A NEW PLANNING ACT FOR NEW SOUTH WALES

Paper prepared by the NSW Division of the Planning Institute of Australia.
August 2010
1. **Introduction**

The Planning Institute of Australia has prepared this paper to gain political commitment and a timetable for introducing new planning legislation for New South Wales.

The Institute is the peak representative body for town planners and related professionals. Members are drawn from all spheres of the industry, from Federal, State and local government, academia, private consultancy, developers, non-governmental organisations and the like. Almost without exception, our members are united in the belief that the current planning legislation is no longer meeting its core function of promoting an effective planning system for the State.

Despite a comprehensive reform agenda implemented by the State Government over the last decade it is the opinion of the Institute that further amendments to the 1979 legislation will be counter productive and will compound the current problems with the Act that are being experienced due to its:

- excessively complex framework;
- the conflicts between the aims of the Act and its implementation;
- failure to address contemporary environmental and community planning issues; and
- the continuing frustration by professionals, the industry and the community about the approvals process.

Another overhaul of the current Act is not the solution. Numerous ad hoc amendments since its commencement in 1979 have been the cause of much of the current dysfunctionality of the Act. **A new Act is the solution.**

The Institute does not seek to identify blame for the current state of the Act; it is an almost inevitable problem for 30 year old legislation. Rather, it looks forward to a planning system for NSW that better meets industry and public expectations and delivers better planning and development outcomes for the State.

2. **Problems with the Existing Act**

- **The system is too complex**

Since 1979 there have been multiple “reforms” that are too many to list. Industry professionals suffer from change fatigue trying to stay on top of the almost monthly changes to SEPPs, Regulations, the Act, Guidelines, Circulars, s117 Directions and the Standard Template. The overwhelming majority of these changes are process focussed with new layers for approvals (Part 3A, exempt and complying, PAC, JRPP, and planning arbitrators - not yet enacted), new procedures for reporting by Councils, new powers to replace Councils, enforcement (Council and
Building Professionals Board), certification regimes, planning agreements, integrated development and the creation of new or different types of development (exempt, complying, local, State, Regional, Major Projects, JRPP matters, PAC matters).

The complexity of the legislation increases the risk of errors of interpretation and process, which generates a fear of potential litigation and risk adverse decision making. This in turn leads to delays and added costs which are ultimately borne by the NSW community in the form of productivity loss or increased development costs.

This is not to say that many of the changes have not been worthwhile. The issue is the layering of process upon process at the expense of the achievement of the outcomes and the objects of the Act. A new Act should remove the layers, create simple procedures where less complex issues are involved and only introduce additional processes where complex or non-compliant proposals or issues justify special consideration against established, clearly defined assessment criteria.

- **Community and economic outcomes are not emphasised**

Whilst it is unfair to solely hold the legislation responsible for the current planning situation in NSW, it is widely acknowledged that there are key areas that are not working as effectively and efficiently as desired, particularly in the areas of physical and social infrastructure provision, housing affordability and business growth, productivity and the distribution of employment opportunities.

The planning legislation should facilitate the resolution of these issues.

The State Government has rightly turned its attention to promoting economic growth in NSW; however the planning system often operates in a preventative rather than enabling manner and can easily be harnessed to thwart growth even in areas capable of accommodating it. This condition can undermine efforts to improve liveability and achieve community benefits. The difficulties inherent in the Voluntary Planning Agreement process reflect this issue.

- **The community lacks confidence in planning**

The perception by many in the development industry and property profession is that community consultation sometimes leads to reactionary decision making based on political rather than planning merit considerations. On the other hand many communities consider that opportunities for meaningful community involvement are being stripped away. Neither attitude engenders confidence in the planning system. An appropriate level of community consultation across all aspects of the planning system must be facilitated through the new Act. The level of consultation should be commensurate to the scale of development proposed.

There is a widespread perception that proper strategic planning has been overtaken by ad hoc project planning.

A mature and effective planning system should have at its foundation robust and well researched strategic plans as the basis for decision making. It must include effective consultation as a valuable part of the plan making process and to foster community support for change. The current legislative processes foster ad hoc decision making, community opposition and confrontation. Public participation should be concentrated more towards the strategy and policy making functions and progressively have a lesser role at the development assessment stage, particularly for low risk, policy consistent development.

There has not been a resolution of the balance between public and private and State and local interests under the legislation. This has seen planning develop into one of the most heated areas of debate in communities right across the State.
To restore confidence in the system, a new Act should have provisions and processes that involve identifying and giving appropriate consideration to all relevant public, private, State, regional and local issues, with the objective of achieving the best possible community and environmental outcomes (a “net community benefit”) in every instance.

This can be achieved through a simple system consisting of integrated State, regional and local plans supported by administrative and funding mechanisms to achieve their clearly identified planning outcomes.

Essential characteristics of the system should be currency (regularly updated) and consistency. Plans must reflect prevailing circumstances and be consistent from State, to region, to locality, to site. Consideration should be given to developing a mechanism to ensure that plans stay current.

- **Coordinated funding mechanisms for public facilities is lacking**

   At present there is an ad hoc array of developer contributions (voluntary and non-voluntary), grants, fees, charges, rates, levies and taxes over different land and development related activities and across all three levels of government. This array of funding mechanisms leaves major funding gaps and an inability to strategically plan public expenditure and the provision and maintenance of infrastructure. Other funding mechanisms used overseas, such as ‘betterment’ and ‘value capture mechanisms’ have not been seriously considered. Rate pegging is constraining the ability of many Councils to fund new capital works and maintain ageing infrastructure. Public land acquisition and compensation mechanisms are currently under review.

   The Act should incorporate enabling provisions for a comprehensive mechanism to fund and finance public infrastructure consistent with the implementation of an integrated State, regional and local planning framework. The Institute is aware that the development of a more efficient mechanism to fund and finance public infrastructure will be complex as the collection of the various fees and charges identified above are currently dispersed through a number of other Acts, for example, the Local Government Act.

- **The Act hasn’t keep pace with evolving issues**

   The current Act is 30 years old and does not necessarily deal effectively with the key emerging issues. At present these include population growth and change; environmental and social sustainability; and climate change. However new issues are constantly arising. The new Act must be alive to how such issues of major importance are addressed in the planning system and should not simply be ‘tacked’ onto the existing Act by more layers of SEPPs or Act amendments. They require wholesale integration into the new legislative framework as essential drivers to new plans at State, regional and local levels.

   The new Act should not be just about administration, development standards, zoning controls and economic growth. Contemporary legislation must be able to respond to current societal issues when they arise, and it is important to consider how this can be incorporated into the new Act.

   The interaction of a new Planning Act with other Government legislation should also be considered as part of the development of the new Act and particularly the connection with the Local Government Act, as a significant part of the implementation of the planning system rests with Local Government.

3. **What should a new Act contain?**

   The first step is to agree on a set of basic principles that will underpin new planning legislation. This will assist in setting a skeleton structure for a new Act.
A new Act should address the following principles:

1. The Act needs to be **enabling legislation** (it enables Plans to be made where policies can be implemented and development assessment can occur in an orderly fashion). Detailed working provisions will be provided through Regulations not the Act (e.g. fire and building regulations and assessment procedures).

2. The objectives behind the purpose of the new Act need to be **meaningful** and based on what is expected. They should not be ‘motherhood’ statements;

3. A level of **process complexity** (plan making, consultation, appeals, development assessment) that is **proportionate to the complexity of the matter** under consideration;

4. Decision making in the planning system is to be **co-operative** (joint seeking of outcomes advancing public and private interests) **rather than adversarial**.

5. **The planning system involves the interplay of legitimate State, regional and local interests** and plans and accompanying administrative and financial structures should reflect this.

6. **Strategic planning** (policy setting) based on an integrated the 3 tiered framework of State, regional and local interests is **fundamental to decision making** on development projects at all levels.

7. This hierarchy should include the State Plan (endorsed by Parliament and incorporating any relevant National Policies), Regional Planning Strategies (approved by State Cabinet), and Local Plans (approved by Councils). **Each plan should be vertically integrated and consistent** and provide for delegation of powers. The Local Plan would incorporate the policies and strategies from the State and Regional Plans and would be the single instrument that land owners refer to for all controls applying to land (similar to the Victorian model). All levels of plan making (State, Regional and Local) should follow a similar series of steps.

8. **Overarching goals** of integrated planning, ecological sustainability (including climate change), economic sustainability, community engagement and social equity will be key elements and indicators of successful legislation. All Plans and policy decisions should demonstrate how they satisfy these goals.

9. Each of the 3 levels of planning instruments described above should incorporate a funding and implementation strategy component, namely a new public infrastructure funding mechanism based on a mixture of financing arrangements (unpegged local rates, GST redistribution, State budget and a betterment / value capture tax) and not merely development levies.

10. **There should be greater emphasis on community participation at the policy or plan preparation stage and less for Development Applications / projects**, particularly as complexity reduces and compliance with the Plan increases.

11. ‘Development’ should be **logically and simply categorised**, for example as Assessable State Development (including the ‘old’ Part 5, Critical Infrastructure and (genuinely) State Significant), Assessable Local Development, Complying Development or Exempt Development.

The determining authority for applications should be clearly and logically enunciated to occur at the appropriate level and with a degree of assessment commensurate with the complexity of the application. It should occur at the first 2 levels described above by Expert Panels or, depending on complexity, under delegated authority by Assessment Officers. Elected representatives must be included on Panels. Assessable development that does not comply with a Plan or a control would follow a different, more stringent path of consultation and decision making.
12. The **roles** of Ministers, State Departments and elected Councillors in the Strategic Plan making and development assessment process should be clearly defined and prescribed, including use of joint expert / elected representative panels.

13. All **determinations should be appellable** by applicants, with limited objector appeal provision for certain categories of development (e.g. development outside an adopted Plan) or above specified thresholds and on points of law. Appeal processes should be proportionate to the complexity of a matter and should be inquisitorial in a tribunal format, rather than adversarial.

4. **A possible structure for a new Act**

As a starting point for discussion, a basic structure of a new Act could have the components shown in the table below. Whilst we are of the view that we must have an entirely new Act, many of the Parts are likely to be similar to the current Act, drawing on some of its ‘tried and tested’ positive elements.

The aim with the structure is to simplify and refocus rather than start from a blank canvass. The final structure will flow from the agreement on key principles, outcomes and processes. The table below is indicative only to present the intended scope of the new Act and the main elements. Each part can be the subject of discussion as to the best mechanism to achieve the desired outcome.

<table>
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<tr>
<th>Potential Act Structure</th>
<th>Parts</th>
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| **1. Introduction**     | Goals and Purpose  
Overarching Principles- Integrated Planning,  
Ecological Sustainability, Economic sustainability, Social Equity,  
Community Engagement  
Interpretation of Terms  
Where the Act applies  
State Government Roles and Powers  
Council Roles and Powers  
Panels Roles and Powers  
Delegations |
| **2. Strategic Planning** | Plan Hierarchy and Interrelationships  
State Plans  
Regional Plans  
Local Plans  
Infrastructure Plans and Master Plans  
Making and Amending Plans |
| **3. Development Assessment** | Assessable State Development  
Assessable Local Development  
Non Conforming Development  
Complying Development  
Exempt Development  
Construction Certification  
Assessment (Weighted Impact Assessment Criteria) and Determination Process |
| **4. Appeals and Enforcement** | Appeal Rights  
Alternative Dispute Resolution  
Compliance  
Enforcement |
| **5. Finance** | Funding of Infrastructure  
Planning Agreements (Public Interest Benefits)  
Land Acquisition for Public Purposes Compensation |
| **6. Administration and Miscellaneous** | |

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5. **Where to from here?**

The Institute recommends that the following steps be adopted:

1. A Planning Act Advisory Group comprising relevant industry associations and planning professionals convened with senior government agencies to drive the Act program and to report to Cabinet (by mid 2011);
2. Green Paper prepared on issues and options for the new Act (by second half 2011);
3. Public exhibition and Advisory Group Forum on solutions and preferred option (by early 2012);
4. White Paper on the new draft legislation (by late 2012);
5. Public exhibition of White Paper and Second Advisory Group Forum (by early 2013);

6. **Commitment to preparing a new Planning Act**

The Planning Institute of Australia (NSW) acknowledges that formulation of a new Act and its subordinate legislation will take time and dedication of resources. The first step is to try to achieve political bi-partisan support for change.

Accordingly, the Institute seeks your support and commitment to herald a fresh start with a new Planning Act for NSW, to adopt a timetable for consultation, debate and drafting of legislation, and agreeing to allocate the technical and legal resources to bring the new Act to life.

The Institute will work with other professional associations and industry groups as well as politicians of all Parties to make the NSW Planning legislation a robust and simplified instrument that will serve the people of NSW well into the future.

**Tony McNamara**

**NSW President**

**Planning Institute of Australia**

**August 2010**