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***Integrated Development
Assessment and Consent
Procedures:
Proposed Legislative Changes***

by

Stewart Smith

Briefing Paper No 9/97

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NSW PARLIAMENTARY LIBRARY RESEARCH SERVICE

Dr David Clune (9230 2484), Manager

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Dr Gareth Griffith (9230 2356) Senior Research Officer, Politics and Government

Mr Stewart Smith (9230 2798) Research Officer, Environment

Ms Marie Swain (9230 2003) Research Officer, Law/Social Issues

Mr John Wilkinson (9230 2006) Research Officer, Economics

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EXECUTIVE SUMMARY

The development approval process in NSW has been criticised by most sections of the community for some considerable time. Problems have included its complexity, too many government agencies involved and delays in determining development applications. Whilst there have been numerous inquiries to find ways to improve the planning approval process, the ‘Thirty different governments...’ report has usefully summed up many of the issues and included recommendations (page 3).

This paper includes a short overview of the planning system in NSW (page 4) and reviews the Green Paper on Integrated Land Use and Planning released by the State government in May 1996 (page 5).

From the basis developed in the Green Paper, the government released in early 1997 the Integrated Development Assessment White Paper and Exposure Draft Bill. The draft Bill amends the *Environmental Planning and Assessment Act 1979* by replacing Part IV of the Act, which deals with development control and assessment (page 7).

The proposed reforms to the EPAA are described in detail (pages 9-19). The reforms can be classed in the following areas: changes to the development assessment system, including the introduction of complying development; the introduction of integrated development consents; and increasing the role of the private sector in the assessment process.

The proposed reforms have attracted both support and criticism. In general, most sectors of the community agree that reform of the EPAA is necessary. What many people also regard as important is maintaining the fundamental basis of the EPAA, ie, ensuring that developments are assessed adequately for their social, economic and environmental affects, without favouring ‘one side or another’.

On 28 May 1997 the Minister for Urban Affairs and Planning Hon Craig Knowles MP introduced into the Legislative Assembly a Bill amending the EPAA and the *Land and Environment Court Act 1979* (page 20). The Bill amends processes relating to Ministerial consents of State significant and prohibited development under s.101 of the EPAA. The Bill introduces mandatory requirements in the development assessment process, relating to the advertising of development. All other requirements must be substantially followed.

Objectors to development under s.101 of the EPAA can only appeal a Ministerial development consent under s.123 of the EPAA. This provides for an appeal not on the merits of the decision, but on the grounds of technical breaches of the law. This may include claims that the advertising requirements of the Act were not complied with, or that the ‘heads of consideration’ under s.91 were not considered properly.

If the Land and Environment Court upholds a s.123 appeal, development consent may be invalidated. The consent authority must start the process again, which delays the whole process. The proposed amendments change the *Land and Environment Court Act*, so that the Court is required to give the Minister as consent authority the opportunity to correct the technical breaches of the law, and then the Minister may seek a declaration from the Court that the development consent is valid.

1.0 Introduction

Planning in New South Wales is regulated by the *Environmental Planning and Assessment Act 1979* (EPAA) and the *Local Government Act 1994*. The EPAA provides a comprehensive three tier planning scheme, allowing for state, regional and local plans, as well as outlining the development assessment process. The *Local Government Act* provides for council decision making procedures and building control. For a full description of the EPAA, see the NSW Parliamentary Library Research Service Briefing Paper No 12/95.¹

The planning system in NSW has received considerable criticism in respect to its complexity, and delays in the development assessment process. In recognition of this and other regulatory issues, the then State government appointed Mr Gary Sturgess to conduct an inquiry into red tape.

In early 1994 Sturgess reported back to the government.² His report focussed on the incoherence of the regulatory process and documented numerous examples. Prime among these was the applicant who had to conduct a \$15,000 flora and fauna study to remove dumped cars and feral cats and establish a wildlife sanctuary; and Australian Newsprint Mills had to undertake archaeological and fauna surveys to plant half a million trees on farmland that had been cultivated for a hundred years. Sturgess noted that it was not only business in NSW which considered that there was a serious problem, all players agreed with the notion that the incoherence and complexity of red tape in NSW were resulting in duplication and poor decision making.³

It was noted in the “Thirty different governments” report that regulation is needed not only to protect the community from harm, but is also essential to ensure an efficient and prosperous economy. In fact, Sturgess regards regulations and standards as so fundamental to the national economy that they should be thought of as part of the economic and social infrastructure. In this regard, excessive ‘red tape’ is the result of under-investment in this area by failing to harmonise regulations, introducing poorly designed regulations or by committing too few resources to its administration.⁴

To help reduce red tape in NSW, Sturgess listed 45 recommendations, covering regulatory reform, the planning approvals process, business licensing, and regulatory review. Pertinent to this paper are his recommendations on the following: delegation of

¹ Swain, M. *Urban Consolidation and Dual Occupancy Development*, NSW Parliamentary Library Briefing Paper No 12/95.

² Sturgess, G. *Thirty Different Governments... The Report of the Commission of Inquiry into Red Tape*, 31 January 1994.

³ *Ibid* at 29.

⁴ *Ibid* at 47.

concurrence provisions to local councils once trained and certified; accreditation and self certification of building approvals; review of the EPAA in relation to clarifying roles of State and local government; and the appointment of ‘case managers’ to help businesses access the regulatory services of governments.⁵

The State government has promised to reform the planning process to eliminate unnecessary red tape.⁶ This paper concentrates on the proposed reforms of the EPAA, which include changes to the development application and consent system, the introduction of integrated developments and private sector involvement in the certification of developments.

2.0 A Brief Guide to the NSW Planning System

Pearson notes that the tension between decision making at the local level and centralised State government control has been a recurring theme in the history of planning law in New South Wales and is still reflected in the EPAA.⁷ Comprehensive planning legislation was introduced in New South Wales in 1945 by passage of the *Local Government (Town and Country Planning) Amendment Act*, which inserted town and country planning schemes into the *Local Government Act 1919*. The Act controlled development through a table of zones showing the status of particular uses, provided for the reservation of land for public purposes and made arrangements for the enforcement of schemes. The result, although a pioneering effort at the time, was an inflexible scheme which worked primarily by separating incompatible uses and tended to reflect past and present development trends rather than encouraging new trends.⁸ The Cumberland County Council was created and was responsible for the preparation and administration of the Cumberland Planning Scheme. The Scheme was adopted in 1951 and applied to all Council areas within the County until a local planning scheme was prepared. A shortage of funds prevented the development of the County Council’s schemes for roads, transport links and open space. This and other problems such as lack of support from government instrumentalities meant the Council was disbanded with the creation of the State Planning Authority in 1963.⁹

In 1962 amendments were made to the procedure for preparing planning schemes by the *Local Government (Town and Country Planning) Amendment Act 1962*. These amendments were designed to speed up the process of planning and development

⁵ *Ibid* at ix.

⁶ “Radical overhaul to speed planning” in *Sydney Morning Herald*, 22 May 1996.

⁷ Pearson, L. *Local Government Law in New South Wales*, The Federation Press, 1994, at 161.

⁸ *Ibid* p 162

⁹ See Sandercock, L. *Cities for Sale*, Melbourne University Press, 1975, for more information on the development of city planning.

control. However, by the early 1970's it became apparent that the planning process and system of approvals and appeals was too complex. The *New South Wales Planning and Environment Commission Act 1974* required the Commission to report on any necessary organisational, administrative and other changes necessary to improve, restructure, integrate or co-ordinate land use planning. The subsequent reports contained the key elements of the *Environmental Planning and Assessment Act 1979*.¹⁰

The EPAA came into force on 1 September 1980. The Act introduced a three tier system of environmental planning instruments, State environmental planning policies (SEPPs), regional environmental plans (REPs) and local environmental plans (LEPs). The control of development through zoning is applied through LEPs, which are produced by local government, whilst SEPPs and REPs are made by the State government for matters that have either state or regional significance. These three planning instruments do not operate independently, and it is quite likely that the operation and application of one is affected by another. There is no presumption that a SEPP prevails over an inconsistent REP, or that a REP prevails over a LEP. Section 36 of the EPAA directs that to the extent of any inconsistency the provisions of a later instrument prevail over an earlier one, unless the contrary intention appears. Most of the SEPPs to date indicate such an intention.

The Department of Urban Affairs and Planning, which is responsible for administering the EPAA, considers that the Act has stood the test of time and that it has been continually refined and made more efficient. Others believe that the complexity of the Act is too great and causes development delays. As a response to these criticisms, the government has initiated various inquiries to find solutions to improve it.

3.0 The Green Paper on Integrated Land Use, Planning and Natural Resource Approvals Policy for New South Wales.

This paper was released by the state government in May 1996. The paper looks at ways to reform the State's planning, land use and natural resource approvals system in order to speed up the process. The paper specifically refers to the interaction between the EPAA and other statutes that operate in the environment area. Some of the proposals for reform include:

- a) ***Combine development consent with operational approvals*** . This would require development consents under the EPAA to be combined with licences, permits and approvals created under other legislation, such as pollution control requirements. At present, proponents are often required to proceed sequentially from one process to the next, increasing the time taken to approve a project and creating uncertainty as development consent provisions may not be harmonised with licence conditions.

¹⁰ Pearson, L *op cit* p.166

- b) ***Create integrated approvals agreements.*** These would consolidate all the conditions that might apply under each approval into one documented agreement involving all regulators. This would force State agencies to consult each other first and streamline their requirements.
- Under such a system, projects of ‘State significance’ to be covered by integrated approval agreements could be linked and assessed through a Commission of Inquiry process or similar, depending on the scale of the project. The Commissioner would be able to consider the project with all the approvals, licences and permits associated with it.
 - appoint approval brokers such as local council officers who could assist in bringing the agencies together to develop integrated approval agreements for small to medium developments
 - enhance the Director-General of Planning’s role in the resolution of disputes between agencies about the conditions that may form part of an integrated approvals agreement for small to medium developments
- c) ***Referrals and concurrences .*** These need to be better managed. The Premier has recently instructed all State agencies to undertake a review of referral and concurrence requirements. Agencies wishing to retain these requirements must justify them to the Premier using a checklist.
- d) ***Strategic Planning and Delegation .*** State agencies to clarify their viewpoints upfront by requiring them to establish a framework of rules, performance standards or goals that can be incorporated in appropriate planning instruments. Local councils could then consider development applications without sending them to State agencies.
- e) ***Performance Standards .*** The adoption of performance standards means that a development application may be approved as long as it does not impact on the environment above a certain level. The advantage of performance based regulation is that it specifies compliance in terms of regulatory outcomes rather than a process by which regulation should be achieved. It is the regulation of ends rather than means. However, in the planning and land use context performance standards may be too ambiguous as a primary test of permissibility.
- f) ***Lead agencies.*** Lead agencies to develop approvals systems for particular categories of development.

The Green paper describes in greater detail the above points, and was a precursor to the *Environmental Planning and Assessment Amendment Bill 1997 - Exposure Draft Bill and White Paper.*

4.0 Environmental Planning and Assessment Amendment Bill 1997 - Exposure Draft Bill and White Paper

The *Environmental Planning and Assessment Act 1979* (EPAA) is divided into the following 8 parts:

Part 1	Preliminary
Part 2	Administration
Part 3	Environmental Planning Instruments
Part 4	Environmental Planning Control
Part 5	Environmental Assessment
Part 6	Implementation and Enforcement
Part 7	Finance
Part 7A	Liability in respect of Contaminated Land
Part 8	Miscellaneous

On February 12 1997 the Minister for Urban Affairs and Planning Hon Craig Knowles MP released the Integrated Development Assessment White Paper and Exposure Draft Bill.¹¹ This reform package, which includes the *Environmental Planning and Assessment Amendment Bill 1997*, proposes to change the EPAA by: replacing Part 4 of the Act, with the new Part 4 called Development Assessment; adding a new part - Part 4A Certification of Development; and adding a new division in Part 6 (Implementation and Enforcement) Division 2A 'Orders of Consent Authorities'.

The White Paper accompanying the exposure draft Bill summarises the principal reform proposals into the following three areas:

- integrate development consents
- provide for appropriate assessment
- increase the role of the private sector in the assessment process

On releasing the package the Minister said:¹²

The reforms will deliver major benefits to the NSW economy by making the State more competitive and increasing our capacity to respond to major investment opportunities.... The reforms will end the frustration of families who want to make reasonable improvements to their property, but who have been frustrated by delays and complexity.

¹¹ NSW Government, *Integrated Development Assessment. White Paper and Exposure Draft Bill*. Department of Urban Affairs and Planning, 1997.

¹² News Release, *Planning Overhaul will abolish red tape*, by Minister for Urban Affairs and Planning, Minister for Housing, February 12 1997.

The White Paper follows from the Green Paper on Integrated Land Use, Planning and Natural Resource Approvals Policy for New South Wales as discussed above. The proposed reforms are designed to: reduce the need for sequential approvals and duplicated regulatory processes; simplify assessment considerations and approval procedures for development proposals; and open compliance aspects of the development assessment system to competition. The Draft Exposure Bill is explained in detail below.

Environmental Planning and Assessment Amendment Bill 1997 - Exposure Draft Bill Description and Commentary

4.2 Definition

The draft Bill includes a new definition of development, to mean:

- the use of land
- the subdivision of land
- the erection of a building
- the carrying out of a work
- the demolition of a building or work
- or any other act, matter or thing referred to in s.26 that is controlled by an environmental planning instrument.

This definition is substantially the same as the present one.

4.3 Part 4 of the Environmental Planning and Assessment Amendment Bill - Development Assessment

Division 1 Purposes

Clause 75 of the draft Bill sets out the purposes of Part 4, which include: to provide a system for determining whether particular development may be carried out; to include a threefold classification of development; to provide appropriate environmental assessment; to provide for public notification of development proposals and public participation in the development assessment process appropriate for each development; to ensure the integration with other legislation; to make it possible to obtain consent for all types of development by making one application; to enable State assessment of development proposals; and to provide an appropriate system of appeals for affected persons.

Division 2 Carrying out of development - the threefold classification

Division 2 introduces a three tier classification system of carrying out development. These are:

- development that does not need consent;
- development that may be carried out only with development consent;
- development which is prohibited.

In general, an environmental planning instrument (State Environmental Planning Policy, Regional Environmental Plan and a Local Environmental Plan) determines what category a development may fall into. For instance, a LEP may specify that a warehouse is prohibited in a residential zone, but the erection of a pergola in a resident's backyard does not need development consent.

Clause 76 covers those developments that do not need consent, as determined by an environment planning instrument. However, environmental assessment may still be required under Part V of the Act.¹³ Clause 76(2) provides for exempt development, which is development that needs no development consent nor environmental assessment under Part V of the Act.

Clause 76A covers proceedings for those developments that do need consent, as specified in an environmental planning instrument. The Bill introduces a new form of development consent. The traditional form of a consent authority (eg local council or other public authority) issuing a development consent is continued, and a new form of complying development is introduced (this will be discussed on page 14).

Clause 76A(3) details the two types of development that need consent: local and State significant development. Local development is that which requires development consent and is not of State significance. State significant development is that which requires development consent under an environmental planning instrument and is of State or regional environmental planning significance and is declared to be so in the environmental planning instrument, or the Minister is of the opinion that a particular development or class of development is of State or regional environmental planning significance. Complying development cannot include: State significant development, designated development¹⁴, those developments requiring a concurrence authority or those applying to land that is critical habitat (as defined in the *Threatened Species Conservation Act 1995*). Clause 76B defines a prohibited development as one defined to be so in an environmental planning instrument.

¹³ Part V of the Act was designed to catch those developments which escaped scrutiny under Part IV. If an environmental planning instrument declares that a development does not require consent, then some other arrangements are necessary for assessing potential environmental impact. These are found in Part V. For more information see:

Farrier, D. *The Environmental Law Handbook. Planning and Land use in NSW*. Redfern Legal Centre Publishing, 1993, at 350.

¹⁴ Designated development is that which is defined in the regulations or an environmental planning instrument. A designated development application must be accompanied by an environmental impact statement, and objectors have third party appeal rights to the Land and Environment Court if the consent authority approves the development.

Division 3 The Procedures for development that needs consent

Division 3 of the Bill outlines the procedures for development that need consent. The procedures by which development consent is obtained differ according to whether the development is local or of State significance, designated or an integrated development. The Bill divides the process into four steps: Step 1 - Application; Step 2 - Public participation/ consultation/concurrence; Step 3 - Evaluation; and Step 4 - Determination.

Clause 78A outlines the application stage. Of note is that a single application can be made to cover one or more types of development as defined by the Bill. For instance, one development application can include subdivision of land as well as the erection of buildings. This streamlines the current process whereby a development application needs to be submitted under the EPAA, and then a building application needs to be submitted under the Local Government Act.

The procedure for Step 2 - Public participation is defined in clause 79. If required by regulations or a development control plan, the consent authority must give notice of the application received. If a consent authority such as a local council needs to obtain the concurrence or consult with a government department, as defined in an environmental planning instrument, the consent authority must do so before determining an application. However, if an environmental planning instrument requires the Minister to obtain the concurrence of another person in relation to State significant development, the Minister is only required to consult with that person (clause 79(3)). Special clauses relate to development that is on land that is part of critical habitat or that is likely to significantly affect a threatened species.

In determining a development application, a consent authority has a statutory obligation to assess it according to s.90 of the EPAA. Presently, s.90 lists what is known as the 'heads of consideration', which details the matters that a consent authority must consider in determining a development application. Presently s.90 has 31 'heads of consideration' and the proposed Bill greatly simplifies these into the following areas:

- provisions in any environmental planning instrument
- provisions in any draft environmental planning instrument
- any development control plan
- any matters prescribed in the regulations
- likely impacts, both on the natural and built environments, and social and economic impacts
- the suitability of the site for the development
- any submissions received from any public participation process

Step 3 - Evaluation, also includes clauses on compliance with non-discretionary development standards. The government may prepare a State Environmental Planning Policy to define standards for a particular type of development. If a development application is for one containing non-discretionary standards as applied in an environmental planning instrument, and the application complies with those standards,

the consent authority is not entitled to take those standards into further consideration in determining the application, nor make more onerous conditions (clause 79A(3)).

Commentary

Some industry commentators support the simplification of the 'heads of consideration'. For instance, planning consultant David Winterbottom supports the simplification, noting that the present s.90 checklist is regularly used even when most of it is totally irrelevant to the proposal, resulting in a waste of time and effort.¹⁵

In contrast, the Environment Defenders Office (EDO) is concerned at the reduction of 'heads of consideration' criteria, believing that the more specific the criteria, the more enforceable it is. With the general criteria as proposed, the EDO considers that there is more room for consent authorities to vary their consideration of environmental impacts, and it will be harder for community groups to appeal a consent authority's decision by way of judicial review.¹⁶

The Fourth Step in the Development Assessment Process

Clause 80 details the fourth step in relation to development assessment, that being the determination of the application. As could be expected, the Bill provides for the granting of consent to the application, either with or without conditions, or the refusal of consent. The consent authority must refuse an application if consent would result in a contravention of the EPAA.

Imposition of Conditions with Development Consent

A consent authority may approve a development application with or without conditions. The Bill largely continues provisions found in the EPAA. However, increasingly public authorities are allowed to seek financial assurances from developers to guarantee the completion of works or compensation for the damage to public property. For example, the *Protection of the Environment Operations Bill 1997* (Draft Exposure) provides for the Environment Protection Authority to seek a financial bond from a licensed polluter to either carry out works or stay within licenced pollution limits. Similarly, clause 80(5) of this EPAA Amendment Bill provides for a new method to ensure that a developer repairs any damage caused to the property of the consent authority or complete any public work such as a road or kerbing and guttering. The consent authority may require the developer to either lodge a deposit with the consent authority or provide a guarantee satisfactory to the consent authority to ensure the above works are completed.

¹⁵ Winterbottom, D. "Integrated Development Assessment. Accentuating the positive" in *New Planner*, No 30, April 1997 at 14.

¹⁶ Environment Defenders Office, *Integrated Development Assessment White Paper and Exposure Draft Bill, Submission*, 1997, at 10.

Appeal Rights to Development Consents

Under s.97 of the EPAA, if an applicant is dissatisfied with the determination of a consent authority, they may appeal to the Land and Environment Court. Local councils determine the majority of development applications in the State. Under the proposed reforms, if a consent authority is a local council, an applicant may request the council to review a determination of their development application, other than a determination to issue or not issue a complying development certificate (clause 82A). This request must be made within 28 days of the determination, and the council may confirm the original determination or change it. The council is not required to notify any person of the review, but must give notice of the result of the review to the applicant, and if the review is one concerning designated development, to each objector. Once one review is determined, no further reviews under this section are permitted. The Bill provides for no time frame in which the council must undertake the review.

Commentary

The EDO notes that the White Paper includes no justification for the inclusion of clause 82A, and considers it remarkable that the Bill is offering an applicant a further chance to obtain a favourable determination without providing any rights of public notification or participation. The EDO considers this unacceptable and that the clause should be deleted from the Bill.¹⁷ Clause 97 of the Bill provides for an applicant not happy with the determination of a consent authority to appeal to the Land and Environment Court, the same provision found in the present EPAA.

Division 4 Special Procedures for Complying Development

Complying development is a new category of development which is described in the White Paper as being ‘routine development which can be certified in entirety as complying with predetermined standards and policies.’ The White Paper acknowledges the introduction of performance based Building Code of Australia standards to be introduced on July 1 1997. This new code will also include ‘deemed to satisfy’ solutions which will meet these standards, and it is proposed that at least initially, complying developments will conform to these ‘deemed to satisfy’ requirements.¹⁸

The government has foreshadowed that a State Environmental Planning Policy will identify what developments are to be classed as complying development. Annexure F of the White Paper provides examples of what a ‘core list’ of these could be. They include: alterations and additions to single dwellings; internal alterations to residential and commercial property; demolition of structures; changes of use from shops to food shops, restaurants and cafes, light industry to another light industry or light industry to warehousing or vice versa. Consideration is also being given to including minor subdivision in the core list. Local councils will be able to add to the core list in their

¹⁷ *Ibid* at 19.

¹⁸ NSW Government, *Integrated Development Assessment. White Paper and Exposure Draft Bill*. Department of Urban Affairs and Planning, 1997 at 21.

administrative area, but not reduce the list without the permission of the Minister.

Clause 84A details the procedure to carry out complying development. An example is as follows: an applicant draws up plans in accordance with standards applying to a particular type of complying development. The applicant employs an accredited certifier to check the plans against the relevant standards. The certifier confirms that the plans comply with any relevant standards and issues a complying development certificate. Once the certificate has been received by the applicant, development may commence.

A consent authority (such as a council) may also issue complying development certificates, and an application for a certificate must be publicly notified in accordance with the development control plan applicable to the area. The council or accredited certifier may issue a complying development certificate unconditionally or subject to conditions, or refuse an application. However, they may not refuse to issue a certificate if the proposed development complies with the development standards applicable to it, nor impose a condition that has the same effect as those standards but is more onerous than those standards (clause 85A(5,6)). The determination of an application by a council or accredited certifier must be completed within seven days. A consent authority that has not determined an application for complying development within seven days is deemed to have refused the application, but may approve it at a later date.

Clause 97(A) provides for an applicant who is dissatisfied with the determination of a consent authority in regard to an application for a complying development certificate may appeal to the Land and Environment Court within 12 months of receiving the notification.

Commentary

The EDO does not support the concept of complying development, due to the fact that it creates considerable scope for the exclusion of the community from decisions which affect it. If this provision proceeds, the EDO recommends that the Bill be amended to ensure that complying development cannot include development impacting on the habitat of threatened species, items of environmental heritage, heritage conservation areas or environmentally sensitive areas.¹⁹

Traditionally, public authorities have been the only bodies able to issue building consents. As such, local councils and their officers have often been under enormous pressure to approve development applications. Sometimes, this pressure has been in the form of bribes which, as evidenced from ICAC investigations, some officers have been tempted by. However, council officers are paid from the public purse, and have no financial interest in the process of approving development applications. In contrast, private certifiers do have a financial interest in the process of approving applications, in the sense that they may be under pressure to approve complying development applications to ensure their services are used in the future. Penalties for incorrect

¹⁹ Environment Defenders Office, *op cit* at 14.

statements by certifiers are discussed later, but they face a maximum fine of \$15,000. Certifiers are also governed by their accreditation bodies and insurance agencies. The White Paper also argues that certifiers will be held accountable through the market place, ‘as accredited certifiers’ employment opportunities will be determined by their reputation.’²⁰ Part 4A of the draft Bill includes provisions regulating accredited certifiers, and these are discussed on page 18 of this Briefing Paper.

Division 5 Additional procedures concerning State significant development.

Under s.101 of the present EPAA, the Minister has the power to ‘pull in’ a development application of State or regional significance to be determined by the Minister rather than a local council. Clause 88A continues this provision, and on giving a s.88 direction the Minister becomes the consent authority.

Currently, s 101 of the EPAA provides that, if the Minister calls in a development application, any person who made a submission under 87(1) (in respect to designated development) can require the Minister to hold a Commission of Inquiry. The draft Bill amends this provision so that the Minister now has the discretion to hold an inquiry, but is not necessarily required to.

Clause 89 of the Bill allows the Minister to declare that prohibited development on specified land may be the subject of a development application for determination by the Minister if the Minister is of the opinion that matters pertaining to the development are of significance for State or regional environmental planning, and the Minister considers it is expedient in the public interest to do so.

Applicants may make a development application for the prohibited development to the Minister, who is the consent authority. The relevant local council may request the Minister to hold a Commission of Inquiry about the prohibited development, and the Minister must comply with this request (clause 89(3)). Presently, the EPAA provides that anybody who made a submission to the consent authority about a prohibited development may require the Minister to hold a Commission of Inquiry.

Commentary

The EDO is concerned about the expansion of Ministerial powers to declare and ‘call in’ State significant development, involving the loss of decision making power by local councils and lack of public participation and notification. For instance, State significant development can be declared in a State Environmental Planning Policy, and this process can be done with no public participation or consultation. Similarly, the EDO is concerned at the amendments that reduce the ability of people who made submissions in regard to designated developments of State significance, or prohibited development, to require the Minister to hold a Commission of Inquiry.²¹ Whilst not holding an inquiry

²⁰ NSW Government, *op cit* at 25.

²¹ Environment Defenders Office, *op cit* at 11.

may reduce the time to determine a development application, the trade-off is potentially a reduced role for public participation.

Division 6 Integrated Development Consents

Presently, development, building and subdivision applications are all considered under separate legislation, often sequentially and with little coordination between approval authorities. For instance, development applications are considered under the *Environmental Planning and Assessment Act 1979*, building applications under the *Local Government Act 1993*, and subdivision is controlled under Part 12 of the *Local Government Act 1919*. To further complicate the approval process, other government agencies may also be required to licence or permit an activity, and the result may be incompatible conditions between the licence and the development consent. To remedy this, the government has proposed a new system, known as integrated developments.

Division 6 of the Bill provides for special procedures for integrated development. The Bill defines integrated development as a development that requires approval under other Acts as listed in Annexure C of the White Paper. For instance, a development application for an aquaculture operation will also require approvals under the *Fisheries Management Act 1994* and pollution control Acts, and because of these multiple approvals required is classed as an integrated development.

Clause 91A details the process that a local development application that is an integrated development must follow. The procedure is as follows: on receipt of a development application for an integrated development, the consent authority must obtain from each relevant approval body the general terms of any approval proposed by that body. If the consent authority determines to refuse an application the authority is not required to seek this advice.

Any consent given by the consent authority must be consistent with the general terms of approval given by any approval body. If an approval body imposes a condition on the development the consent authority must include these conditions when approving the development. If the approval body does not grant an approval then the consent authority must refuse consent to the application. If the approval body fails to inform the consent authority in the required time, the consent authority may determine the application regardless.

The integrated development process for State significant development is similar to that for local development (clause 92). However, if an approval body informs the Minister that it will not grant an approval, or it will grant the approval but subject to general terms that the Minister considers inappropriate, and the Minister and approval body cannot resolve the matter, the Minister may make a recommendation to the Premier concerning the determination of the application. The Premier may then either resolve the matter, or deal with the recommendation under s.121 of the EPAA, which enables a Commission of Inquiry to be held.

Once an approval body has provided its general terms of approval for an integrated development, it cannot vary the terms of that approval before the expiration or first renewal of that approval (clause 93).

Commentary

From a planning perspective, one commentator has welcomed the single approvals system and the requirement to obtain in principle approval for major developments from all appropriate government agencies.²² In general, the early consideration of all the issues relating to a development application is to the benefit of all the parties. However, the Environmental Defenders Office notes that many of the approvals granted by other bodies such as the EPA depends on the production of complex data by the applicant. In practice, much of this fine detail work is only carried out in the later stages of project planning. The EDO considers it impractical to expect industry to produce large amounts of detail early on in the process, and similarly unreasonable to expect approval bodies to be limited in their exercise of their regulatory functions to the terms of an approval granted when much of the detail was not yet even in existence.²³

Division 7 Conditions requiring contributions towards public amenities and services

Division 7 covers conditions requiring contributions towards public amenities and services. Clause 94 outlines the procedures involved, and is similar to section 94 of the EPAA. Of note is that complying development may also be subject to a s.94 contribution, as defined by the complying development certificate and imposed by the consent authority or accredited certifier.

Division 9 Appeals and related matters

This Division continues appeal proceedings similar to those incorporated in the EPAA.

Division 10 Development by the Crown

This Division largely continues provisions found in s.91 of the EPAA. However, a new section, clause 104, states that development by the Crown that does not require development consent under an environmental planning instrument and comprises an erection of a building or demolition, may be carried out if it is certified by or on behalf of the Crown to comply with the technical provisions of the law. Under this section, the Minister may also declare that a specified technical provision of the State's building laws do not apply, or do apply with certain exemptions or modifications.

Division 11 Existing Uses

This Division covers existing use rights and is largely similar to those found in the present Act.

²² Winterbottom, D *op cit* at 14.

²³ Environment Defenders Office, *op cit* at 9.

4.3 Part 4A Certification of Development

Part 4A is a new provision and includes issues dealing with the certification of development. Clause 109 defines an accredited certifier as a person who is accredited by an approved association and who is indemnified by an approved insurance policy covered for ten years after the person issues the certificate. Accredited certifiers can issue complying component certificates, completion of building work certificates and subdivision certificates.

A complying component certificate is one that includes one or more of the following: states that the work involved in a specified aspect of the proposed development will comply with all development standards applicable; that advertising and notification of the development has been complied with; that specified work has been carried out in the development; and that a condition attached to the development approval has been complied with (clause 109G).

A completion of building work certificate states that a specified building has been completed in accordance with the terms of a development consent or complying development certificate and is of a class specified in the certificate. The Bill provides for a variety of situations in which a certificate cannot be issued (for instance, development consent has not been granted, see clause 109N). Similarly, a subdivision certificate endorses a plan of subdivision of land and states that the subdivision complies with the Act. Again, restrictions and obligations apply to the issue of subdivision certificates.

Division 5 covers issues concerning accredited certifiers. An accredited certifier must not issue a certificate for any development if they are related to the developer or has a pecuniary interest in the development. A person who falsely represents that they are an accredited certifier, or issues a certificate in relation to any development whilst not being accredited in relation to that development or makes any statement that is false or misleading in connection with a certificate is guilty of an offence, with a maximum penalty of 150 units (\$15,000) (s.109ZA).

An applicant refused a building work certificate or a subdivision certificate by a consent authority may appeal to the Land and Environment Court within 12 months after the decision was made (s.109ZB).

4.4 Part 6 Division 2A - Orders of Consent Authorities.

Part 6 of the EPAA defines implementation and enforcement powers. Presently, under the EPAA local councils do not have the powers to issue orders. Orders to remedy a breach of the Act can only be issued by the Land and Environment Court. The draft Bill inserts new powers for consent authorities to make orders. Clause 121A defines the orders that a consent authority may give and to whom they may be given to. They include orders: to cease using premises for a specified purpose; to demolish or remove

a building; not to demolish or remove a building and others (nine in total). The introduction of an orders regime into the EPAA will give consent authorities greater powers than they have at present, allowing them to take more direct action over infringements of development consents.

5.0 *Changes made by the Environmental Planning and Assessment Legislation Amendment Bill (amendments in relation to ministerial consents)*

On 28 May 1997 the Minister for Urban Affairs and Planning Hon Craig Knowles MP introduced into Parliament the *Environmental Planning and Assessment Amendment Bill 1997*. As stated by the Minister, the focus of the Bill is development consents granted by the Minister for projects of State significance, notably those of designated development.

Background

To challenge the validity of a development consent an objector to a development has a variety of grounds. The Land and Environment Court has a wide jurisdiction to hear appeals, and the Land and Environment Court Act divides appeals into the following classes:

- Class 1 - Environment planning and protection appeals
- Class 2 - Local government and miscellaneous appeals
- Class 3 - Land tenure, valuation, rating and compensation matters
- Class 4 - Environmental planning and protection and civil enforcement.

An appeal to the Land and Environment Court is only permissible if provided for in the relevant statute.

Under s.101 of the EPAA, if the Minister is of the opinion that it is expedient in the public interest to do so, and considers it to be of significance to State or regional planning, he may 'call in' a development application to be determined by him rather than a local council. If requested by a council or an objector (if they made a submission under s87(1)), the Minister is required to hold a Commission of Inquiry.

On granting consent, the Minister is required to fulfill all the normal procedural requirements of a consent authority. For example, the 'heads of consideration' under s.91 are taken into consideration, and that the development application has been properly advertised.

Under s.101(9), the Minister's determination is final, and sections 97 and 98 do not apply. Section 97 provides for an applicant who is dissatisfied with the determination of a consent authority to appeal to the Land and Environment Court within 12 months, whilst s.98 provides appeal rights to objectors of the determination. Both of these appeals come under the Class 1 jurisdiction of the Land and Environment Court, but neither apply to s.101 determinations.

The only avenue of appeal left open to objectors to a determination of the Minister under s.101, is s.123 of the EPAA.

Section 123 (*Restraint and Breaches of this Act*) states: any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act whether or not any right of that person has been or may be infringed by or as a consequences of that breach.

A s.123 appeal to the Court is considered a Class 4 action. Such an appeal cannot consider the merits of the development application, but can only consider if the correct decision making process was followed. This may include that a designated development was properly advertised, or that the ‘heads of consideration’ under s.90(1) were taken into account.

Pearson writes: ²⁴

The only possible challenges to a decision made under s.101 would be a challenge to the reasonableness of the Minister’s opinion that a particular development application related to a matter of significance for State or regional planning, or a challenge based on failure to consider a relevant matter under s.90(1). The result of a successful challenge on these grounds would in any event be at best a declaration that the decision was invalid and a direction that the Minister reconsider, rather than a rehearing on the merits of the development application.

A successful challenge under s.123 may result in any development consent being declared invalid by the Land and Environment Court. However, the option is open to the Minister to appeal that decision in the Court of Appeal, or reconsider the application, making sure that the due process of the law is followed. This creates delays as the Minister must go through the whole process once again.

However, it is quite possible for a Court to find that whilst there has been a technical breach in the law in the determination of a development application, the Court does not find the consent invalid. For instance, in discussing whether the Commonwealth government had failed to take into account a relevant consideration, Mason J in *Minister for Aboriginal Affairs v Peko Wallsend* ²⁵ found the following:

Not every consideration that a decision maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision.

²⁴ Pearson, L. *Local Government Law in NSW*. Federation Press, 1994, at 216.

²⁵ 162 CLR 24

It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account...I say 'generally' because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given weight to a relevant factor of no great importance. The preferred ground on which this is done...is [whether] the decision is 'manifestly unreasonable'.

What is 'manifestly unreasonable' was considered in the *Wednesbury* case where it was found that a case could only be made out if the decision was "so unreasonable that no reasonable person could have come to it."²⁶

Pearson also made reference to a possible challenge to a s.101 determination on the basis of the Minister not considering all the 'heads of consideration'. Street CJ in *Parramatta City Council v Hale*²⁷ outlines some of the important principles in relation to a consent authority considering all the 'heads of consideration' found in s.90(1) of the EPAA:

The law is clear that a provision such as s.90(1) necessitates, as a precondition to the validity of a council's decision, consideration being given to such of the matters listed therein as objectively are of relevance to the application. Secondly, if a council takes into account irrelevant considerations, that will vitiate the decision. Thirdly, if a council misdirects itself in law as to the scope of the content of its statutory powers or duties, that too will vitiate the decision.

All of these three grounds of invalidity have three points in common. In the first place, in each of them the proof of the invalidity rests upon the challenger. In the second place, none will lead to invalidity unless it was a material error such as to justify the intervention of the court: it need not be shown to be of critical or decisive significance in the council's decision; on the other hand *de minimis non curat lex*.²⁸ In the third place the reference in each to 'the council' is to the council as a group..

²⁶ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1K.B. at 230,233-234.

²⁷ (1982) 47 LGRA 319 at 335

²⁸ The law does not involve itself with trifles.

Pearson notes that a successful s.123 appeal is extremely difficult.²⁹ It is apparent that even if a Court does find a breach in the law, it is not automatic that the development consent is invalidated.

However, if a development consent is found to be invalid, the proposed amendments as put forward by the government make it easier for the Minister to comply with the process of making a valid determination. If a Ministerial development consent is found to be invalid by the Land and Environment Court, the Court is obliged to specify what needs to be done to ensure validity rather than just declare the determination to be invalid. The Minister may then go away and rework the determination. Having ensured that the terms specified by the Court have been complied with, the Minister may then make an application to the Court seeking a declaration that the development consent is valid.

In debate on 29 May 1997 the Opposition put forward several amendments to the Bill which the government accepted. These amendments included widening the scope of the Bill to include not just Ministerial consents, but also consents by local councils. The Bill is amended to include a definition of ‘application determination authority’ which includes both local councils and the Minister.

The Bill in Detail

Clause 104B amends the EPAA by creating a new category of mandatory requirements in relation to the validity of development consent made by the application determination authority, and by default makes other requirements ‘not mandatory’. The Bill provides for only two mandatory processes, these are: a requirement that a development application to carry out designated development and its accompanying documents be publicly exhibited for the minimum period of time; and a requirement that a development application to carry out advertised development and its accompanying documents be publicly exhibited for the minimum period of time. All other requirements, such as the heads of consideration found in s.91, will be judged according to whether they have been ‘substantially’ complied with. What this means will be determined in each case depending upon the provisions and facts peculiar to each case.

The Bill also amends the *Land and Environment Court Act 1979*, by inserting a new Division - Orders of conditional validity for certain development consents. Clause 25A defines the applicability of the amendments to relate to development consent granted by the application determination authority. The operation of Division 3 extends to any invalidity arising from any steps preliminary to the granting of development consent, whether those steps were taken, or should have been taken, by the application determination authority or by any other person or body. In particular, (but not restricted to) Division 3 extends to invalidity arising from non-compliance with requirements declared to be mandatory under the changes as described above.

²⁹ Pearson *op cit* at 215.

On determining a s.123 appeal, if the Land and Environment Court finds an application determination authority's development consent to be invalid, the Court may instead of finding the consent invalid, make an order to: suspend the operation of the consent in whole or in part; and specify the terms which will make the consent valid (clause 25B). These terms may include: carry out steps again; require steps not already commenced to be carried out; require acts, matters or things to be done or omitted (clause 25B(2)).

Clause 25C states that the application determination authority may then make an application to the Court that those terms specified under clause 25B have been substantially complied with and the Court may then make an order declaring that the terms have been substantially complied with, and declare that the consent is valid.

Clause 25 E requires it to be a duty of the Court to consider making an order under this Division instead of declaring or determining that an application determination authority's development consent is invalid.

After the order of the Court that a consent is valid, clause 104C of the EPAA states that the application determination authority may regrant the consent for the development. A development consent declared to be valid under s.25C is final and the provisions of s.97 and s.98 do not apply.

Opposition amendment No 3 was supported by the Government and outlined that if the Land and Environment Court found a breach of the law was of a technical or non-substantial nature and did not materially affect the rights or interests of any party, then this breach does not affect the validity of a development consent.

Commentary

The original proposed amendments relate to Ministerial consents for State significant projects or prohibited development. As such, they are often large projects, and arouse much interest and sometimes opposition in the community. Opponents to these forms of development are restricted in their rights to appeal against a Ministerial development consent, and an appeal on the merits of the decision is not possible. Any appeal must challenge the procedural or technical aspects of the consent process, and appellants often use this tactic in an attempt to delay project consent. Appellants hope that during this delay, market conditions may change, holding conditions may become too expensive or any number of factors may arise to deter the applicant from proceeding.

The Opposition successfully argued that the Bill was too narrow in its application, and should apply not just to Ministerial consents but to all consent authorities, including local councils. This will also make it easier for local councils to have a chance to correct substantial technical breaches of the law, without having a consent invalidated.

The section 123 appeal was originally provided for in the EPAA to restrain breaches of the Act. The inclusion of such a provision has ensured that consent authorities have been very careful in their administration of the Act.

The inclusion of Opposition amendment No 3 is curious given the comments of Justice Street and Mason as described above in the Background section. It is apparent that at present where a Court finds a breach of the law to be frivolous or not unreasonable then the Court may refuse to invalidate the development consent.

In his Second Reading speech about the proposed amendments, Minister Knowles acknowledges the time delays when a development consent is found invalid. He hopes that with the provisions of the Bill these delays will be reduced.³⁰ As such, the changes are unlikely to be supported by community groups around the State, some of whom use these delays to help influence planning in the State.

6.0 Conclusions

As the *Environmental Planning and Assessment Amendment Bill* (Integrated Developments) proposes major reforms to planning in the State, it has attracted considerable interest from community and other interest groups and planners. As could be expected with such reforms, supporters and critics have emerged. In general, many planners consider the draft reforms to be a genuine attempt to improve the planning system.

However, other planners consider that the reforms do not go far enough. For instance, leading planning lawyer John Mant stated: “my major criticisms are that the reforms do not go far enough, and secondly that they are being shoehorned into a flawed Act rather than being the excuse for its replacement by simpler and more effective legislation.”³¹ Mant considers that the fundamental flaw of the EPAA is the belief that simply administering the Act will result in well designed cities and towns. He suggests that properly structured organisations, with appropriately skilled staff and leadership are needed to manage cities and towns. Mant’s conclusion is “Good effort, pity about the vehicle and can we please have some more soon.”³²

Other community groups have been more critical of the draft Bill. The Environment Defenders Office (EDO) believes that the draft Bill is flawed, and has the following general comments:³³

- the failure of the Bill to take a balanced approach to the task of regulating land use planning. The Bill is overtly pro-development.
- the consultation period on the draft Bill was inadequate
- the failure of the Department of Urban Affairs and Planning to consult with the

³⁰ *Hansard, Galley Proofs*, 28 May 1997, at 86.

³¹ Mant, J. “Integrated development assessment. Nice ideas, wrong vehicle.” in *New Planner*, No 30, April 1997 at 15.

³² *Ibid* at 16.

³³ Environment Defenders Office *op cit* at 3.

Environment Protection Authority over the preparation of the Bill and its integration with the *Protection of the Environment Operations Bill 1996*.

- the failure to include any of the Regulations and guidelines which are so important to the success of the draft Bill in the package distributed for comment.

The EDO is concerned about proposals to move important parts of the present Act to the Regulations, and the reduction of transparency of decision making. As far as the EDO is concerned, the Bill's most serious flaw is its claimed overt bias towards development interests at the expense of community and environment protection interests.

In late April 1997 it was reported that 'an unprecedented alliance' of bosses, unions, environmentalists, builders, social welfare groups and local councils had been created to fight the government's proposed planning reforms.³⁴ The new alliance is reported as saying that the proposed reforms fail to balance social, environmental and economic concerns.

Development assessment in NSW has come under criticism for being too slow and cumbersome. It is argued that the community can no longer afford the delays associated with development assessment and approval. The task for governments is to find the balance between ensuring environment protection and community involvement in the planning and development of their communities on the one hand, and ensuring that regulations do not lead to excessive delay and cost overruns for developers on the other. Many community groups argue that if the proposed reforms go ahead, the balance will be in favour of the developer rather than the community and environment protection.

What all sectors of the community do agree on is that the current system is in need of reform. The purpose of the development assessment process of the EPAA is to consider all aspects of a development application, including social, economic and environmental factors. It is apparent that to be widely accepted, any reforms must not diminish any one of these three areas.

³⁴ "All-round attack on planning change" in Sydney Morning Herald, 30 April 1997.