Submission on the Planning White Paper and Bills

By Cr. John Mant

1. INTRODUCTION

The White Paper and the Bills amount to a proposal for a failed reform:

- Too much of the current fundamentally flawed system is retained.
- It has only token regard for the reform opportunities flowing from the implementation of the Minister's fundamental performance measure – a single parcel formatted digital document of controls.
- Corruption will be facilitated.
- It is centralist and undemocratic.
- It requires, in effect, that 'development controls should not control development'.
- It proposes a planning regime that is unachievable and a consultation process that is 'not mandated'.
- It represents a win over individual communities by the standard product, could-be-anywhere, development industries.

This submission summarises the reasons for these conclusions, and sets out what would be a proper reform.

2. WHY IT IS A FAILED REFORM

2.1 Too much of the current fundamentally flawed system is retained

A number of the provisions in the Bills are a mere re-badging of the current system. For example, it retains, unnecessarily:

- Separate regulations (i.e., by the proposed 'development controls', presently called 'LEPs', previously known as 'PSOs'), separately made for each council area, instead of imposing control through the Act itself, making the 'controls', in effect, policies given status in the legislation but not made as statutory instruments.
- Six paths for development applications, instead of a single path.
- Multiple decision bodies and decision paths.
- The essentials of the existing layered paper-based complex planning controls.

2.2 It has only token regard to the Minister's fundamental performance measure

The Minister had but one performance measure when he announced the Planning Review:

'Wherever you are in the State, someone who wants to provide housing or someone who wants to protect their environment, should be able to press a few buttons and know exactly what was intended for that particular parcel of land and what can or cannot be done with it. An IT friendly system. A user friendly system."

The proposals provide for the 'Local Plan' to be the main record of development controls. This record is to be digitally recorded on a cadastral data-base and amendments to it will be made by entry into that database. The details of consents will also be included in the digital record.

To an extent, the proposal reflects the Warringah LEP 2000, which was a 'single document' of development controls made under the existing legislation, albeit with more integrated controls than the proposals recommend.

It is ironic that, in 2013, the Department of Planning should be now advocating that which it opposed following the making of the Warringah LEP 2000. The Kibble Committee in 2003 (*Planning System Improvements Reform)* reviewed the single parcel formatted document and rejected the model, preferring to retain separate SEPP and REP controls and mandate what has become the standard 'statutory' LEP and the single document, non-statutory DCP. This system, at great cost and with considerable community disagreement, has been imposed on Councils in recent years.

The reasons for the Kibble proposals appear to have been:

- The desire of the producers of standard urban products (standard project homes, fast food outlets, shopping centres …) to be able to place their products on standard blocks of land without the need for the exercise of design discretion (that is, without having to have regard to the physical or social context).
- The desire of the Department to reduce the cost involved in drafting separate LEPs for separate Councils. The requirement that all Councils have the same LEPs, the same set of standard zones, etc. reduced the time taken by Parliamentary Counsel in the preparation of development controls.

Kibble effectively reinforced the multilevel unintegrated control documentation that was one of the fundamental faults of the 1979 Act. In the place of integration of the multiple control documents demonstrated in the Warringah LEP200, Kibble proposed the standard LEP format and controls that have been criticised by communities as reflecting an 'everywhere will look the same as everywhere else' philosophy.

Although the White Paper proposals provide for a 'single document', it retains the layers of documentation from the fatally flawed existing system. Thus the single document will consist of:

- a strategic context,
- a coloured zoning map of a few very broad zones,
- separate chapters for planning controls, and
- development guides.

The zoning plan and planning controls, in effect, are the LEPs, and the development guides are the DCPs.

By retaining the separate layers of control documents, each with separate legal effect, the proposals fail to take advantage of the Minister's performance objective. To do so, the 'single document' should list all of the controls applying to each parcel of land in an integrated form, with the issue of relative 'weight' coming from the drafting rather than in which chapter in the 'single document' the words are contained.

Further, there is no need for the coloured plan - the relevant land use table for each parcel will be contained in the digital document. An information plan can be published if a visual summary of the land use tables is required. The abolition of the coloured plan would help to overcome the community belief that 'the purpose of planning is to separate land uses', rather than 'to facilitate excellent places'.

Whilst there should be a strategic context, it should not be part of the development controls. The strategic context is the justification for the control words. Only words that do development control work, i.e., affect the valuation of land, should be in the development controls.

Making the strategic context part of the development control document falls into the error of the Victorian Planning system, where appeal cases are greatly extended in time as lawyers debate strategic planning words which often lack the careful meaning of properly drafted development controls.

By contrast, in South Australia the only document that can be put in evidence regarding the development controls is the development control document, which does not contain the strategic framework.

2.3 Corruption will be facilitated

The Better Planning Network has prepared a paper on the corruption risks of the proposals. Clearly, the provisions of the Bill do not comply with the six key principles outlined by the ICAC in its report *Anti-Corruption Safeguards and the NSW Planning System*.

The ICAC must be asked to review the proposals.

In addition to the matters raised by the Better Planning Network, several provisions in the Bill suggest that development controls should not inhibit market forces and that development rights can be 'purchased' by the provision of 'public' benefits. Both of these provide justification for favouritism and facilitate a climate of corruption. For example, developers often promise a 'public benefit' to gain an increase in development rights, only to renege on the benefit having gained acceptance to the design of a larger development.

Third part merit appeals remain severely limited, despite many submissions, including from the ICAC, calling for their wider introduction. No coherent reasons have been given for failing to introduce this most effective weapon against corruption. The scale of untransparent executive discretions contained in the proposals might be more acceptable if third party merit appeals were widely available.

2.4 It is centralist and undemocratic

Too much power is directed into the hands of the Minister and the Director General of Planning and Infrastructure. There are at least four ways by which a result similar to that available under the notorious Part 3A could be achieved.

The Director General has no statutory protection, although he is not subject to direction on the contents of assessment reports. Nonetheless, his position is inherently precarious.

The Better Planning paper on corruption highlights issues with the members of the many panels which are proposed to be appointed. Only the members of the PAC have some statutory protection. Other appointed members can be instantly dismissed. Many, as the membership of the existing Panels attest, can be employed as consultants and lawyers in private practice.

Unlike the typical IHAP, which has a large panel from which the members for any area are selected 'randomly', the membership of planning panels will be known to applicants and the community. This, when coupled with active roles in consulting businesses, enhances opportunities for undue influence.

In any event, while a case can be made for a panel conducting a hearing on a development application, where the decision amounts to essentially a 'bounded' discretion, the making of new development controls is essentially a policy/legislative decision. There is a strong case to be made for such decisions to be taken by elected representatives, of course, following a transparent process. If such decisions are being delegated to appointed persons then, at least, those appointees should be and should be seen to be independent, not conflicted, and free from the threat of dismissal.

2.5 It requires, in effect, that 'development controls should not control development'

Some provisions in the Bill clearly have been influenced by the view of The Treasury.

Essentially, this view holds that 'development controls should not control development rights'.

Planning controls consist of a range of development controls which include fire safety, the codification of the laws of nuisance, broader public health issues, consumer protection, and the direction of urban development patterns in city and country. They provide some certainty to land owners about the future value of their land and enable them to make rational development decisions.

While the imposition of development controls should be justified by clear strategic policies and objectives, their imposition will always result in a loss of 'financial viability'. That is what development controls do. If market forces were going to produce what government, acting in the public interest, sought, then there would be no reason for imposing development controls.

The Treasury inspired provisions are unworkable and will facilitate corruption.

2.6 It proposes a planning regime that is unachievable and a consultation process that is 'not mandated'

Strategic planning

A recurrent theme in the design of planning legislation is a statutory requirement for layers of strategic plans, from the general to the specific, with each being consistent with the other.

The 1979 Act contained provisions almost exactly the same as those proposed in the current Bill. No strategic State or regional plans were prepared; the legislative provisions were cynically used to make detailed development controls initiated by the State Government.

In any event, there is no need for the preparation of strategic plans to be statutory. The only statutory need is for an administrative system to impose development controls, which are merely one mechanism for achieving strategic objectives.

You don't need legislation to plan.

Making strategic plans statutory has the following perverse consequences:

- Ministers and Treasuries ask what is the consequence of a strategic plan being 'statutory'? Does it mean that, in some way, they are enforceable through a Court? If they are, then it is likely that the plans will say nothing of consequence.
- Instead of strategic planning being a consistent process of good government, a statutory strategic plan inevitably becomes an *end-State* document based on projections which are out of date by the time the statutory process has been completed.
- The 'silo' nature of State Governments ensures that the objectives in a strategic plan which require actions from silos other than the planning silo are expressed as hopes and wishes rather than actionable proposals. Reviews of previous strategic plans inevitably demonstrate that many actions that 'should' take place have not happened.

Community Consultation

The whole of Part 2 of the Bill, except for a repeat of the current requirements for the giving of notice, is redundant, as clause 10.3 provides that they are 'not mandated'.

One can understand why there would be a reluctance to allow such broad-ranging promises to be enforced through the Court. The giving of notice is objective – the notice was or was not given. Whether or not there was 'sufficient consultation' could occupy many days of Court argument and would tend to ensure that consultation was always exhaustive for fear of a Court challenge.

As with the strategic planning provision, the consultation provisions are misleading, raise false expectations and are unnecessary in the legislation in their current form.

Legislation is not needed if Government wishes to carry out consultation that is not legally mandated.

Educating the planning profession

An extensive chapter in the White Paper talks of the need to multi-skill the planning profession.

This panders to the fantasy that a single professional group, many with mere undergraduate degrees, can aspire to being the managers of the complex business of managing and developing cities and towns, and protecting rural and environmental areas.

Planning in NSW has suffered from the silo mentality of the Department of Planning. It would have been far better if the White Paper had discussed how urban and environmental management should be conducted by integrated multi-disciplinary teams where a wide range of professionals could productively contribute to decisions. For example, the development assessment process would benefit greatly from architects and urban designers being in key positions. The same goes for environmental scientists and ecologists when dealing with environmental issues.

2.7 It represents a win for the standard product could-be-anywhere development industry, over individual communities

The provisions reflect an ideology distinctly different from that underlying the 1979 legislation.

Apart from the simplistic and naïve views of The Treasury, the development industry about 15 years ago set out to convince Governments that 'the purpose of planning is to facilitate development'.

The first objective for strategic planning reflects this philosophy with social and environmental issues being relegated to 'have regard to' status. Amenity and urban design as well as ecologically sustainable development are not mentioned in the proposals.

The development industry set out to facilitate standard products and standard places by standardising development controls across Australia. This would enable 'standard urban products', such as detached houses, shopping centres and fast food outlets to be placed on standard subdivisions in standard zones anywhere in Australia. In this way, the push to have discretionary assessments of designs required to fit their context could be resisted.

The second objective of the development industry was to take discretionary decisions out of the hands of local councils and give it to appointed panels. The proposals not only encourage this; they also take the making of plans and controls out of the hands of elected officials other than the Minister.

3. A SUGGESTED PROPER REFORM

It is recommended that instead of the current proposals legislation for a greatly simplified, more transparent and efficient and effective system should be put forward.

The reform should consist of:

- Legislation dealing only with the making and administration of development controls. If strategic planning is to be made 'statutory', the process should be in a separate Act.
- Development control imposed by the Act – 'all development requires consent'.
- Planning policies to be given legislative force (i.e. stronger than merely 'having regard to') to establish the extent of the discretions available to government in determining whether or not to give consent. For example, different classes of development might be exempt from the legislation, subject to code and/or merit assessment. 'Prohibited' developments, instead of requiring 'spot rezoning' processes, would simply require a development application assessed and decided by a highly transparent process.
- Only one path for lodging a development application – that path might take different routes depending on the nature of the application and the extent of discretion.
- The use of panels to conduct hearings that assist in the making of development assessments and decisions.
- Changes to the development policies being justified by independent studies and subject to public hearings.
- All development policies and decisions on development applications to be recorded in a digital cadastral database in a parcel format.
- The policies and decisions applying to each parcel to be contained in an integrated form with interpretation depending on the drafting rather than the part of the document in which they are contained.
- Any changes must 'explicitly amend' the relevant single documents.
- Notice should be given to the community of any application where the decision body has a discretion to approve or refuse an application.
- An inquisitorial appeal process to include wide ranging third party merit appeals.
- No statutory provisions excluding the role of the Courts from reviewing potential breaches of the legislation.
- Statutory protection and independence for the holders of statutory decision-making positions.

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