. The other thing I might say is the provisions relating to the making of SEPPs and LEPs have come before Parliament, I think in some form or other, 36 times in the last 40 years. Some of those amendments have been very small and incidental. Parliament has actually had a look at part 3 of the Act some 36 times in the last 41 years. The last major amendments to part 3—the most recent ones—were in 2017, 2013, 2008 and, I think, 2005. There has been considerable parliamentary scrutiny of proposals that have actually changed part 3 of the Act, the way that these instruments are expressed and the foundational provisions of that. It is not as if this particular part of the Act has not been available to Parliament to have a look at. In each case, there is a policy development process that goes on, and if particular things are good practice from other jurisdictions they can feed into that process. Sometimes they might come up or they might not. I am not sure that the question of disallowance has ever made it into one of those pieces of legislation.

The Hon. BEN FRANKLIN: Thank you for being here, Mr Ray, and for all the work that you do. Could you please talk a little more about your thoughts on the idea of sunset clauses for SEPPs?

Mr RAY: The question I have for you is what happens when the sun sets?

The Hon. BEN FRANKLIN: Indeed.

Mr RAY: What is the legal position when the sun sets? Does that mean the ancient provisions from 1965 pop back up, or does it mean there are no provisions?

The Hon. BEN FRANKLIN: It has been posited to us that then there will be a period of review to see, in each case, what will then happen—whether the SEPP will continue or whether something else—but there will be actually a proactive assessment of what then happens.

Mr RAY: Sorry. The first thing I would say is that you cannot have a sunset provision that operates automatically because in some circumstances there will be nothing—for whatever reason you might end up with no provisions. The worst case would be that development was just allowed without limit, and the second-worst case would be some ancient instrument that was no longer fit for purpose popped back up.

The Hon. BEN FRANKLIN: Perhaps a better way of saying it would be a mandated review after a particular time period, potentially five years?

Mr RAY: What I would say about that is, yes, obviously in the department we do keep all the instruments under regular review. Often we have a policy where we review some of the larger instruments after two years—the new instruments—because people have had the benefit of operating with the instrument after a little while. That does reveal things that can be improved and I think that is very good practice.

The Hon. BEN FRANKLIN: What does that two-year review happen for?

Mr RAY: It usually happens for larger policies that are brought in.

The Hon. BEN FRANKLIN: But it is not automatic.

Mr RAY: It is not automatic, but it is good practice because then it allows you to pick up what happens within those first two years of actually running that particular instrument. Then changes can be made or better information can be got out to the community if there is something that is not clear. So that seems to be a good practice. But for the smaller SEPPs or SEPP amendments, that is pretty unnecessary. For example, there was a SEPP that prevented canal estates development in New South Wales and it was a very specific single-issue SEPP. There was not much point in ever reviewing that. As to what the right time is, again, I would say that for some SEPPs the review might be once every 10 years. Others might need a more recent review, but I would not like to see a mandated time on it.

One of the things I would say about that is that there would be an issue if—it is a balance then between the resources of the department to further the government of the day's planning policy agenda versus going through the motions because there is a mandated five-year review. The question obviously is that, if there was a mandated five-year review, we would want to do a good job and I do not know that that strikes the right balance of review against actually pursuing the government of the day's agenda. Because obviously the department only has limited resources to do that. If there was a mandated review, then I think it would need to be a proportionate one and not overly regulated so it could be fit for purpose in each case.

The Hon. BEN FRANKLIN: Is that something the Minister could potentially do when they are publicising their SEPP? They could say as part of it, for example—I am not asking you to comment on that. I am asking you to comment on the logistics. A recommendation from us could be that when they publicise the SEPP they must put into that publication what the review process will be, understanding that it will necessarily be bespoke depending on the SEPP.

Mr RAY: Provided that it is bespoke depending on the issue, yes. And perhaps it might be that in some cases it would not be proposed to be reviewed because there are a lot of SEPP amendments that are trying to fix up things that have appeared as an issue that are not—you know, it needs further work. There is something that is not entirely clear or there is a court decision that actually says, "Okay, it actually means something different to what people expect."

The Hon. BEN FRANKLIN: I understand, but the concept of having a section of the SEPP which explains what the review process is and why is not something that you would not instinctively oppose?

Mr RAY: No.

The Hon. BEN FRANKLIN: Some witnesses today spoke of there being a not just competitive tension sometimes between the SEPP and the legislation to which it is responding or at least with which it is interacting—but sometimes they are contradictory and therefore entirely at odds. Have you found that in any situation? Is there an example of that that you have seen, or a number of examples? If so, is this a problem and what do we need to do to fix it?

Mr RAY: I would say it is not a problem because a SEPP can only do what the Act allows it to do. I do not see how any SEPP or LEP could actually be in conflict with the governing Act. I just do not think that is possible. The Parliamentary Counsel drafts the instruments. They provide advice to government that the instrument legally may be made and that relates to the provisions of the governing legislation. I think the risk of that is quite low and I cannot think of a circumstance where—I know that there is no circumstance in which that opinion was not given before a SEPP or an LEP was made.

The Hon. BEN FRANKLIN: The Environmental Defenders Office today suggested that the department of planning saw its most important stakeholders as being local councils, the property industry and private certifiers. That is a direct quote. I thought I would give you the opportunity to respond to that if you would like.

Mr RAY: That is a very narrow band of the people that the department talks to. So, for example, the department has a regular fortnightly—sorry, it is a monthly meeting now. It was fortnightly during COVID. We have a regular monthly meeting with environment groups and community groups in which we discuss the initiatives of the department and we get feedback on those initiatives. That has been operating well. We talk to a range of other groups. We have a monthly meeting with a series of groups that contain the Minerals Council, NSW Farmers, waste industry representatives and a range of more rural-based people. We have a monthly meeting with the supply chain people as well, where that is again something that we started during COVID. I think we have quite a broad engagement through the engagement that we undertake now. Of course, we take submissions and encourage submissions from anyone. Indeed, that is part of the process—eliciting those submissions. Whether we get 100 submissions on a SEPP, or 50 or 1,000 submissions, that is part of the process and we welcome it.

The Hon. BEN FRANKLIN: So you would unilaterally reject that proposition?

Mr RAY: Yes.

The CHAIR: During today and in the submissions the Design and Place SEPP consultation has been raised as an example that I think all of the groups have said is a good consultation process. They may have some qualms or issues about individual parts of the draft SEPP, but the actual consultation process has been talked up as a good model to follow. Can you talk us through just what that consultation process for the Design and Place SEPP is? What have you actually gone through in the consultation process?

Mr RAY: It is important that it is a fit-for-purpose process. That initiative is a very big initiative. It is consolidating a whole range of different matters and it is actually bringing forward some quite new and innovative policy not only about design and place but also about sustainability and basics. There is a lot in that policy. My

understanding is that there has been a range of consultation with different groups and experts and there has been work done. Initially there was a statement of intended effect put out earlier this year for public comment that elicited a lot of comment. The exhibition of that was extended quite substantially. Now, there is a process of engaging—I think there are about five different groups of different stakeholders that we are engaging with about different aspects of the proposal.

That is eventually going to lead to a draft instrument, which we will put out for public comment. The public comment will be considered. I think we are working towards at the moment putting out a report on what we heard from the first round of public comment. I assume that we will also be putting out a report about what we heard from the second round of public comment, but in the meantime there are lots of discussions with stakeholders and interested parties and they will continue. Ultimately an instrument will be made. In relation to the sustainability aspect of that, the Australian Government and the States have agreed to a low-energy trajectory for buildings through the National Construction Code, which is moving towards net zero by 2030. There is a component in that that needs to be brought in towards the end of 2022. We will be out consulting with a cost-benefit analysis, a public consultation with a cost-benefit analysis, and how those changes might impact residential buildings.

The CHAIR: And the time frames, from go to whoa?

Mr RAY: I think the time frame is certainly 18 months. It might even be two years by the time it is finalised.

The CHAIR: Is that because of the nature of the SEPP?

Mr RAY: I would say that was particularly because of the nature. It is a many-faceted SEPP. It is design, it is place, it is looking at subdivisions for the first time—principles about subdivisions. It is also a principles-based SEPP, which is a bit of a new model, rather than a strict development control. As I said, it is looking at sustainability as well. There is a lot in it and the consultation process is a fit-for-purpose process.

The CHAIR: How does that vary, then, for the preparation or development of other SEPPs?

Mr RAY: At the other end of the spectrum, I have already talked about the SEPP I refer to as the toilet paper SEPP. But there are also rapid SEPP amendments to allow the clearing and clean-up from the bushfires in 2019 and 2020 and provisions to ameliorate allowing shop owners to put containers as temporary commercial buildings to enable them to conduct business. Again, those things moved very swiftly at the other end of the spectrum. There is a broad range of different approaches within that. As the provisions get more complex, the engagement gets more complex. The other thing that we are very lucky to have is we are able to do more engagement online. It is obviously not a perfect answer for some areas of the community, but we are able to use a lot of online tools. For example, there is a tool called Social Pinpoint that allows people to get online and make comments about particular aspects of a plan that might relate to the particular concerns of their location, in a broader plan, or in relation to a particular issue.

The Hon. GREG DONNELLY: In the same theme that was raised by the Chair—the consultation process—as you said, there perhaps is a spectrum within the overall approach here, with the ones that may need to be dealt with quite rapidly through to the more complex ones and everything in between. But where does the list of steps for each one of those possible arrangements exist? They obviously have been used and continue to be used; they are not made up each time. There is obviously a set of steps that are applied. Where do they reside?

Mr RAY: There is a number of steps that we have to go through that are in the legislation, and there are also steps that are in the regulations about how we notify and how we do certain things at the end of the process.

The Hon. GREG DONNELLY: Just before you go on, obviously subject to what is in the legislation and regulation, I suppose what I am getting to is beyond that. We are talking about custom, practice, internal procedure and guidelines. Where does that sit? Where does one find all of that?

Mr RAY: What I would say is the custom and practice is something that resides within the departments and expert advisers that the department looks to to understand how best to engage on a particular proposal or otherwise—and also in the department's community participation plan.

The Hon. GREG DONNELLY: Sure. But just pressing you further, presumably there are these different examples—and the mind is brought to bear about these matters beyond the legislation and the regulations that we in the department follow, which presumably have a set of items that are ticked off to ensure these are covered to meet the requisite aspects of this particular type of situation. That is not just carried around in someone's head in the department, or even a few people's heads. It is obviously documented. What are those documents called?

Mr RAY: I suppose there are aspects of it that are documented. There is a facility for us, for example, to put material up that relates to the exhibition of proposals through our planning portal. There are procedures for doing that and there is no doubt a range of procedures that relate to other things of that nature that are not the digitally based material. But what I would say is that there is a general favouring of putting something out on exhibition. If I looked back in the past 10 years, I would think the majority of SEPPs have been put out for public exhibition. But in each case, in accordance with the requirements of the legislation, the department provides advice and then the Minister makes a determination whether he accepts that advice or not—or whether he might amend that advice or he might say, "No, in this case I would like—". Often what we might do is we might put up an exhibition plan or a community engagement plan with the proposal. If Ministers are happy with that community participation plan then they will make a determination to publicise the SEPP in accordance with that plan.

The Hon. GREG DONNELLY: So essentially it is the department—obviously with the Minister ultimately perhaps being made aware of a particular proposal's aspects and dealing with the consultation and then saying, "Listen, I think in the circumstances that makes sense", and sort of saying, "Proceed".

Mr RAY: I would say that in all the major cases there would be some sort of community participation plan or an exhibition community engagement plan that would generally be put up as part of the initiation of a SEPP-making process. That would say how the consultation would be carried out, what tools would be used and how the department would try to outreach to particular sectors that may have an interest in it or particular groups.

The Hon. GREG DONNELLY: What would be the objective criteria that the department would use to make an assessment about whether or not the circumstances were such that consultation ought not take place or cannot take place in those particular circumstances?

Mr RAY: The criteria will be developed in line with the particular policy that is proposed. Obviously we have the community participation plan, so that is our first port of call. And then a judgement is made, often in consultation with—because the Minister has to turn his mind to publication. He cannot make an instrument without turning his mind to publication. There are also other statutory requirements for consultation: in relation to threatened species, in relation to the Greater Sydney Commission, in relation to Sydney drinking water catchment. All of those matters would be considered and then a proposal would be put forward, and ultimately it is a matter for the Minister to decide whether that particular engagement proposal was the appropriate one or whether he wanted it targeted in a particular way—or if he is concerned that a group might not be fully engaged, he might request further work. He or she might request further work.

The Hon. PETER POULOS: Some SEPPs mean far more to mum-and-dad investors, especially when they are interacting with local councils. I am just wondering if you have any thoughts on whether there is scope for enhancing a plain English version of some of these instruments to enable these individuals to interpret and navigate through them?

Mr RAY: Yes. Obviously the department does strive to try and provide plain English material that is available to make it easier to access the SEPP. In some cases, the department provides—for example, in relation to the exempt and complying codes, the department has a hotline and has had a hotline that is manned during the week that will answer questions from anyone who is involved, whether they be mums or dads or anyone else, about particular provisions that might relate to their property. I am sure that we can always strive and do better than we do. We certainly do try and make some of the more complicated ones as understandable as possible, and we do encourage people to engage with us. We have a lot of material on our website, in particular. With particular initiatives, there will be a greater outreach. There was considerable outreach with the Low Rise Housing Diversity Code a few years ago. The department was on the ground talking to various communities where those matters caused concern.

The Hon. PETER POULOS: Will the same apply, in your opinion, with engaging with our culturally diverse communities as well?

Mr RAY: Yes, that is also a key issue. One of the good things about people in the department—there are a lot of people who fall into that culturally and linguistically diverse group, and they are often of assistance in those sorts of circumstances. Could we do more? Yes. Do we try and do as much as we can? Yes, we do, in particular circumstances, if particular people are going to be affected. It is very important that everybody has access to the information.

The Hon. PETER POULOS: In terms of more, how could we progress that as an opportunity?

Mr RAY: It often depends on where the SEPP or the LEP is going to have the most impact. The department, in many cases, works with local government if the SEPP is having a particular impact in that local government area. Again, it is very much a bespoke situation. I do recall in certain years gone by that there has

been engagement with newspapers that were not English-speaking newspapers, and a range of those sorts of things, as well, depending on the circumstances.

The Hon. CATHERINE CUSACK: Would it be possible to get a flowchart showing the life of a SEPP, before it is born and when it is actually christened by the Governor—

Mr RAY: Yes, of course.

The Hon. CATHERINE CUSACK: —or through its different stages?

Mr RAY: Yes. I do have an answer for you, from your earlier question. There are 51 SEPPs at the moment. There are 39 that were made as SEPPs and there are 12 deemed SEPPs that were made as regional environmental plans. They now have the status of SEPPs because regional environmental plans were removed from the planning system in about 2005, I think. So, there are 51.

The Hon. CATHERINE CUSACK: Thank you very much for that.

Mr RAY: I should have had that number. Sorry about that.

The Hon. CATHERINE CUSACK: It's okay.

The Hon. BEN FRANKLIN: You can't be expected to know everything.

The Hon. CATHERINE CUSACK: Secondly, just on the Henry VIII provisions, I am not sure if you have heard evidence or read any evidence that there have been questions raised in relation—

Mr RAY: Yes.

The Hon. CATHERINE CUSACK: Particularly the effect of effectively changing legislation in other portfolios. Obviously we have had some positives puts to us by other stakeholders, but I wondered what the Government's position is in relation to the benefits and why they are continued. Also, unpacking that a bit, are there provisions when the SEPP is being made for the affected portfolios to be consulted in that journey?

Mr RAY: Yes. I suppose it goes back to the nature of planning legislation, which obviously came out—this is on the UK model that came out in the late 1940s. It is obviously a system of regulation, as opposed to a system based on property. Before the planning system came into existence, there were lots of attempts through property rights to say what could be built on a piece of land. In lots of properties where the house was constructed in the 1920s and 1930s, there is often a covenant on the title which says, "You must build a brick and tile house on this land to the value of £600," for example.

That was obviously an attempt to ensure that there was a certain quality. It was really a planning outcome. The issue is, of course, that things change over time. For example, when the Government puts in large infrastructure projects and metros, then there is a question about what the appropriate zone form and building form should be around the stations when there is obviously a lot more capacity. If there was not a clause like 3.16, then that would not enable—there would be a conflict between those provisions, those covenants, and the planning rules, and that conflict would not be able to be resolved under law.

The Hon. CATHERINE CUSACK: Many of these covenants predate the current planning system.

Mr RAY: Yes, many of them. Most of them predate the planning system.

The Hon. CATHERINE CUSACK: And they can maybe refer to all sorts of things in the covenant?

Mr RAY: They can indeed. The point of it is that once a planning instrument is made, whether it is an LEP or a SEPP, the appropriate environmental and social studies, all those technical expert matters—they have been looked at. There has been a thorough assessment not only when the instruments are made, but then when the development consent is granted. There has been a thorough, triple bottom-line assessment. And so, it would seem quite strange that a covenant from 1924 would halt development that had been through a series of community engagement processes and where there had been a thorough, evidence-based assessment.

I think that is the primary driver for that clause. There are safeguard provisions in the legislation. Those clauses are in most LEPs and all such clauses have to go to the Governor to be made; so, they have to go to Executive Council. Now, LEPs are not made—unlike SEPPs, they do not go through the Executive Council, so there is an oversight of those types of provisions. My understanding is that in relation to provisions that relate to regulations or other Acts, those Ministers who are in that portfolio and who have the allocation of those Acts are consulted before any of those provisions are put to the Governor.

The Hon. CATHERINE CUSACK: Maybe you would like to take this on notice, but I am not surprised at all to hear that there is a procedure like that. In some instances, it has been—according to the evidence, some

of these provisions will affect how you administer your child care, or have a health implication. I just wondered if you could give an assurance to the Committee that those Ministers are aware, and at what point in the process, if that is okay?

Mr RAY: I will come back with you. I know personally—I have an example from many years ago. It is a long time ago, but before the Olympics there were problems with sewer outfalls in Sydney Harbour. The Government of the day put in a large infrastructure project to double the capacity of the pipes, and that required some laws to be suspended because technically they could not do the tunnelling, even though there were no surface problems with it. In that case, I know that the portfolio Ministers were consulted before that. Let me go back; I will take that away and—

The Hon. CATHERINE CUSACK: Is it also fair to say that these provisions give clarity to the policy, so that there is not really any doubt that it might be clashing with something else and there might be some—

Mr RAY: Yes. And the provisions are very specific. They only disapply the covenant or the provision to the extent necessary to undertake the development. They do not wipe it out. It is only very limited to the extent necessary to undertake the development, and that development is usually undertaken after consultation through assessment and/or the planning controls.

The CHAIR: Earlier on you were responding I think to the Hon. Ben Franklin's series of questions around reviews, sunset clauses, mandatory reviews and the like. I think it was then you mentioned the department already undertakes a review of some of the SEPPs as it is. Is that an internal review that you were talking about? Or is that an external review that involves community and stakeholders?

Mr RAY: Again, it depends on the circumstances. In smaller scale situations it might be an internal review. In other situations we might ask for public comment. In some cases we might get an expert to do a report for us, and if necessary in some cases that may well be put out for public comment, or in some cases we might just rely on the report and publish the report. Again, it is a fit-for-purpose review.

The CHAIR: That review would not be initiated until you had a conversation with the Minister about the fact you were about to exercise that review function?

Mr RAY: Yes. We would seek his consent to that.

The CHAIR: This morning Professor Neudorf addressed the Committee but in his submission to the Committee he talked about the requirement of the publication of draft texts and explanatory statements for SEPPs. I would like to explore with you if that was to be put in place how that would work in the process of developing a SEPP and what added difficulties or added elements that would create?

Mr RAY: Let me go back to one of my earlier answers. I would say the majority of SEPPs that have been put out for public comment, like a statement of intended effect, an explanation of intended effect has been put out to gain comment, but not in all cases. What I would say is that if we were required to put that out and seek public comment in all cases, there would be some circumstances where we could not do the work that we did at the start of COVID or after the bushfires. That would mean that we would have to take probably a month more, because probably need to put something out for, like two weeks is probably the least amount of time that you could put something out for. Then we have got to assess the consultation and provide advice on that consultation, make any changes, what have you. That would be for something that was very small. So, that is four weeks.

Some other things that are slightly bigger, again, that might take eight weeks to do that. So there would be serious issues with our ability to do some of those things that we did very quickly in COVID or because of the bushfires, or because there is some problem has arisen and we can just make a very quick change, and if it only affects one or two councils. So, for example, we were requested by Hawkesbury Council at the end of last year, they were dealing with a bushfire recovery matter. There is a quite famous, I must say I have not been there, but a quite famous retail outlet near Bilpin called Tutti Fruitti, the Tutti Fruitti cafe. The owners wanted to reopen. They were not able to provide the assessment in time and they requested the State Government to assist them in order to allow a temporary use, a temporary facility there while they could go and get their development application through. Again, that was the department helping out the council in that particular case. But if we had had to consult on that, and it was due to open on a particular day, so that would have been pushed back, and various other things.

The other thing I might just say is, not every LEP goes to consultation either. There are a range of minor LEP provisions that are not consulted on; if they are of a machinery nature, or if they are correcting typos, or if they are what we call a very minor policy change. And there are some LEPs that are slightly more involved that may not be consulted on either, in a sort of broad community sense, but there may be targeted consultation required. So that at the moment the gateway mechanism for LEPs determines the level of consultation. For larger

ones it is a minimum of 28 days, smaller ones 14. But there are some that are not consulted on, and that has been the case since 2009.

The Hon. CATHERINE CUSACK: Can I clarify one thing there? The Tutti Fruitti example you just gave, was that done as an amendment to an—

Mr RAY: It was an amendment to the LEP, yes. That is the other thing I would say, while there is a hierarchy in the sense of SEPPs generally prevail over LEPs, a SEPP can amend a LEP, and many SEPPS amend a LEP. And LEPs can actually amend SEPPS. That happens a little bit more rarely, but it does in fact happen.

The Hon. CATHERINE CUSACK: In the case of Tutti Fruitti, the SEPP amends the LEP. Does the SEPP then disappear?

Mr RAY: Yes.

The Hon. CATHERINE CUSACK: Wow.

The CHAIR: Going back to this explanatory statement for SEPPs, I appreciate—

The Hon. SCOTT FARLOW: Sorry, can I pick up on that question? Your question before about what happens when the sun sets—you could not have a sunset clause on something like that that amends the LEP and then sort of disappears, could you?

Mr RAY: No. It has done its job. Because all it was doing was putting that provision in. The provision itself has a sunset but it is a sunset provision in the LEP. For example, the department I think towards the end of last year, removed a range of concurrence and referral provisions and those provisions were in a range of LEPs. And the SEPP was made to remove those provisions, because they were no longer being used, or agencies felt that they did not need to see those referrals, and the SEPP disappears. That is an often case, the SEPP actually, it has no more work to do.

The Hon. CATHERINE CUSACK: It is a lever for government to get stuff done.

Mr RAY: Absolutely.

The Hon. CATHERINE CUSACK: That is mainly uncontroversial?

Mr RAY: Yes, mainly uncontroversial, and the work that is done with councils. Also sometimes there is a bit of a program, or has been from time to time, of putting controls that were originally in a SEPP because they were a site of State significance, back into the LEP. That also happens as well, so those controls are in a LEP.

The CHAIR: Your explanation around those almost emergency style instruments is one thing, but at the other end if I could look at the Design and Place SEPP, where you are going through quite an extensive consultation process, and this is going to be a substantial body of work, would it be possible for an explanatory statement in that instance?

Mr RAY: Well, there was an explanatory statement. So, in the first—

The CHAIR: At the commencement?

Mr RAY: At the first time that the—so, are you proposing when the process starts?

The CHAIR: At the end, so that—

The Hon. CATHERINE CUSACK: In the gazette? Is that what you mean?

The CHAIR: Yes. Once it is gazetted there is some statement from the Minister that indicates how this has come about, what its intent is and your consultation. I do not think people are proposing a very long, but just so that there is for something like this. This is going to be quite substantial, clearly.

Mr RAY: So what I would say to that, Chair, when the statement of intended effect was put out for public comment in February, that is what that was.

The CHAIR: That is what it was?

Mr RAY: It was a detailed explanation of how the Design and Place SEPP would work and what the subsidiary documents were and what the process for the consultation and the development of the SEPP and the subsidiary documents were, and also the areas that the SEPP would do. So that is what we do.

The CHAIR: That has been done. That is good.

Mr RAY: Yes.

The CHAIR: That would be available?

Mr RAY: That is available on the department's website.

The CHAIR: Mr Ray, we have run out of time. Thank you very much for your time today. You took some questions on notice.

Mr RAY: Yes, I did.

The CHAIR: The good people of the secretariat will be in contact with you in relation to those questions. You will have 21 days in which to turn them around.

Mr RAY: Thank you very much, Chair.

The Hon. CATHERINE CUSACK: Can I just clarify this? The flowchart that I asked about for the life of the SEPP—could it actually be the life and death of the SEPP?

Mr RAY: Well, I will say that there are 51 that have not died yet.

The CHAIR: But there are some that have.

The Hon. CATHERINE CUSACK: But some disappear and some continue on.

Mr RAY: That is right.

The Hon. CATHERINE CUSACK: But anyway, just the life cycle of the SEPP.

Mr RAY: Yes.

(The witness withdrew.)

PAULINE WRIGHT, President, NSW Council for Civil Liberties, affirmed and examined

The CHAIR: I now welcome our next witness. Would you like to make a brief opening statement?

Ms WRIGHT: Yes. Thank you very much. I will. I would like to begin, of course, by acknowledging that we are meeting on Gadigal country and pay my respects to the Elders, past and present, as well is to their future leaders. This is a very welcome opportunity, and I thank you for it, to address you on the important issues arising from the sweeping Executive powers inherent in the process for making State environmental planning policies in New South Wales. In particular, the NSW Council for Civil Liberties welcomes the opportunity to make some observations on the exclusion of State environmental planning policies [SEPPs] as legislative instruments from scrutiny, sunsetting and disallowance under the various legislative provisions that ordinarily enable the Parliament to consider and disallow subordinate legislation.

The exclusion of SEPPs from that process creates an effective scrutiny gap which should be remedied. I will make further reference to that shortly. In recent years we have seen subordinate legislation, including SEPPs, being used evermore frequently by the Executive to make laws in New South Wales—no less than 11 have been made just this year and in 2020 about 50 were made, as I understand it. SEPPs can, of course, have very serious ramifications for the built and natural environments and there is a significant public interest to be served by ensuring that the process of making them involves both meaningful public consultation and parliamentary scrutiny. The making of subordinate legislation of this kind by ministerial fiat undermines democracy and, in circumstances where such significant powers are being exercised without any requirement for public consultation, ministerial discretion should be properly limited by making SEPPs subject to parliamentary disallowance provisions at the very least.

At present, the process for making SEPPs gives the Minister sweeping powers. SEPPs, by their nature, have the potential to affect the urban and built environments as well as the natural environment and the rural environment and affect the way that we live our lives in a fundamental way, and our property rights. For instance, a recent SEPP related to the protection of koala habitat. It commenced on 17 March 2021. While some sectors of the community welcomed the making of that SEPP, others did not. What is indisputable, though, is that it did have a significant impact on private property rights and it was brought in without, in the view of the NSW Council for Civil Liberties, any comprehensive and meaningful community consultation and parliamentary scrutiny. That is something that we do not want to see happen, no matter how laudable the intent of the SEPP might be. What we want to see is SEPPs being made with a process that minimises the potential for them to be politicised.

At present part 3 of the Environmental Planning and Assessment Act, or EPA Act, empowers the Governor of New South Wales to make environmental planning instruments, including both SEPPs and local environment plans, or LEPs, on the Minister's recommendation. SEPPs are intended to be directed to regional and statewide matters while LEPs relate to local environmental planning and development. Either the Minister or a local council may make an LEP for the purpose of local environmental planning, but while the power to make locally significant LEPs is subject to compulsory community consultation and an exhibition process, that is not the case for SEPPs, even though SEPPs have the potential to affect the citizens of New South Wales statewide. It should also be remembered that SEPPs override any LEP to the extent of any inconsistency. So, you have had a community consultation process for an LEP, but a SEPP can then be brought in that completely overrides that and disempowers the people, effectively, from having had their say on the making of the LEP.

The Minister may undertake community consultation in making a SEPP but none is required and it cannot be enforced. There is a clear requirement for public consultation in the creation of LEPs. Increased community participation is an object of the EPA Act. In a democracy the public has a right to input on decisions with statewide or regional environmental consequences. For that reason, the NSW Council for Civil Liberties believes the Minister should be compelled to consult in the process of creating any SEPP. We also consider that legislative amendment is necessary to place appropriate limits on the discretion of the Minister to ensure that a SEPP may be made only when it furthers the objects in the enabling legislation, which is the EPA Act. Those objects are set out in section 1.3 of the Act. They include the protection of the environment and adherence to principles of ecologically sustainable development.

The Council for Civil Liberties is also concerned that SEPPs are exempt from Parliament's general power to scrutinise or disallow a statutory rule. Both of those processes provide important democratic checks. SEPPs are also exempt from the default sunsetting provision of five years that applies to other kinds of subordinate legislation. In our view, this should be remedied by amendment through the Subordinate Legislation Act. These exemptions together mean that the Minister has almost unfettered power and no motivation to consult the public or Parliament in developing and creating SEPPs. Enabling parliamentary scrutiny of subordinate legislation is essential, in our view, to public confidence in the lawmaking process in New South Wales and to maintain key

rule of law principles, including fundamental things like the separation of powers and parliamentary sovereignty. Of particular concern is the provision in section 3.16 of the EPA Act, which is an example of what has been referred to as the Henry VIII clause. It effectively means that a SEPP may stand above even primary legislation made by the Parliament. This raises serious concerns about parliamentary sovereignty in that it gives the Executive power to make overriding laws via provisions in a SEPP. We have had the benefit of reading the submission of Associate Professor Neudorf and Adjunct Senior Lecturer Leadbeter to this inquiry. We respectfully agree with their analysis of that particular aspect.

In our submission, which I take it you have read, we make reference to two specific contextual issues that underline the need for scrutiny and consultation with respect to the making of SEPPs, and they are climate and First Nations issues. Firstly, in relation to climate, the International Covenant on Civil and Political Rights [ICCPR], to which Australia is a signatory, guarantees human rights, including those that are dependent upon the protection of the environment. In failing to act on emissions, Australia may be in breach of its resultant obligations. If the Executive makes SEPPs that fail to consider properly climate change, then that would be inconsistent with our obligations under the ICCPR as well as the objectives of the EPA Act, being the primary legislation. This context underlies the need for consultation and scrutiny of the development of SEPPs.

In terms of First Nations Australians, the EPA Act aims to promote the sustainable management of heritage, including Aboriginal cultural heritage. However, we have seen Indigenous voices ignored or minimised during development decision-making and SEPPs may override these important considerations. That is something we do not want to see. Again, this context underlines the need for consultation with key stakeholders in the community in developing SEPPs.

In summary, the NSW Council for Civil Liberties considers that legislative amendment is required so that SEPPs are subject to disallowance and parliamentary scrutiny as well as to the usual sunset provisions, since sunset provisions are one means of scrutiny because they effectively mean there has got to be a review at the end of the sunset period. It adds a layer of accountability through a parliamentary process and that is the proper process as we see it.

Thank you very much. I am happy to answer any questions.

The Hon. BEN FRANKLIN: Thank you so much for being here, Ms Wright. Were you here when Mr Ray was giving his evidence? I just cannot remember if I saw you or not.

Ms WRIGHT: I was not. I came in right at the tail end of his evidence.

The Hon. BEN FRANKLIN: No problem. The only point that I wanted to make is that Mr Ray talked in some depth about the whole sunset issue and said one of the fundamental problems is that if there was a sunset clause—an automatic sunset clause—which therefore made the SEPP then become inoperable, let's say, after five years, often there would be nothing then that would take its place or possibly legislation from the 1960s or something like that. So his view was that having some sort of potential for review at an appropriate time might be a good way to go, but an actual official sunset clause in terms of it being shut down at an automatic time would not work. Would you like to respond to that?

Ms WRIGHT: If it was properly scheduled you would call a review in plenty of time prior to the sunset time to have that very process occur at that point. But if there is no sufficient justification for it following that review process in perhaps the six months leading up to the sunset provision, then the sunset would be justified. If it is still required then there is the ability to have the SEPP renewed.

The Hon. BEN FRANKLIN: I guess that is the point I am trying to make. He said, "Look, there are going to be clearly SEPPs that need to continue. Frankly, they are the only thing that provides that administrative, overarching—"

Ms WRIGHT: They play a really important role.

The Hon. BEN FRANKLIN: Absolutely. I guess the point that you are making, then, is that the most important issue, rather than the official closing down of SEPPs, is in fact making sure there is some sort of review done after those SEPPs have been put in place.

Ms WRIGHT: That is right and if the review does not justify their continuation, then the sunset provision can kick in.

The Hon. CATHERINE CUSACK: Can I particularly thank you for bringing a kind of philosophical overlay to this hearing that we are having today. Planning legislation, if I can put it to you, is about public interest, as you have articulated in the objectives of the Act. But you specifically mentioned personal property rights are very affected as well. I suppose the more you constrain somebody's land, the more you are having a very personal

impact on their individual wealth or their aspiration or whatever. The terminology used with me is "invested stakeholders" versus "stakeholders"—so a conservation stakeholder, but then you have invested stakeholders being the actual property owners. I wondered if you could talk a bit more about that need to balance the rights or ensure the rights of the public and of the person or the business that owns that piece of land. Have you thought through that issue? It is really a vexed one for me.

Ms WRIGHT: It is difficult, but if you have got a proper process then those difficult considerations can be considered and balanced against each other. You may have competing interests in different stakeholders—you do have the invested stakeholders and you do have the broader community stakeholders. Sometimes their interests will be aligned and sometimes they will be divided, but if you have got a proper scrutiny process, a consultation process, those different interests can be weighed and balanced and a decision can be made from an informed perspective rather than a process that does not require consultation even for a controversial proposal, which has real danger of not considering all of those things properly. The invested stakeholder can have really significant impacts on their farm—or whatever the land might be that they own. It may be a farm—and suddenly they are no longer permitted to clear to enable grazing or something happens in a SEPP that allows State significant development to occur with little notice or none on their land. That can have huge repercussions on the value of their land and on their livelihoods. That is why I say there is a potential for very serious impacts on the way we live our lives.

The Hon. CATHERINE CUSACK: It can make these processes quite emotional when people feel affected that way.

Ms WRIGHT: Yes.

The Hon. CATHERINE CUSACK: If I can just return to an earlier comment you made about the volume of SEPPs and the 50 that were made in 2020 last year. Playing devil's advocate, the fact that we are not mired in controversy and rebellion, doesn't that suggest that most of those SEPPs have gone quite smoothly in terms of their operation? I personally know that the koala one had its controversies, but it was accompanied by legislation as well—a bit of a unique one. But I cannot really think of SEPPs that tipped the community into turmoil and so, given that number, doesn't that actually suggest that in principle it is not being abused and that it is performing okay in terms of the things that it is aiming to achieve?

Ms WRIGHT: I think the problem with broader planning policies is that you do not notice them unless you are directly affected by them. The public may not understand the ramifications of particular SEPPs until they discover that their rights are affected by them. That may not happen until 10 years down the track. No-one is—well, certainly the Council for Civil Liberties is not saying that SEPPs do not have a proper function; they most certainly do. They are actually really important in the way that the State can actually plan our environment and our built and developed environment. So they are really important strategic documents. But what we do want to see is a process that allows for consultation and that allows for bad SEPPs to be disallowed by this Parliament so that we do not have problems, so that the process cannot be politicised and so that there is a safe way of making those policies for the people of New South Wales.

The CHAIR: Before I go to the Hon. Peter Poulos I just want to follow on from that line of questioning. A lot of the SEPPs last year related to pretty dramatic moments in our history. The bushfires, for instance, as we heard earlier, where one of the SEPPs actually was to allow store holders to install a container so they could continue to operate. So a lot of the SEPPs last year had a short purpose to address an issue that no-one had predicted or expected. We have heard today there are a range of SEPPs right through to—the one that everyone is talking about today is the Design and Place SEPP, which is clearly going to be quite a monumental amount of work and quite substantial planning policy. So from that back through to others—

The Hon. CATHERINE CUSACK: There is a range of SEPPs.

The CHAIR: There is a range of SEPPs, so the sunset clause, for instance, in some may not be applicable. Would it be fair to say that it is more—and this is to quote someone else today—there is a lot of horses for courses in this?

Ms WRIGHT: There absolutely are. Some SEPPs are brought in to address emergency situations, as you have referred to, and they are quite properly made as an emergency measure. I think there is no argument with that. But by the same token, having a process that is in place that applies to all SEPPs no matter what, with some scrutiny that can take place after the event for urgent ones, keeps the process safe and maintains the parliamentary sovereignty in lawmaking.

The Hon. PETER POULOS: Good afternoon, Ms Wright. Thank you for participating. I was particularly drawn to pages 10 and 11 of your submission in relation to First Nations issues. Do you mind

expanding on some of your observations of where you think the current process could be improved or is deficient in terms of our current Indigenous engagement?

Ms WRIGHT: The difficulty really is quite broad. It means that Indigenous engagement is not activated because there is no requirement for any stakeholder engagement at all. That means that if there was a political will to, for instance, allow mining on Indigenous land where there was a significant cultural place or site within that there would be the power at present for the Executive to simply write a SEPP without consulting the First Nations traditional owners of that land, and it could just happen without consultation at all. That to me is inconsistent with the notion of self-determination and respect for Indigenous culture and traditional cultural authority.

The Hon. CATHERINE CUSACK: You would like to see a strengthening of those Indigenous consultation provisions?

Ms WRIGHT: Yes, not only—Indigenous is really, I suppose, the context in which we see the importance of community consultation being at its most important, in many ways.

The Hon. PETER POULOS: If you were to explore layers of this consultation, amongst our Indigenous community there is a greater concern at this stage that the current process is not tapping into their cultural sensitivities and sentiments?

Ms WRIGHT: Yes. I think that we have seen, in different contexts across Australia, Indigenous rights not being fully respected when it comes to development and things occurring that damage Indigenous artefacts and places. Juukan Gorge, for instance, was a terrible situation. That was not following a SEPP, but you can see what happens when Indigenous voices are not heard in the process of development. One can see that there is the power—whether it would be used or not is another thing—but there is the power for the Executive to simply say, "Yes, we want that mine because it is good for the community in that place," without considering the impact on Indigenous heritage and culture.

The Hon. SCOTT FARLOW: Just picking up on that point and others as well, I think we have had some discussion today about the vast array of SEPPs that we see. We see significant ones, like the place-making SEPPs, and then we see, as the Chair mentioned, the Tutti Fruitti cafe one. Would you see maybe a different band of consultation required or provisions in place dependent on how significant the SEPP might be?

Ms WRIGHT: You might have a brief consultation period for things that have minor impact but you might have a longer consultation period required—and a more comprehensive one—for matters of real State importance. I think the minimum for the making of an LEP at the moment is 28 days—that is the minimum—but the maximum is open-ended. That could certainly be considered in terms of making SEPPs. You have a minimum period of consultation, and there may even be an emergency consultation of nil if there really was an emergency that required the making of something immediately, but with scrutiny past that. But for things that are going to be of lasting significance for the people of New South Wales then a substantive period of consultation—not only just of the intent of the SEPP but also the draft SEPP itself—ends up meaning that you get better laws when there is consultation. No parliamentary or Executive draftspersons are going to be able to be as good at drafting as they are when they have input from all the considerable intellects across the State of New South Wales.

The CHAIR: Thank you very much for your submission and your time here today. It has been very valuable. I do not think you took any questions on notice. That will draw the hearing to a close.

(The witness withdrew.)

The Committee adjourned at 16:43.