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by

Stewart Smith

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EXECUTIVE SUMMARY

Land is a finite commodity, and competition for land, especially in cities, is often quite intense. This also means that the choice of use of land in a city or town of any size is often an issue of contention that government must determine.

The three tiers of government in Australia each have an important role to play in determining land use. In addition, the property owner (and in effect the property market) is possibly the most important player in determining what building and development occurs where.

The Commonwealth Government is possibly the least important level of government in the administration of land use. Historically, the two main methods the Commonwealth has used to influence land use and design is through use of grants and by direct ownership of land. Commonwealth activities on Commonwealth land are not bound by any State or Local legislation, but by Commonwealth environmental law. This has created some conflict with the States and Territories. Further conflict may be generated when the Commonwealth Government decides to sell land considered surplus to requirements (pages 1-2).

The State Government is also an important land owner in its own right owning important items of both cultural and natural heritage. How the State manages these resources provides an important 'role play' and demonstration of 'best practice' for the private sector. The State Government also has important planning powers and has a variety of means to control land use and design across the State. The State Government may also sell 'surplus' public land, and this may also create some criticism in the community, similar to any Commonwealth Government sale proposals (pages 2-5).

Local Government is possibly the most important public sector participant in the land use planning field because it regulates day to day land use and building design and construction (page 5).

Of course, the land owner plays a very important part in determining 'what goes where'. Land owners have important property rights, commonly referred to as 'doing as one pleases on one's own property'. How to marry the notion of private property rights and public interest has troubled governments for some time (pages 5-7).

The Paper presents a case study of East Circular Quay as an example of urban land use conflict (pages 8-11). Some possible solutions to reduce land use conflict are discussed, centering around the concept of increasing the participation of the public in land use decision making (pages 11-15).

1.0 Introduction

Land is one of those finite commodities. We cannot create more land and competition for land can be quite intense. It also means that the use of land in a city of any size is always going to be 'an issue' for governments. The fact is that when it comes to choosing what an area of land is to be used for, there will invariably be some conflict. Furthermore, once a piece of land has been zoned for a particular use, then there may well be conflict in the choice of building design, layout or destruction or alteration of pre-existing structures.

How to resolve some of the above issues is the topic of this Briefing Paper. In Australia, the three tiers of government each have a crucial role to play in the planning of land use and design, both in city and regional areas. While the role of the Commonwealth, State and Local governments is important, the role of the land owner is at least as important and possibly the most important. The wider community must also have a role in deciding land use, and how this impacts on the rights of the land owner is also canvassed in this Paper.

2.0 The Role of the Commonwealth

The Commonwealth has a variety of roles to play in the planning and development of land, but in general it is the least important in the day to day administration of land use across the country. However, the sheer size of the Commonwealth Government means that if it wishes, it can have a significant role to play in the development of both cities and regional areas. Historically, the two main ways that the Commonwealth Government has influenced land use and design are through their use of grants and by their direct ownership of land.

An example of the Commonwealth Government using its 'fiscal might' to influence land use was the Labor Government's 'Better Cities Program'. The Commonwealth Government initiated the Program in 1991 as a means of reforming urban management processes by creating model partnerships between the three layers of government, the private sector and the community. The Federal Government committed $816 million to the program over five years, matched by State funds.[1] Examples of projects in New South Wales include the redevelopment of the Eveleigh Railway Yards in Redfern and the redevelopment of the Newcastle dock area known as the Honeysuckle development.

More recently, the Commonwealth Coalition Government announced in the 1997/98 Budget that a billion dollar Federation Fund, to be used for major regional and infrastructure works, would be established. It was stated that the Fund would be used for projects of national significance as part of the centenary activities.

The Commonwealth can also influence planning and the characteristics of a locality by owning land in its own right. Commonwealth activities on Commonwealth land are not bound by any State or Local planning legislation. Commonwealth bodies can in effect do as they please in relation to their land and their use of that land. This power is found under section 109 of the Constitution, which states that where the Commonwealth does validly

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1 Commonwealth of Australia, *Better Cities. National Status Report 1995.*

exercise its powers in environmental matters, Commonwealth legislation will prevail over State legislation if there is any inconsistency. This means that Commonwealth government bodies, such as the Defence Force, can develop their land subject to Commonwealth government environment legislation. The relevant Local and State Government bodies have no legal right to intervene or participate in the planning and development process for that piece of Commonwealth land.

This over-riding power of the Commonwealth, and refusal by the Commonwealth to submit its activities to State legislation, has generated a certain amount of friction with State and Local Governments. A considerable amount of friction is potentially further generated when the Commonwealth Government decides to sell surplus Government land, particularly land which is considered to be important in either a local, regional, State or indeed national context. Community attitudes do change over time, and it is conceivable that what is considered 'surplus' to one generation may become 'invaluable' to another. Invariably, once public lands are sold, it is very difficult to buy them back into the public domain.

3.0 The Role of the State Government

The NSW government has a variety of roles to play in relation to land use and planning. Firstly, it is an important land owner in its own right. Managing this land and the public estate, much of which is in sensitive environments, is an important role for the State government. The State owns important items of both cultural and natural heritage, and plays an important role in the conservation, restoration and protection of these features. How the State government manages its own land resources provides an important 'role play' and demonstration of 'best practice' for others in how to manage their land. The NSW Department of Public Works plays an important part in the management of the State's historic public buildings, and has a specialised Heritage, Conservation and Restoration Group within the Department. In central Sydney, several topical issues in regard to State Government property include the redevelopment of the Conservatorium of Music and the restoration of Customs House at Circular Quay.

The State Government has recently reformed heritage protection provisions, with the formation of a new Heritage Council and a Heritage Office, independent from the Department of Urban Affairs and Planning. The Heritage Council and Office will be responsible for establishing a State wide Heritage Inventory of the State's most significant heritage items. Once an item is identified as being of State significance, a strategy will be developed for protecting it. The Council and Office will also prepare a model Heritage Local Environmental Plan to demonstrate to Councils how they can best protect local heritage items. The Government will also establish a $30 million Heritage Fund to restore and conserve the State's heritage. The funds will be raised from $5 million from the sale of the State Office Block and $25 million allocated over three years from the disposal of land assets held by Landcom. The money will serve as a sinking fund, the interest generated from which will be used to support heritage projects. The Government has also directed all State Government agencies and State Owned Corporations to compile a register

of their heritage items. Known as a section 170[2] schedule, agencies will not be permitted to take any action which would 'adversely affect a heritage item, unless there is no feasible or prudent alternative'.[3]

The State Government therefore has an important role to play in the management of the public estate. However, it also has a crucial role in the planning of land use across the State, especially in regard to the allocation of infrastructure and State Government services. Through the *Environmental Planning and Assessment Act 1979*, the State Government also has a variety of powers at its disposal to control land use and design. These include a variety of State Environmental Planning Policies, Regional Environmental Plans and the Minister must sign off each Council's Local Environmental Plan. In addition, the Minister has the power to 'pull in' a development application and become the consent authority. However, for many reasons the State Government may also elect to ignore these powers, and allow local councils to plan land use and approve development applications as they see fit.

In 1997 the State Government introduced amendments to the EPAA which streamlined the development approval process. Critics of the Bill at the time stated that the Bill was overtly pro-development and reduced the ability of the public to have a meaningful and timely input into the planning process.[4] Only reviews of the legislation in the future will be able to determine if this prognosis of how the Act will work in practice is correct.

The State Government is also responsible for the provision of major infrastructure across the State. In any city or regional area land use planning is heavily influenced by the available infrastructure to service any development or redevelopment. The NSW Government currently spends around $2.5 billion annually on the development of major infrastructure in the Greater Metropolitan Region (GMR - collectively the Greater Sydney, Newcastle, Wollongong and Central Coast regions). How to coordinate the provision of these infrastructure services is a mammoth task for government. In an attempt to improve the coordination of infrastructure provision, the State Government has established a Ministry of Urban Infrastructure, located within the portfolio of the Minister for Urban Affairs and Planning.[5]

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2 Of the *Heritage Act 1977*.

3 NSW Government, *NSW Government's Heritage Policy*. April 1996.

4 See: Smith,S. *Integrated Development Assessment and Consent Procedures: Proposed Legislative Changes.* NSW Parliamentary Library Briefing Paper No 9/97.

5 Ministry of Urban Infrastructure Management, *Urban Infrastructure Management Plan 1998*. March 1998.

The Ministry's primary function is to improve the co-ordination and integration of infrastructure planning, provision and management by strengthening linkages between:

- urban management strategies
- infrastructure planning and development undertaken by individual Government agencies;
- the State budget and financial approval processes, managed by Treasury.

The Ministry has recently published its first five year Urban Infrastructure Management Plan.[6] The objectives of the Plan are to provide:

- a framework for infrastructure decision-making to achieve urban management strategies
- a vision of urban infrastructure for agency infrastructure planning and provision
- directions for improved linkages between urban management strategies, infrastructure provision and the State budget process, and
- a comprehensive view of infrastructure planning and expenditure on a regional basis and by policy area.

The Plan has a 5 year outlook and is the first in an annual series. The plan shows that over the next five years, the Government will target major infrastructure projects to:

- provide better public transport and roads;
- improve the movement of freight;
- improve access to services like schools and hospitals;
- better service growth areas;
- clean our waterways and improve air quality;
- and protect biodiversity.

Each year, priorities will be reassessed and the plan will be updated.

The Ministry advises the Urban Management Committee of Cabinet (UMCC) on specific infrastructure projects, programs or issues and assists the Committee to identify priorities for urban infrastructure and its management. The UMCC has responsibility for identifying the key items of infrastructure needed to underpin the future directions of the region. The Committee is chaired by the Minister for Urban Affairs and Planning and Minister for Housing, the Hon. Craig Knowles, MP.

The State Government has also passed legislation to have an influence in the planning of particularly important areas. For example, Sydney is the State Capital and it is appropriate for the State Government to have a say in the planning of such an important area. Up to 1977 the City of Sydney was the consent authority for development within its boundaries. From 1977 to 1989 the Minister for Planning became the sole consent authority. With the introduction of the *City of Sydney Act 1988*, the State Government retained an influence in

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6 Ministry of Urban Infrastructure Management, *Urban Infrastructure Management Plan 1998*. March 1998.

the planning of the City. Part 4 of the Act regulates planning in the City of Sydney. The Act constitutes a committee of the City Council known as the Central Sydney Planning Committee. The Committee is not subject to the control or direction of the City Council and the Council has no power to affect a decision of the Planning Committee. The CSPC consists of seven members, being the Lord Mayor of Sydney; a senior government employee with architectural experience nominated by the Minister for Public Works; two Councillors of the City of Sydney elected by the Council; the Director of Planning; and two persons having knowledge of either architecture, planning, tourism and so forth and who are not public servants appointed by the Minister for Urban Affairs and Planning.

The CSPC is the consent authority in the City of Sydney for major developments, defined in the Act as those with an estimated cost over $50 million. The administrative work of the CSPC is performed by staff of the City of Sydney. With the above arrangement, the State Government is able to appoint four out of the seven members of the CSPC, and is thus able to influence the planning decisions of the City.

The State Government may of course also sell or lease 'surplus' public land, usually either to private people/corporations or to local government. The sale of public land by the State Government to private interests may also create some criticism in the community, as per the above comments in relation to the Commonwealth selling public land.

4.0 The Role of Local Government

Local government is possibly the most important public sector participant in the land use planning field because it regulates day to day land use and building construction. Local councils are the consent authorities for the majority of building development in NSW. It is the local council which develops the local environment plan and zoning regulations, which will establish the framework of what development can go where. In addition, Councils have the final approval of the design of the building. The procedures of Councils, including their land use and building design decision making processes, are regulated under the *Local Government Act 1993*.

Virtually all land use and building development conflict involves to some extent the relevant local council, as it is they who are in the 'firing' line from aggrieved developers or local residents. Local councils are therefore more often than not considered to be 'in the hot seat'. How to reduce conflict in the community in regards to land use planning and design, and the involvement of local government, is discussed in section 7.0 of this paper.

5.0 The Role of the Landowner

The crux of any debate about land use ultimately revolves around the notion of private property rights. In response to concerns about land use in the city the Lord Mayor of Sydney Councillor Frank Sartor is reported to have said: "how do you stop a developer

from exercising his private property rights?"[7] Councillor Sartor was referring to the right to be able to do as one pleases on one's own land. More than two-thirds of Australia, or over 500 million hectares of land are managed by private landholders, whilst about 40 million hectares are in the reserve system.[8] On these figures alone, the importance of private property on the ecological sustainability of our cities and country is clear. However, how to marry the concept of public benefit and sustainability with the right to do as one pleases on one's private property is an issue that has plagued governments for many years.

The right of property holders to use their land as they wish is a powerful argument as it is grounded in political philosophy over three centuries old. In feudal England, property rights were tied to inheritance and the divine right of Kings. This divine right to land ownership by the King was rescinded by an Act of Parliament in 1660, and with the abolition of feudal dues the modern set of property rights became possible. With these developments, a new theory of property was required to justify land ownership.[9]

John Locke pronounced his theory of land ownership in 1690, and based property rights on the labour of the individual. According to Locke, property rights are established without reference to Kings, governments or even the collective rights of other people. The right of use of land became determined by the labour of the land, resulting in improvements. According to Locke, property remains in the state of nature until improved by value added labour, and if this labour was not forthcoming then the land was wasted. Once improved, Locke held the amount of labour, and hence transformation from natural environment to developed, is still the chief factor in any value assessment. Under a Lockean regime, property rights are established on an individual basis, independent of social context, providing the foundation for land owners to claim that society has no right to interfere with land use options.

The evolution of property rights to the present is not straightforward, and there are now two conflicting views. One is that owning property involves both rights and obligations so that the restrictions on land use imposed by environmental and planning regulations are part and parcel of being a land owner rather than being an infringement on it. The alternative view is similar to the Lockean theory, that land ownership involves only rights, while environmental regulation is an obstruction of those rights.[10] While this may appear to be only a philosophical debate of little interest, the issues are fundamental to the protections which our legal system extends to property. Whatever the outcome of that philosophical debate, in present day terms the whole structure of private rights is still based on an

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7 *The Sydney Morning Herald*, 13 July 1996, p.4.

8 Commonwealth of Australia, *National Strategy for the Conservation of Biological Diversity*, 1996.

9 Hargrove,E. *Foundations of Environmental Ethics*, Prentice Hall, 1989 at 64.

10 For more information on property rights see: Bonyhady,T. "Property Rights" in Bonyhady,T (Ed) *Environmental Protection and Legal Change*. The Federation Press, 1992, at 41.

exploitive model of resource use.[11] Similarly, the legal framework is based around the protection of property rights.[12]

Section 51 (xxxi) of the Australian Constitution provides that when the Commonwealth acquires property from any State or person it must do so on just terms. Similarly, in NSW the *Land Acquisition (Just Terms Compensation) Act 1991* guarantees that when land affected by a proposal for acquisition by an authority of the State is eventually acquired, the amount of compensation will be not less than the market value of the land (unaffected by the proposal) at the date of acquisition. It is clear that the State cannot acquire private land without just compensation. However, unless statutes specifically provide for it, a restriction on land use through a planning mechanism does not attract any compensation payments.

In regards to new developments, the design of a building can have a big impact on its acceptability and appeal to the community. It is the responsibility of the land owner to formulate plans for buildings on a site, although the consent authority must approve them. However, quite often there is a certain amount of conflict between a property developer and their team of architects and designers in the first place. Indeed, in the Sydney Morning Herald one prominent architect notes that architects see developers as Satanic figures and developers are tired of architects. It was noted that some architects had an inherent fear of developers, who were painted as 'blustering, economically rapacious, socially insensitive, environmental rapists, heritage haters and intellectually impaired with little architectural education'. On the other hand, developers, tired of consulting architects who they considered 'elitist', had created in house architectural teams who perhaps produced more conservative or 'formula' designs.[13]

Whatever the prevailing thoughts at the time as to how good a building design is, it is inevitable that over time a building considered worthy of praise and awards may become blighted by changing attitudes. For instance, the old State Office Block, built in 1967, won a prestigious architectural award for its design. By the 1990s some considered it to be an 'eyesore', although others argued that it was still a building worthy of its award and should be retained. It was eventually sold by the State Government, recently demolished and a bold new design from an internationally acclaimed architect was approved for the site. This new building may in turn win an architectural award, and then be considered an eyesore in thirty years time. What constitutes heritage worthy of protection or preservation is still very subjective in such a young city as Sydney.

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11 Besant,C, "From Forest to Field. A brief history of environmental law" in *Legal Service Bulletin,*1991*,* Vol 16 No 4, at 164.

12 See Godden,L. "Law, Property and the Environment: Can the Legal System be more Responsive to the Environment?" in *People and Physical Environment Research*, Paper No 50, 1996, at 14.

13 "Architectural olive branch to developers" in *The Sydney Morning Herald*, 27 March 1998.

6.0 Urban Conflict Case Study: East Circular Quay

It could be argued that the current redevelopment and building activity at East Circular Quay has resulted in one of the biggest urban development debates that Sydney has experienced. The complexity of the problem is compounded by a lack of easily publicly accessible and reliable information about the site and its history. In an attempt to remedy this, earlier this year the City of Sydney published a history of the East Circular Quay site. However, critics of the development at East Circular Quay have branded the publication as 'tainted' with the views of the Lord Mayor Councillor Frank Sartor.[14] Nevertheless, the book does give a good time line of the site which is shown below:

A Time Line of East Circular Quay 1788 - 1998

Pre 1788	Sandy beach, rocky outcrop
1788	Governor Philip selects the eastern side of Sydney Cove for his residence. Livestock from the First Fleet landed here, called Cattle Point.
1789	Small redoubt and two guns installed on the Point. Hut built for Bennelong. The area became known as Bennelong Point.
1795	Salt Making
1812	Structures cleared out and walls and fences built by Macquarie to keep 'riff-raff' out of the area.
1813-16	Landscaping around the foreshores to Bennelong Point and on to Mrs Macquarie's Chair. There's a carriage way around the point, but no public road.
1821	Fort Macquarie is completed
1831	Plans for a new Government House involved selling the land around the foreshores to private interests.
1837	Foundations of Government House laid (it took eight years to build). Reclamation of foreshores began, involving quarrying the East Circular Quay rock face to form the Tarpein Way. Quarrying also at Bennelong Point.
1844	New Semi Circular Quay completed. The East Circular Quay roadway is created. 28 allotments for sale, but development is slow.
1845	Government House completed, Customs House opened.

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[14] "Mayor throws book at Quay issue." in *The Australian Financial Review*, 18 March 1998.

Mid 1850s	Macquarie St north is formed (previously a footpath to Bennelong Point)
1860s	The first wool stores and warehouses are constructed. These 1860s and 1870s buildings remain the dominant structures for 90 years.
1868	The Moore Steps are constructed.
1902	Fort Macquarie demolished and a tram shed built at Bennelong Point. Tram shed still known as Fort Macquarie.
1936	Work starts on Circular Quay railway station.
1956	Unilever House and Circular Quay station opened.
1957	ICI House built, removal of height restrictions on Sydney Buildings.
1959	Tramsheds are demolished to make way for the Opera House
1962	AMP building at Circular Quay built - the first 'big' one after the removal of height restrictions. Cahill Expressway opened.
1971	Lend Lease House built. CML acquires 'Bennelong House' at 55 Macquarie St.
1973	Opera House completed
1977	LJ Hooker 'Gateway' proposal (at central Circular Quay) creates controversy over height.
1980	Interim Development Order 37 established height controls allowing heights up to 68.4 metres above sea level.
1983	Lend Lease commission a study to determine the feasibility of a consolidation development on the site, and reject the idea.
1986	First development approvals given for replacement buildings on the site
1987-88	Revamp of Circular Quay for the Bicentennial. East Circular Quay gets an improved walkway.
1988	Minister for Planning accepts three separate development proposals for 1-33 and 35-41 (CML) and 61-69 Macquarie St (Perpetual Mutual/Mirvac). The Unilever Building is demolished.
1989	CML has bought up all sites north of the Moore Steps. The idea of a joint CML/Mirvac solution to the site is floated. Central Sydney Planning

Committee commissions an urban design assessment for East Circular Quay.

1990 CML floats the idea of a tower 30 stories high. It is received with much public criticism. CML commissions Kohn Pedersen Fox to design buildings for the site.

1991 CSPC exhibits Draft Development Control Plan, including Urban Design Guidelines. This includes the idea of selling the East Circular Quay roadway. CML lodges an application for development of Nos. 1-59 East Circular Quay which did not conform to the draft guidelines. Exhibition of both the application and the guidelines generate public criticism. CML withdraws their submission. The City advises the CSPC that it will not accept the guidelines, and will not sell the roadway without the building heights coming down. Resolves to ask the Government to consider a land swap. The CSPC agrees to review the guidelines. The Lord Mayor and Minister announce a joint consultation strategy with the developers, and an Ideas Quest to assist in determining new guidelines for the development at East Circular Quay. Perpetual/Mirvac lodges an application to build 17 storey hotel at No. 61-69 Macquarie Street. Hassels revolving 36 stories tower idea gets an airing in the press.

1992 The Ideas Quest receives 206 submissions. New guidelines are accepted in August. The City/CML/Mirvac announce a joint development strategy. Andrew Andersons is selected architect for the whole site.

1993 Deed of Agreement set up between Colonial Terraces (CML), Perpetual Trustess (Mirvac) and the City. City leases the road to the developers for 60 years in exchange for reduced building heights and rights to air space over the buildings. The Council accepts the Federal Government's offer of Customs House. This negotiation further lowers the heights on the Mirvac Building. A Project Control Group of the three owners is set up.

1994 CSPC gives consent for developments at Nos.1-59, for a part hotel/part residential with a maximum height of 45m and at Nos. 61-69 (residential, maximum height of 46.7m). Consent given to demolish buildings on Nos. 61-69.

1995 Construction begins. The agreement with the hotelier falls through. There are numerous amendments to the project.

1996 A submission from CML to replace the hotel component with residential apartments and a restaurant is accepted by the CSPC. Protest groups organise as the building goes up. CML divests itself of all but a small holding in the development to the Hong Kong and Shanghai Hotels Ltd (The Peninsula Group). CSPC refuses approaches by the Group to negotiate the heights upwards.

1997 Approval is given for a hotel on the site involving minor alterations to the building. Subsequently the developers announce that it is not going ahead and revert to the residential scheme. The covers come off the northern building, increasing public criticism. Various schemes for removing the building are canvassed by objectors. Peninsula agree to consider design modifications to the finishes of the building. At this stage the two other sites at East Circular Quay are developed to about ground level.

Circular Quay is an area steeped in history for the city and the nation. It could be argued that the East Circular Quay site is even more important as it leads to the world famous Opera House. All planners then are keenly aware of the importance of the site to the city. The buildings that were constructed in the 1950s and 1960s were by the 1990s looking very dreary and not appropriate for such an important site. However, when these buildings were knocked down, for the first time in many years the public had uninterrupted views from the western side of the Quay right across Sydney Cove into the Botanical Gardens. Interest in the site then became very topical, because many people didn't want buildings to then block views across to the Gardens and to the approach of the Opera House. As the new most northern building was constructed, the design of the building became evident to the public, and views became blocked, public opposition to the developments grew louder and public rallies against the developments were held. Both the developer and various elements of government then became involved in an attempt to diffuse public opposition.

7.0 Some Possible Solutions to help Reduce Land Use Conflict in the Community

Throughout NSW there is potential conflict in the zoning of land use. As indicated in this Paper, these conflicts have been highlighted at sites of national significance around Sydney Harbour. However, the basis of the conflict, which is often an opinion that a development proposal is an inappropriate use for a given site, may be found in any town across Australia. Councils and Governments are there to govern, and this includes making decisions on 'what goes where'. However, techniques to reduce 'bad decisions' and the 'flak' resulting from these decisions has been the topic of much discussion in recent times.

One suggestion is to increase the number of decisions accepted by the wider community is to more widely involve the community in decision making, ie, public participation. Appropriate community involvement can lead to a more flexible decision making process and solution, result in a less confrontationist approach, and in the long term lead to a more cost effective and better result.[15] Agenda 21, a key document from the United Nations Conference on Environment and Development, emphasises that the role of public participation in environmental decision making is essential if sustainable development is

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15 Harding,R. (Ed) *Environmental Decision Making. The roles of scientists, engineers and the public*. The Federation Press, 1998, at110.

to be achieved.[16] Benefits of public participation are said to include to:[17]

- promote better understanding of a project; its objectives and likely impacts.
- identify and address concerns of all interested and affected parties; including local residents, developers, planning officers.
- provide a means to identify and resolve issues before plans are finalised and development commences, thus avoiding community anger and resentment and potentially costly delays.
- empower local communities - by giving them some control over the decisions that affect their lives, people who help prepare plans tend to support them.
- encourage transparency and trust amongst stakeholders and promote cooperation and partnership as suspicion is broken down.
- increase the chances that the final decision will be acceptable to the general public
- improve the quality of decision making as it ensures that final decisions have legitimacy and validity amongst prominent participants.

Of course, public participation in the decision making process may not overcome all opposition to a project. Whilst there is no guarantee that early consultation will always result in the avoidance of conflict, public participation may ensure that the key concerns will be acknowledged and addressed, and improve the chances of reaching a resolution that satisfies most stakeholders.

How best to involve the public in environmental decision making is going to depend on the particular circumstances of the project. Opportunities to involve the public include allowing them to comment on proposals; attend public meetings; hold workshops; conduct surveys; form citizen advisory committees; hold public inquiries and form community liaison groups. Increasingly, community representation on government appointed advisory committees or on corporate advisory committees is becoming a popular method of incorporating public participation.

In 1998 the NSW Cabinet Office released a paper on public participation in the formulation of policy.[18] The paper suggests that the meaning of public participation is open to competing definitions. The paper argues for a spectrum of meaning, with four key types of participation. These are:

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16 United Nations Conference on Environment and Development, *Agenda 21*. Paragraph 23.2.

17 Harding,R. (Ed) *Environmental Decision Making. The roles of scientists, engineers and the public*. The Federation Press, 1998, at 111.

18 NSW Government Cabinet Office, *Participation and the NSW Policy Process. A Discussion Paper for The Cabinet Office New South Wales*. March 1998.

- consultation: defined as the act of listening to views and taking them into account when making public policy. In the end the government must decide policy, yet the definition assumes some form reciprocity. Each partner in the consultation provides information, and each participant has the capacity to influence the attitudes of the other and to affect decisions made.

- partnership: a feature of the modern corporatist style of government has been the development of sophisticated and professional interest groups able to articulate a point of view. In the partnership model of participation, policy is made in 'policy communities', involving a long term dialogue between government agencies and interest groups. Often these relationships are given formal endorsement through the creation of advisory boards which bring together government, business, unions and consumers. The partnership model is open to 'policy closure', in which access to government is used to secure a privilege and security. This model also restricts access to decision makers for a relatively few, usually those best placed in interest groups or with the ear of the Minister. However, partnership has advantages for government, which may be able to confine participation to groups and organisations whose members are, if not sympathetic, at least aware of the issues and available options.

- standing: legal innovation in recent decades has provided new forms of access and participation through legislation and court practice. Community organisations which seek to assert the public interest in areas such as environmental protection and civil liberties have an emerging legitimacy and importance in Australia. However, courts should operate as arbiters of last resort, opening up decisions for scrutiny rather than seeking to control the policy making process. Few individual citizens have the ability to contest government decisions in the courts, so this category of participation also includes preliminary stages such as access to government information; and the capacity to seek reasons for decisions and the right to have them reviewed by a more senior officer, body or tribunal. Despite some relaxing of strict rules of standing by the courts, most change has come in the form of legislation giving citizens the right to seek information held by government, to question how a decision was made or to challenge its legality.

- consumer choice: the role of customers provides an emerging role for participation. Public sector reform has stressed the need for market or quasi-market mechanisms for the allocation of public services. This has opened new possibilities for consumer influence on the design and delivery of government. It provides a forum for participation

> through individual purchasing choices. This move has been made possible with the greater move by government to contract out services. Advocates of contracting claim that it is not enough for governments to use business practices, but that government services should be delivered by business, according to contracts won by competition. The result is a government which regulates markets but does not participate in them, and a public service which sets policy but relies on others to deliver the goods.

The above types of participation have been identified in terms of policy formulation. In regard to helping decision makers determine what form of development, if any, goes where, then the choices listed above may be limited. Possibly the most useful type of participation for consent authorities would be a consultation and partnership style of public involvement. In addition, it must be remembered that the standing provisions can play a significant part in the affairs of consent authorities.

The *Environmental Planning and Assessment Act 1979* includes certain minimum standards of public involvement in regards to environmental decision making in certain areas. These include the advertising of development proposals and environmental impact statements and the development of local and regional environment plans. In addition, the Minister may consult the public before gazetting State Environmental Planning Policies although this is not mandatory. In the above cases the public is permitted to make submissions on proposed developments or environmental planning instruments. The public has no role in the initial formulation of the plans or proposals. Under the EPAA, in regard to a development a Commission of Inquiry may also be held to make a recommendation to the Minister. The public has access to these Commissions to represent their interests. However, one criticism of this process is that a Commission of Inquiry is held at the end of the project development process, often after much public opposition to a proposal. If there was more public participation at the front end of the project, it is possible that the proposal may be designed to accommodate public interests and be accepted in the wider community. Inquiries at the end of the planning process may result in redesigning the project to satisfy environmental requirements that could have been identified and responded to with upfront public consultation. The EPAA also includes provisions for judicial review of the decisions of consent authorities. For instance, section 123 of the Act states that any person may bring proceedings in the Land and Environment Court to remedy or restrain a breach of the EPAA, whether or not any right of that person has been infringed by or as a result of the breach.

Increasingly, if denied the opportunity to be consulted, members of the public may attempt to increase their level of participation in ways that are not facilitated by government or industry. The formation of community ‘watch dog’ groups or engaging in direct action such as blockades or product boycotts often results in time delays and increased expenses for government and industry. While it is acknowledged by commentators in the field that introducing public participation in environmental decision making will not eliminate all dissent in the community, failing to involve the public often results in greater aggravation and action in the community.

Public leaders are starting to recognise that public involvement in the planning process is important. For instance, the Lord Mayor of Sydney Councillor Sartor, is reported to have said that the four year old 'Living Sydney' strategy needs updating. It was reported that to achieve this, Councillor Sartor considered that there should be more grass-roots involvement in the planning process. He is reported to have said: "I believe it is essential that we proceed to test our vision and do so with the involvement of the community. As part of the process to update our vision for the city, I propose that council invite public submissions from key stakeholders, key city organisations and members of the public."[19]

The Government Architect Chris Johnson also has recognised that greater public involvement is necessary in an attempt to avoid 'planning disasters'. He notes that in regard to the redevelopment of (industrial) sites, especially around Sydney Harbour, "one step to regaining public confidence is to find new ways to open the tender process to public scrutiny."[20]

In May 1998 the NSW Government appointed a new Urban Advisory Panel, comprised of four leading architects and chaired by the NSW Government Architect Mr Chris Johnson. One of the main tasks of the Advisory Panel is to advise the Minister for Urban Affairs and Planning on strategic design of the built environment, especially around the foreshores of Sydney Harbour at sites of State significance.[21] However, there was no inclusion of the public on this Panel.

This lack of any public participation in the Advisory Panel may reflect some of the problems of trying to be as inclusive as possible in harnessing public views. Just how to represent the public or ascertain the opinions of a sometimes apathetic public can be difficult. Other problems of including public participation in the planning process include the domination of the process by interest groups; the expense in cost and time; difficulty in gaining a representative sample of views; local people tend to lobby for local interests and ignore wider/regional or State perspectives; and the public participation process can be difficult to control.[22]

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19 "Taking Sydney beyond 2000" in *The Sydney Morning Herald*, 4 April 1998.

20 "Saving Sydney Harbour" in *The Sydney Morning Herald*, 16 May 1998.

21 "Saving Sydney Harbour" in *The Sydney Morning Herald*, 16 May 1998.

22 Harding,R. (Ed) *Environmental Decision Making. The roles of scientists, engineers and the public*. The Federation Press, 1998, at 122.

8.0 Conclusion

It could be argued that the wider community has lost confidence in the process to decide what development goes where. This is evidenced by the widespread dissatisfaction with building proposals at sites of State significance, including East Circular Quay and other prominent harbour foreshore areas. It could be argued that strengthening techniques to involve the community should be considered a priority for the Government to ensure greater faith by the public in the planning process.

Especially in regards to the planning around Sydney Harbour[23], the response of the State Government has been to introduce and foreshadow legislation to centralise planning control in the hands of the Minister for Urban Affairs and Planning. The creation of the Ministry of Urban Infrastructure and the development of a rolling five year infrastructure management plan will assist the State Government in controlling urban development. It is also hoped that with the assistance of expert Advisory Panels, the Minister will be able to 'massage' building and project proposals so that they contribute to an ecologically sustainable city rather than detract from this goal. In early August 1998 the Leader of the Opposition Peter Collins MP announced that a NSW Liberal government would create a Ministry for Sydney, taking control of all city-wide planning decisions, as well as responsibility for Sydney Harbour. He is reported to have said: "It is time to start integrating our planning authorities in a meaningful way; not just on an ad-hoc basis; not just to patch up planners' mistakes as more and more land is released for development; but to think about the future and demand co-operation amongst those who will plan it and manage it."[24] Mr Collins said the Minister for Sydney would become the city's advocate in Cabinet, promote the city at international forums and be responsible for integrated planning throughout the Sydney basin.

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23 See: Smith.S, *The Management of Sydney Harbour Foreshores*, NSW Parliamentary Library Briefing Paper No 12/98.

24 "Libs plan to take control of city" in *The Sydney Morning Herald*, 6 August 1998.