Panels, Hearing Bodies and Assessment Commissions

by John Mant A Sydney planner and non-practicing lawyer

There is precious little public policy theory underlying the Department's grab-bag of proposals for the reform of the Planning system.

As the inventor of most of the models that make up the proposals about decision making, I feel I should attempt to provide some theoretical and historical background.

Several new decision bodies are proposed as part of the 'reforms'. Two, at least, are based on institutions I set up in South Australia, one is something I have been pushing here in NSW and the other is based on a power I included in the Local Government Act.

I suppose I should feel vindicated. For over 25 years, whenever I suggested that the intellectual giants running Planning in NSW should look at what happens in other States, I was met with one of those typically crushing one liners that substitutes for policy discussion in this State, '*Why should we do that, nothing ever happens in South Australia'*, or whichever State I mentioned might be worth learning something from. Wonderful state chauvinism.

The four models reflect four theoretical positions:

Separation of Roles

Urban management is a task for executive government (although, I have changed my view that a Minister has a sufficiently long term view to do the job alone), while the exercise of development control should be done at arms length from executive government.

It was for this reason that, when I ran Planning in SA in the late 70s, I turned the statutory planning authority into a ministerial department and created a Development Assessment Commission of 'experts' who made state level development control decisions at arms length from me (as Director General) and the Minister. In a separate division from the Area Managers, who were the core of the Department, assessment staff dealt with the DAs (under the direction of a high level statutory officer) and the DAC made the decisions. (Except for State government developments where the DAC made a recommendation, effectively to Cabinet.)

With the Minister, myself and the area managers not dealing with the processing of individual developments, we could get on with the business of actively managing the planning issues facing the State, including making development controls which naturally were place formatted and contextual. There were few conflict of interest problems. We could get involved in the business of governing, secure in the understanding that a separate group of people would be applying the rules to particular developments.

The contrast with NSW could not be starker. The Minister's roles are regularly conflicted, even before the political donation problems. The DG's position has no statutory protection yet he has key statutory duties to carry out in the legislation, while being responsible to the Minister for all aspects of planning policy in addition to managing the statutory process. No wonder there is little community faith in the processes.

Parliaments Don't Make Good Hearing Bodies

My second theoretical principle is a particular of the first one. When a council meets, it does so as a parliament, which is not a good forum for conducting a hearing. A proper hearing requires a non-conflicted hearing body, the members of which have not been lobbied, the right to be heard, and the right to have a decision supported by written reasons.

A council meeting, especially one with a long agenda going late into the night, does not conform to these hearing principles. It cannot, given that it is a parliament and not a hearing body. Parliaments debate resolutions, they don't attempt to achieve consensus reasoned decisions.

It is for this reason that I have been urging councils to set up Independent Hearing and Assessment Panels, which can conduct a proper hearing and provide a recommendation, supported with reasons, before a council makes a decision. Panels are selected from a list of potential members, who, apart from community members, do not live in, or do business in, the council's area. Selection is random and, as those appearing are not told who will be on the panel, lobbying is not possible.

In those councils that have established IHAPs, Councillors are supportive. They know that fresh eyes are brought to difficult applications. The staff recommendations can be scrutinised. Councillors can refer to the hearings all those who attempt to lobby them with assurances that their concerns will be properly considered. Those appearing are properly heard and their submissions are dealt with. Appeal costs have been reduced. And, importantly, councillors retain the final say. They are not threatened by the IHAP; it is their creation. The experience has been that their respective Councils have accepted most IHAP recommendations.

The Property Council accuses me of inconsistency in that, by leaving the power to make the final decision to the council, I have not properly separated the powers of the parliament (the council) from those of the judiciary (the panel).

I think the few occasions where a council has not accepted an IHAP recommendation are a small price to pay for very positive support for the model from councillors. It means that the panel and its members do not become the enemy, as did the Court when the Minister was Lord Mayor and he ran an expensive campaign against it. Besides, it allows the community, in the end, to hold the councillors responsible for the area and for councillors to be able to accept that responsibility.

Marble Cake Rather Than Layer Cake Intergovernmental Relationships

My third theoretical principle is that good intergovernmental relationships are more like a marble cake than a constitutional lawyer's layer cake. What you need therefore are forums where representative of different levels meet regularly, to carry out some regular duty, in circumstances where they also can arrange for any potential conflicts to be dealt with the right mix of expertise and powers. Reality does not always divide powers in the same way – in fixed layers.

When I went to SA the late George Clarke had just completed a major planning exercise for the City of Adelaide. The planning was managed by a high level committee of State public servants and elected councillors (who in Adelaide, at least then, were typical establishment figures). When the Plan was adopted and the development controls from it were given legislative force, I recommended keeping on the committee in the form of the City of Adelaide Planning Commission. (CAPC).

There were four council reps and four State reps with the Lord Mayor as chair and the Minister with the casting vote. (Which encouraged consensus building, as nobody wanted to trouble the Minister.) The statutory task of the CAPC was to deal with State level development control decisions, and State and the Council's own developments. For me, its main purpose was get key people together regularly, over a drink, to discuss how the City was travelling. In this they were aided by my Area Manager for the City who had his office in the Town Hall, next to the City Planner.

The statutory role of the Adelaide model was adopted for Sydney with the CSPC. When, at the time, I put the model to the Liberal Party Minister, I proposed equal numbers of nominees. Being NSW, of course the State nominees had to be the majority. Typical. At least the concept of having the Lord Mayor as Chair was kept.

The CSPC is essentially just a development control body, although it does sometimes gets involved in planning work.

As such, compared with the IHAPs, the CSPC procedures really don't conform to the principles of a fair hearing. It behaves more like a council than a hearing body. The deliberations are in public and proceed with resolutions and debate. There is no proper response to the oral submissions, nor are there detailed reasons for decisions that are contrary to staff recommendations. Further, members seem to caucus before coming out to hear from those making submissions. I have had an experience of one member in a clear conflict of interest in that he gave support to a design, on which he later had to sit in judgement. And it is possible that there have been occasions when Ministers have lobbied State nominees.

The CSPC is one model but its genisus had more to do with city management, than providing a proper hearing body. As such it does not provide a good model for general use as a hearing body.

The Exercise of Statutory Powers

At the time of writing the Local Government Act I must have had some bad experiments of late night silly decisions by councils (usually about conditions), which couldn't be corrected because council had exhausted its statutory powers. Rather naively, I proposed a review provision which, when building control was squeezed

untidily into the EP&A Act became Section 82A. Somewhere along the way it was amended to allow for fresh plans to be lodged, provided they were '*substantially the same development'* – that well known piece of string. Originally the purpose of the section was to enable mistakes of council to be corrected; not an opportunity for the applicant to correct its proposals.

So we had another appeal system; one, if not open to abuse, at least seemed to be. Down the street from us we had a typical case. A real ambit claim came in and was properly refused on many grounds. Following a meeting on site between council officer and applicant's architect some small reductions were proposed. Under 82A approval was now recommended; even through all the grounds still applied.

The local community could not see how something which was substantially the same now could be recommended when it had been so thoroughly refused previously.

The 'Reform' Proposals

You can see all three models in the Department's proposed reforms.

PAC

A Planning Assessment Commission is proposed to deal with most State level applications. This is a good idea. It would also help if there were a separate statutory person who signed off recommendations to the PAC.

The PAC is quite like the SA model, although it is to have a membership more like an IHAP, with the members being selected from a larger panel of permanent members. By contrast the SA model has a standing membership of 9 members – far too many as it is the product of different interest groups each wanting to have one of their people on it.

Unfortunately, in SA, some recent appointees seem to have been selected on the basis of their closeness to the Minister's office than their high level formal qualifications. For these reason the there should be Parliamentary oversight of the appointments to the PAC, as there is for appointments to ICAC.

Regional Panels

These are described as being a kind of ad hoc CSPC. The Property Council is pursuing a model like the Planning Panels it recently conned the SA Government into adopting. These Panels are standing bodies that take the decision power away from councillors. To reduce concerns, a minority of councillor members have been included. Well that's all right then!

You can just imagine how this would work in NSW.

The faction with the numbers on council would select the members. Donations would flow to that faction. All those excluded and a part of the electorate would campaign

against the Panel and its members. Complaints to ICAC about conflicts of interest would continue unabated…..

If the Minister does not think that councils can deal with large applications properly th

IHAPs

These are given some small support. This is typical of the Department's attitude to them. For years the Department refused to do anything to encourage their use by councils.

A major problem in NSW is that doing something about the way councils make planning decisions falls somewhere in the large gap between the Departments of Planning and Local Government. When you ring one to find out what they are doing they refer you to the other.

ICAC says it is only concerned about corruption, not general fairness. So its support for IHAPs has been tepid. And within the membership of the LGSA there are too many who enjoy the line up of supplicants patiently waiting for their three minutes to beg for council's support or opposition to one of the many developments being dealt with that night. So not much support there.

Councils should recognise that the present way in which most make decisions is not working. Nobody is happy with it. Delegating difficult decisions to staff is not an answer, as often staff have had to wear too many hats, and have been too involved in seeking solutions to be seen to be exercising an independent review. IHAPs provide a fair hearing process, which still leaves councillors with the final decision.

Way to go and should be pushed by local government as a proper alternative to regional bodies and the PC's proposals.

Arbitrators

Section 82A clearly encourages ambit claim ablications. Only one appeal should be allow and that is to the Courts. The 'reform' proposals suggest arbitrators should be brought in for 82As. Better to get rid of the section altogether or at least cut out the bit about new plans. The system does not need another process for wheeling and dealing.