RECENT REFORMS TO THE NSW PLANNING SYSTEM

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Introduction

A raft of reforms to the NSW planning system has added many new sections to the Environmental Planning and Assessment Act 1979 (the Act). More is not less, unless now you are able to bring your development in under the new Part 3A which allows the Minister to give consent with discretion unbounded by much of the large pile of existing planning and environmental controls. Instead of fixing the holes, bumps and dead ends in the existing systems, the reforms have created a by-pass expecting a relatively trouble free ride for those able to get past the gatekeeper at the turn-off.

Who has what power?

Most development control systems exhibit complex arrangements between different levels of government and between the executive, parliament and the courts. There are constant disputes about which level of government has the powers to approve development controls, to initiate changes to those controls, or to make decisions within the discretions provided by the controls. There are also disputes about the extent to which the judiciary can remake or review decisions.

Especially important are the powers to make exceptions, either to the controls (a 'spot rezoning'), or by the extensive exercise of a discretion (eg using SEPP No 1 which permits variations to development standards such as height and floor space). Most applicants for development consent want to get more development on their site than the vendor thought was possible. For some, certainty for vendors and flexibility for purchasers can be important virtues of a development control system. It is not surprising that the development industry has welcomed Part 3A and its extensive increase in the Minister's ability to be flexible.

What were the Reforms?

Making sense of the overall objectives of the recent reforms is not easy. They were the product of a number of *ad hoc* committees looking at different aspects of the system without a policy that providing an intellectual framework. Most of the committees were dominated by administrators and members of the development industry. Making life easier for these two groups was a one theme that could be detected running though the reforms. Other than ritualistic statements there was little

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said about reforms to the system that might lead to better outcomes for urban design or sustainability.

Being essentially a tidying up exercise, there was no suggestion of fundamental reform to the Act.

Two mechanisms have been used – firstly, the layering new processes over what exists, and, secondly, reducing some of the large number of existing control documents, by tossing out of some that were no longer relevant, simplifying others and putting what remained in different chapters of a loose leaf folder and calling it a 'single document'.

The Act itself finishes up being longer and more complex, rather than simpler. While there should be a fewer number of control documents, there will still be three or four levels of documentation and more than one document applying to each land parcel.

Fundamental Faults in the NSW legislation

Some years ago, this author identified the fundamental faults of the Act[2] as:

- A poorly resolved combination of the British based planning control system and US based environmental impact assessment practices – that is, Parts 4 and 5 of the Act.

- A system for writing development control documents that would lead inevitably to proliferation.

- No proper application of the separation of powers doctrine - a failure to separate executive, legislative and arbitral powers – that is, the managing and rule making functions were not separated from the function of exercising development control over individual developments[3].

- The general absence of third party merit appeal rights.

The recent reforms to the system have essentially focussed on the first two of the fundamental faults listed above – that is, Parts 4 and 5 and the proliferation of control documents.

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[2] '*Development Control: Tale of Three Acts'*, Journal of the Royal Australian Planning Institute Journal, 1982.

[3] Unlike at the level of State and Federal governments, Councillors in parliamentary style meetings are called on to fulfil all three functions. (Although, with no assistance from the Department, some have now established IHAPs, which recognise the distinction between parliamentary and arbitral processes.) And, unlike in most other States, the role of the NSW Minister is highly conflicted. He is responsible for facilitating development in the State, ensuring an adequate land supply and protecting the environment and, at the same time, he has to be seen to be making fair and proper development control decisions on individual developments. It is a combination of roles, which is bound to reduce the community's trust in the fairness and transparency of the administration of the Planning system, even if a ban was placed on developer donations.

There has been no real attempt to redefine the various powers of the decision-makers so that they comply more appropriately with the separation of powers doctrine (although the reforms do include the possibility, at the Minister's option, of an Independent Hearing and Assessment Panel (IHAP) being appointed by the Minister[4] to conduct hearing into Part 3A developments). Indeed, the virtually untrammelled powers of the Minister to alter the prohibitions and criteria and decide applications has reinforced in the one set of hands, executive, legislative and arbitral powers of an extent not seen in any other planning control system n Australia.

The Reforms to Parts 3 and 4 and Part 5

<u>The difference between Parts 3 and 4 and Part 5 of the Act</u>

Part 3 is a process for setting the rules.[5] Importantly, the Act provided that only Councils could initiate changes to the controls in a Local Environmental Plan (LEP). Early in the life of the legislation this led to the improper use by the State of State Environmental Planning Policies (SEPP)[6] to make changes to the zoning of individual parcels, a process that has now been made unnecessary by the writing of Part 3A and the power given to the Minister to ignore many existing development controls in making a development consent decision.

Part 4 is a process for making decisions in accordance with the requirements and discretions provided by the controls. The decisions are left to Councils in the first instance, unless the Minister calls an application up, which he has done over the years, again by what I consider to be the improper use of the SEPP making power. Call-ups have been made, either because councils have not been trusted to make the decision, or because a particular development was in trouble. In addition to making the Minister the consent authority under Part 4, the SEPP would usually provide the necessary changes to the controls.

By contrast to the rule bound Part 4, Part 5 imposed a US style impact system where everything effectively was subject to consent[7], provided the applicant went through an

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[4] It is not clear why it was thought necessary to create a separate hearing process to that conducted under the Commissioners of Inquiry, an existing statutory body with some permanence and reputation. If there was something wrong with the Commission process then surely it would have been better to fix it rather than create another process to do the same job.

[5] Because of the way the Act was conceived there are far too many rules in too many unintegrated development control documents –see the discussion below.

[6] SEPPs were originally conceived as being broad statements of State planning policy, with cascading documents at the regional level and local levels which implemented, in descending levels of detail, the general State level policies. Because detailed cadastral controls were to be in the LEPs and changes to these could only be initiated by councils, the State Government had no way to amend controls applying to single sites or particular areas. The original concept of a SEPP quickly changed to cadastral control documents spot rezoning particular sites, or, worse still, actual amendments to procedures which by-passed Parliamentary scrutiny as SEPPs, through considered to be delegated legislation, were not laid in Parliament and therefore were not subject to disallowance, as is a regulation. They also were not subject to regulation impact statements.

[7] Initially by the proponent itself, if it was the government; later amendments made it more like a Part 4 consent by including an approval by the Minister for proposals with major impacts.

exhaustive process of assessing the likely impacts[8]. Generally third party remedies were limited to administrative law challenges to the adequacy of the assessment. These led to complex and lengthy hearings and there was no certainty about any decision that was made. Risk was increased for developments under Part 5 as the process did not issue an un-challengeable 'consent' document.

The whole business about what was in Part 4 and what in Part 5, how the different Parts related and how consents were given in Part 5, became very complex. The opportunities for procedural error were substantial.

The new Part 3A

Part 3A is the attempt to tidy up the Minister's various decision roles under Part 5 and Part 4. Given that the Minister came to have a consent role under Part 5 and that SEPPs were often used to spot rezone particular projects and make the Minister the consent authority under Part 4, it was considered that a new Part 3A process could bundle up all the Ministerial approvals into one new process. The opportunities for procedural error would be reduced and the spot rezoning process using SEPPs under Part 3 could become just part of a brand new and simpler development consent process, where constraints imposed on decisions by existing development controls could be ignored. As far as possible, the opportunities for administrative challenges were to be limited; either by excluding them in the legislation[9], or by writing about powers in ways that did not make it easy to challenge how they were exercised[10].

Part 3A therefore is a new consent process specifically designed for the Minister to use. It has new words for old procedures and is a mix of Part 3, Part 4 and Part 5 type processes. Although there is now a 'better practice' system for the Minister to use, those asking wanting consents or rezonings from councils, or proponents whose decisions are not dealt with under Part 3A, are stuck with Part 4 or Part 5. It is apparently a 'reform' to have *three* processes instead of *two*.

Part 3A also brings together the various paths to the Minister's consent role by combining the wide range of *ad hoc* SEPPs into a single 'State Significant' SEPP with many chapters. It is an odd collection, a bit like an archaeological dig, with some call-ins covering areas, some categories of development and some specific projects. There are catch-all call-ins such as construction projects over $50mil, which involve Ministerial discretion, or, in order to avoid the challenge consequences of exercising a discretion, anything at all that the Minister, using a Ministerial Order, wants to add to the list.

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[8] An EIS is similar in scope and function to a 'Planning Study', which Part 3 requires to be done and exhibited before making a changes to the development controls. When a rezoning is taking place, everything is subject to consent with the Council and the Minister considering the findings of the Planning Study in exercising their discretion. As with a decision under Part 5, there is no merit appeal to the Court.

[9] For 'critical infrastructure' the attempt has been made to abolish the supervision of the Court altogether.

[10] For example, the Minister has only to 'consider' the assessment and recommendations of the DG's report on the project, not even 'have regard to', or as in South Australia, 'not make a decision seriously contrary to'.

For applicants, one advantage of getting under Part 3A is that the rezoning and consent process is truncated. Much more importantly, applicants can avoid controls that apply to ordinary people. The rationale for this reduction of the prohibitions and controls in EPIs and in other legislation is that that is what SEPPs have been doing for years and all Part 3A is doing is to provide it all in one process[11].

The reforms put in place a mechanism that will allow those who can bring themselves under them the ability to avoid the controls that apply to vendors and give to the Executive, in the form of the Minister, the right to make a decision with little or no constraint from rules made by or on behalf of Parliament.

Before making a decision, the only document that the Minister has to receive is the Director General's report based on the DG's assessment of the *proponent's* assessment. Challenges to the adequacy of the report's contents, or to any decision that is made by the Minister, are unlikely to succeed as the Minister only has to 'consider' the DG's report before making a decision and the Court has recently suggested that, as the purpose of the reforms was to facilitate development, it will be reluctant to intervene in the exercise of the Minister's powers.

The legislation places some dependence on the role of the DG. The position has to give the requirements for the applicant's assessment of its project, assess the applicant's assessment, require any improvements to the project the DG thinks is necessary and write the report with recommendations to the Minister. While the DG cannot be directed as to the contents of the report, the position has no statutory protection; its holder is sackable at a moment's notice with no reasons to be given, and very few rights to compensation (that is why no reasons are given). In most other States those involved in these types of process and assessment decisions have a statutory position with some protections against unfair and instant dismissal. In some it is an independent statutory body, and not the Minister, that makes the decision, or recommendation.

The discretion of the Minister is virtually unbounded both as to whether to deal with an application and to then do the dealing.

One wonders why so much legislation is required to arrive at this simple situation of almost unbounded Executive discretion over laws made by Parliament. The reason presumably is that, because the complexity of the existing legislation remained unchanged, complex provisions were required to arrive at the position where that complexity does not apply to favoured developments.

Reducing the number of control documents

[11] The first version of Part 3A forbad the Minister from giving consent to a development 'wholly prohibited' by the controls. The 'tidying up' amendments in the dying days of the Government provided that the Minister could ignore the existing controls unless there were Regulations made by the Minister which said he couldn't. So the control document will prohibit something, Part 3A will allow this to be ignored unless a Regulation says that the Minister cannot. This is 'reform'!

This author has been writing for years about the absurd proliferation of control documents under the NSW system, so he should not complain about attempts to reduce them.

Disappointment in the reforms in this instance centre around two aspects:

> The failure to fix the fundamental flaws in the legislation caused the proliferation in the first place.
>
> The failure to create a format for writing controls that reflected support for sustainability, the advances in the technology with digital cadastral data bases and critiques of the outcomes of urban and rural planning since the widespread use of detailed land use zoning.

Failure to Fix the Fundamental Flaws

The proliferation of control documents in NSW came about because they are distinguished by which level of government wrote them[12] and there is no requirement that each new control document should specifically amend what already existed.

As a consequence, there are four levels of planning control documents covering the same parcel of land and, within each level, there may be any number of separate documents. Strategic planning units in State and local governments were encouraged by the system to produce new planning documents rather than identify faults in the existing controls and fix them. There was no statutory discipline placed on staff to inquire about what were the existing controls before embarking on the writing of a new document. The new document could just be laid over what existed and it was then a matter for the users, rather than the policy makers, to work out what was overruled by what[13].

The 'reforms' have not done away with the four level control document system. They do not do what some other States have done, namely to have a single control document which either level of government can change, with all changes having to 'specifically amend' the document. That the 'reformers' did at least understand this objective is reflected by the requirement that there should be one LEP for each council and only 'one DCP applying to each parcel'. However, SEPPs and REPs are to continue, even through some provisions in the SEPPs have been put into standard controls in the standard LEP and others have had their provisions bundled into a loose leaf folder with a single title, which looks like a reduction, but isn't really.

The Failures in Formatting

To reduce the proliferation of documents, the single LEP has a standard template of controls and zones.

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[12] The early versions of the legislation had assumed there would be Regional Planning Authorities which accounted for the REPs as a separate category in the four level system and the distinction between controls that are the 'Law' and those that are merely 'Policy' led to councils' controls being in LEPs and DCPs.

[13] Look at the ease with which the Coastal SEPP was just laid over all the existing controls thereby adding enormously to the complexity of managing the system for all the coastal councils.

There are to be separate cadastral maps for zones, heights and FSRs so local planners have only to prepare these maps and the job is done. There is also to be only one Development Control Plan applying to each parcel. It is not clear what controls, as against administrative provisions, will be in DCPs but, in any event, they cannot contain land use controls, height or FSR controls or, presumably, have provisions that affect or modify such controls.

Two major influences contributed to the decision insist on controls being formatted on around a land use-zoning template:

Departmental officers wanted to reduce the work required approving and amending local government controls.

Secondly, the producers of standard urban products – subdivisions, project homes, shopping centres and fast food outlets, etc - wanted to standardise zones and controls so as to avoid having to adjust designs to fit specific environments or existing built contexts. That is, they wanted more developments to be as of right, where councils could not exercise discretion over an application so long as it was in the right standard zone and complied with the standard controls.

The advisory committee that decided to introduce standard land use zones specifically rejected the concept of parcel formatted controls – the concept of using each parcel as a neutral receptacle for the integration of all controls applying to the parcel, which is a comparatively easy task if a digital cadastral data base is used.

Consequences of a Standard Land Use Zone Format

There are several consequences of the decision to reinforce formatting based on standard land use zones:

The purpose of Planning is presented as being 'to separate land uses and increase the need for travel'

> Planners continue to represent to the public that the purpose of Planning is, not to reduce the need to travel, to create excellent places and functioning communities, but, rather, to separate land uses. The first part of the major planning document is a set of standard zones with standard generalised objectives and titles in the main based on a single use, or in the case of residential zones, different densities[14]. The council's Plan for its area continues to be a map of generally single use zones, each denoted with a separate colour.

If "Good Planning" is the separation of land uses, presumably any attempt to mix land uses should be resisted

[14] Although the residential zones are labelled different densities, the public will read them as 'detached houses', 'town houses and villas' and 'flats' as, indeed the definitions of a range of housing types support.

Suggestions about moving away from single use areas will continue to be seen as exceptions to 'Good Planning' and, presumably, therefore to be resisted by the public.

Can standard, council wide, mixed-use zones really work?

Although the standard zones have some potential for mixed uses, the system makes it difficult to restrain the use most attractive to the market from dominating the areas of the zone. How is the number of local shops in a general residential zone limited, or the number of residential flats in mixed residential zone, given that the locality based DCPs cannot be inconsistent with provisions in LEPs and therefore cannot prohibit that which is permissible under the LEP[15]?

Everywhere will look the same

For local government and their communities the opportunity for locality based planning and design will be restricted in the interests the producers of standard urban products. Their ideal of being able to put their standard products in standard zones with standard controls has been facilitated. Even more will everywhere look the same as everywhere else.

Lowest common denominators will prevail

Each standard zone has a standard set of uses that cannot be reduced and may only be added to if the additional use is also applied to every area of that standard zone in that council's area. The chances of getting local variations of the standard zones are unlikely. The lowest common denominator is likely to apply.

Also, given that DCP urban design controls cannot reduce height or FSR controls in the LEP, councils will tend to reduce these entitlements so as to retain a discretion to increase them for developments that meet the DCP policies.

Not LIS friendly

Because the land uses, heights and FSR controls are to be in different chapters of the LEP, with other controls, including place objectives, being in the DCP, a user, even with the aid of a digital cadastral base, will have to jump around several parts of two documents to find out what controls apply to a particular parcel of land. Had the 'reforms' been conceived of by those based in the

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[15] The recent controls for Redfern Waterloo used FSRs to restrain the percentage of a building that could be used for residential in a mixed use zone, which finished up with the absurd result that each terrace building, including ones nowhere near a shopping strip, if it was to achieve its maximum permitted FSR, had to have one floor devoted to commercial, retail or community use. The 'safety by design' and title consequences appear not to have been considered. It demonstrates the difficulty of using FSR for both building bulk and use control, and the difficulty of trying to achieve complex design and use results with standard land use zoning controls that do not have specific place objectives and formatting.

digital age, rather than those rooted in1950's paper based controls, the parcel could have been used to format the controls in the first place. This would have enabled users to obtain warranted information integrated by government.

Where to for local Planners now?

No Problem if Not Much is Wanted

If you accept the purposes of the reform to control formatting, and you and your community are pleased with the urban design results being achieved over the last few decades, then you should be quickly able to complete the tasks of preparing existing controls in the new format.

However, if you and your community want objectives and controls that seek to achieve locality responsive development that fits into its context, then the new standard controls will not be helpful.

A Paddington Example

Take, for example, William Street in Paddington. This is a nice little street running up to Oxford Street which has been gradually and illegally turning into an up-market fashion street. It is getting into the international tourist guides as a place to visit. Part of its attraction is that it is not a single ownership shopping centre with high rents and no real competition. Council and the local community want it to continue and prosper, but as a special place.

The two storied Victorian houses remain and it is intended that the original terrace detailing and fittings must also remain or be restored. Retail can occur on the ground floor but residential must remain on the top floor. There will be only very discrete signage.

If place formatting had been the basis of the Government's reforms then the controls would be easy. William Street would be a separate collection of parcels with its own specific Desired Future Character Statement. Use controls, FSRs (probably not needed) and heights would be noted along with the all-important constraints on altering traditional features and limiting signage. The controls would all be in the one place in the digital document and the print out should give the inquirer all on the controls needed in an integrated and easily understood couple of pages.

As it is, under the Standard LEP and the single DCP, first a standard zone must be selected and then the rest of the controls would be scattered amongst two local documents with possibly some State SEPPs also applying. But, to start, which standard zone to choose?

Perhaps R3 Medium Density Residential? This would allow child care centres, boarding houses, group homes, seniors housing and *neighbourhood shops*. Problem is *neighbourhood shops* are defined as:

> *...retail premises used for the purpose of selling foodstuffs, personal care products, and other small daily convenience goods for the day-to-day needs of people who live or work in the local area* (emphasis added)

Clearly this won't do! Tourism NSW wants as many overseas residents as possible to be attracted to William Street, Paddington.

Same problem exists with B1 Neighbourhood Shops. And while B2 Local Centre allows *retail premises,* that use comes with other activities that clearly would be incompatible with William Street, including function centres, office premises, recreation facilities (indoor) and service stations.

Retail premises could be added to the Neighbourhood Shops zone but this would mean that every such zone in the Council's area would have a similar licence, which might not suit the rest of Woollahra.

Of course, these niceties do not generally apply where urban development consists of broad scale land use separation and large barns containing monopoly shopping centres, huge pubs and collections of fast food outlets along main roads, all surrounded by hectares of tarmac and car spaces for everyone. These areas presumably were the ideals of those behind the Standard LEP and the reduction of the ability of any locality based DCP to modify the use, FSR and height entitlements in the LEP.

What to Do if Localities are Important?

If outcomes for localities are considered important then it is suggested that the constraints inherent in the formatting and content of the standard controls be ignored at first. Work with the local communities to draft desired future character statements. Agree on what controls are needed to help achieve that future. This will provide a document that will be in a form that can be understood and worked on. Once there is sign off only then look at the standard format and content imposed by the Department. Have the outcomes drive the statutory content rather than *vice versa*.

If a number of local planners show that community and council objectives are not capable of being achieved using the implements designed by those wanting an easy life or standard products in standard places, then maybe, in the inevitable next round of reforms, there could be a system that might help produce, not only integrated controls via a single parcel based digital cadastral data base, but also excellent places and sustainable development.