PLANNING LAW REFORM AND FAST-TRACKING DEVELOPMENT IN AUSTRALIA

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Statutory planning and building systems in Australia, like many other countries, have undergone significant reform in recent years. A key focal point of these reforms has been to streamline, simplify and progress the assessment and approval of building and other development projects. Generically referred to as ‘fast-tracking’, this element of the reform agenda is typically set within a discourse which uses terms, for example, of removing ‘red tape’ and ‘delay’, and of promoting ‘simplification’ and ‘appropriate assessment’ of planning approvals. While considering the area of planning reform in Australia generally, emphasis in the paper is placed on the state of New South Wales (NSW), Australia’s most populous state. From a contextual case study analysis of statutory planning reform in NSW over the past two decades, this paper seeks to demonstrate that there has been a paradigm shift in the nature and purpose of town planning which has been driving this reform process. Increasingly reform of statutory planning and building systems are perceived by governments as essential for the stimulation of economic activity.

Keywords: development assessment, fast-tracking, planning approvals, statutory planning reform.

INTRODUCTION

In 2014 the Planning Institute of Australia devoted a special edition of its journal Australian Planner to topic of planning reform in Australia. Specifically, the catalyst for this publication was a decade of sustained reform of planning systems across Australia (Ruming and Gurran 2014). Under the Australian Constitution planning is primarily a state, rather than a national, responsibility, and all six state governments have been engaged in a lengthy process of reform at both the strategic and statutory planning levels. A number of similar themes are apparent in terms of both the drivers of these reforms, and also the type or character of the changes proposed and adopted. Further, a fundamental consistency is apparent in the planning reform occurring in Australia and that evident in countries with a similar planning heritage such as England and New Zealand (Gunn and Hillier 2012, 2014; Goldfinch and Roberts 2013; Gurran et. al. 2014). A key point of difference with planning reform in Australia however is the fragmented and complex characteristic of planning systems in that country, with planning jurisdiction divided amongst the six state, two territory, and national governments.

The aim of this paper is to demonstrate that there has been a paradigm shift in the nature and purpose of town planning which has been driving the reform process. Increasingly reform of statutory planning and building systems is perceived by

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governments as essential for the stimulation of economic activity. Thus, a focal point of statutory planning and building systems reforms in Australia has been to streamline, simplify and progress the assessment and approval of building and other development projects (Williams 2012). Generically referred to as ‘fast-tracking’, this element of the reform agenda is typically set within a discourse which uses such terms as removing ‘red tape’ and ‘delay’, and of promoting ‘simplification’ and ‘appropriate assessment’ of planning approvals.

Context for this paper is provided through the background of neo-liberalism and micro-economic reform, and draws in particular on the previous work in this area of Gleeson and Low (2000). More specifically, the theoretical framework of corporate liberalism and the entrepreneurial state can explain historically, the manipulation of the statutory planning system to fast-track approvals to permit investment in large infrastructure and development projects. Moreover, this reform agenda has progressively extended to include other (smaller) development and building projects so as to promote the level of investment, employment and construction activity across the property development sector generally. Following a broad consideration of planning reform in Australia, focus is directed to the state of New South Wales (NSW), Australia’s most populous state. Much of the reform in NSW has centred on the primary planning statute, the Environmental Planning and Assessment Act 1979 (‘EP&A Act’), which is analysed in detail.

CONTEXT TO STATUTORY PLANNING REFORM IN AUSTRALIA

Set against increased stakeholder expectations in the service delivery of planning systems, is the added presence of general political pressures driving planning reform. In a specific sense, planning systems have been impacted upon through states’ neo-liberal requirements for the fast-tracking of the planning process, the privatisation of many public industries and services, and the reduction in public spending (Blowers 2000). Considered here are the historical, political and philosophical contexts within which planning reform has taken place in Australia. Regulatory reform of the development control process – the statutory framework within which development proposals are assessed and determined – is a common theme across the planning systems in the states and territories of Australia. Gleeson and Low (2000) perceive this kind of regulatory reform as consistent with the latest form of urban governance in Australia, which they term ‘corporate liberalism’. They argue that corporate liberalism is a response to the pressures of globalisation and note that it ‘combines handing over the social functions of government to the private sector with strong direction from the political level and close relations with business’ (Gleeson and Low 2000: 5). Corporate liberalism denotes a form of governance in which the state envisages itself as a corporation engaged in the business of attracting business, thereby creating an ‘entrepreneurial state’. The resulting competition between state governments to attract international and domestic capital – caused in part by the perceived forces of globalisation – has been a driving force for planning system reform (Williams 2012).

Governments want their states and capital cities to be attractive places for national and international investment, economic activity, employment generation, and development. Therefore they have embarked on ‘reform’ by removing unnecessary regulatory red tape and delay; manifestations of corporate liberalism in the field of statutory planning reform in Australia include:
- Greater commercialisation of state and local government administrative (including planning) departments, most typically through their designation as ‘business units’, and outsourcing of government functions to the market/private sector.
- The increasing role of the private sector in the regulatory control of development (witnessed by the rise of private certification of some proposals and building work, a move justified on the grounds of promotion of competition, greater efficiency and responsiveness to the needs of business).
- ‘De-politicisation’ of both state and local level planning and development decision-making through increasing use of expert independent panels (for example planning panels assuming significant decision-making roles previously undertaken by local councils).
- Provision for the ‘appropriate assessment’ of development proposals (examples include ‘code assessable development’ and ‘exempt and complying development’).
- Streamlining and the fast-tracking of development proposals (examples include ‘integrated development assessment’; assigning proposals as ‘state significant development’, which is determined through a specific, generally less transparent and robust assessment regime at the state or ministerial level; and special purpose legislation for particular types of development such as infrastructure).

At the national level, the Council of Australian Governments (COAG), established by the Commonwealth Government in 1992 as the peak intergovernmental forum in Australia, has been an influential player in setting the broad contours of policy reform. In 1995 COAG ratified the National Competition Policy recommendations arising from the 1993 Hilmer Report, which saw the incorporation of significant reforms into state planning systems (including responses such as private certification). Also of significance was the establishment in 1998 of the federally led and funded Development Assessment Forum (DAF) in response to the 1996 Bell Report on small business regulation (Commonwealth of Australia 1996). Membership of DAF includes Commonwealth, state and local government; the development industry; and related professional associations. DAF provides recommendations to Commonwealth and state planning and local government ministers and has promoted leading practice regulatory reform including goals such as private sector involvement and professional determination for most development applications.

Finally, the Productivity Commission and its predecessor the Industry Commission have been central to shaping the agenda for planning reform in Australia since the mid-1990s. In its 1995 assessment of the benefits to economic growth and revenue-raising from the implementation of the National Competition Policy, the Industry Commission (1995) identified regulatory reform in the development approvals system as potentially capable of delivering annual efficiency gains worth AU$750 million nationally. More recently, during 2010 the Productivity Commission (2011) undertook a benchmarking study of the states’ and territories’ planning and zoning systems. Initiated at the request of COAG, the Productivity Commission report endorsed COAG’s regulatory reform agenda, and acknowledged the ongoing work of DAF, particularly in creating a leading practice model for planning systems (DAF 2005).

**FAST-TRACKING DEVELOPMENT ASSESSMENT IN NSW**

Described and analysed below, in broad chronological order, are the reforms to the NSW statutory planning system. Focus is placed on those reforms which relate, either specifically or incidentally, to fast-tracking the assessment and determination of development projects. Like other states, the regulatory reform agenda in NSW has been relentless, with major changes to legislation and planning instruments since 2005.
in particular reflecting the aim of facilitating both large- and small-scale developments through streamlining and fast-tracking approvals. Yet the period under consideration stretches over 20 years: beginning in 1993 with amendments to the EP&A Act, to the present day with the formulation of proposed new planning legislation, the Planning Bill 2013 (see Table 1).

**Integrated development assessment**

On 1 July 1998, the reforms contained in the *Environmental Planning and Assessment (Amendment) Act 1997* (the Amendment Act) came into force in NSW. The Amendment Act repealed the previous Part 4 (‘Environmental Planning Control’) of the EP&A Act and replaced it with a new Part 4 (‘Development Assessment’). This legislative action represented the response by the NSW Government to a series of national and state proposals and policy initiatives for microeconomic reform and a reduction of government red tape pertaining to regulatory bodies involved in development approvals processes. These included implementation of national competition policy reforms arising from the Hilmer Report (NSW Government 1996) and an inquiry into government regulations affecting development (Sturgess 1994).

**Table 1: The course of statutory planning reform in NSW: 1993-2013**

<table>
<thead>
<tr>
<th>Year/Period</th>
<th>Reforms</th>
<th>Key reform documents</th>
<th>Key legislative changes</th>
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<tr>
<td>2007-2008</td>
<td>Housing, Commercial and Industrial Development Codes</td>
<td>Improving the NSW planning system (2007)</td>
<td>State Environmental Planning Policy (Exempt and Complying Development Codes) 2008</td>
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Source: Compiled by authors.

Related ‘proto-reforms’ by the NSW Government included major legislative change in the form of the *Local Government Act 1993* and consequent amendments to the EP&A Act (to partially integrate the types of approvals available under both statutes). These were soon followed in May 1996 by the release of two Green Papers by the Department of Urban Affairs and Planning (DUAP 1996a, 1996b). The Green Papers invited public comment and culminated in the release in February 1997 of a White
Paper titled *Integrated Development Assessment* and an accompanying Exposure Draft Bill (DUAP 1997), a modified version of which was gazetted in 1997 as the abovementioned Amendment Act. It commenced in July 1998.

Three principal areas of reform were introduced by the 1998 integrated development assessment amendments. These were integrated development consents, provisions for appropriate assessment, and an increased role for the private sector in the assessment process. Integrated development consents involved the introduction of a new single assessment system for development, building and subdivision control; rationalisation of other local government approvals relating to building work with a development consent granted under the EP&A Act; and linking of approval requirements under other Acts with a development consent granted under the EP&A Act. This latter aspect of integration of development approvals sought a more coordinated and integrated approach to development assessment among state agencies. In terms of provisions for appropriate assessment, amendments to the EP&A Act to implement this reform goal included simplification and rationalisation of assessment criteria for development applications; clarification of assessment procedures for ‘local development’ and ‘state significant development’; creation of a new category of ‘exempt development’ (that is, minor proposals not needing any form of approval); and introduction of a specific assessment process for a newly created category of routine ‘complying development’. Finally, regarding the increased role for the private sector in the assessment process, new Parts – 4A, 4B and 4C – were introduced to the EP&A Act to create a system of private certification of development within the NSW planning system. Reforms included appointment of ‘accreditation bodies’, which enabled professional associations to act in partnership with government in the implementation scheme. It also enabled (private) accredited certifiers to perform compliance functions formerly conducted by consent authorities, enabling ‘accredited certifiers’ to issue five new types of certificates: complying development, compliance, construction, occupation and subdivision certificates.

**Plan First and Ministerial Taskforces**

The next step in planning system reform came in 1998-2001 with a review of the statutory plan-making system existent under Part 3 of the EP&A Act. A Green Paper was released by DUAP in February 1999 and finally a White Paper titled *Plan First: Review of plan making in NSW* in February 2001. This package of reforms was branded as ‘Plan First’ and not only proposed to rationalise the State’s land use planning controls, but also sought to integrate into the statutory planning framework (and hence place under greater control by DUAP), the growing array of natural-resource-based plans that were being created outside the EP&A Act by other Government bodies. Laudable as these concerns over the growing fragmentation of the land use planning and natural resource management systems were, this integrative element of the Part 3 reforms was overshadowed by opposition to Plan First from within the State bureaucracy and local government: the threats to established bureaucratic interests which this program posed would prove insurmountable (Freestone and Williams 2012). In addition, there was growing dissatisfaction within local government, the community and developers, that the earlier integrated development assessment reforms had not realised their anticipated benefits (DIPNR 2003a). It was in this context that from the middle of 2003 the NSW Planning Minister announced the establishment of a number of Ministerial Taskforces to review the operation of key aspects of the NSW planning system.
In order to guide reform, during 2003, eight taskforces were established to review and report on aspects of the NSW planning system that had been of concern. Relevantly, the areas of local development assessment (DIPNR 2003a), statutory and strategic plan making (DIPNR 2003b), and major development and infrastructure projects, were examined by three of the taskforces. The concerns of the development industry had been accorded significant weight in the review process (evident, for example from the composition of membership of the taskforces) and these would be factored more explicitly in the next and more decisive round of reform emanating from the taskforce recommendations (Piracha 2010; Freestone and Williams 2012). These reforms were flagged in 2004 (DIPNR 2004) and initiated in 2005-2006 and included the Standard Instrument – provision for the production of standardised environmental planning instruments; introduction of Part 3A of the EP&A Act for ministerial determination of major and contentious developments; improvement of development assessment by removing unnecessary concurrences; and an extension of exempt and complying development through adoption of state-wide codes for housing, industrial and commercial development.

The Standard Instrument

The adoption of the Standard Instrument as part of the NSW Government’s response to the recommendations of the planning reviews undertaken by the various Ministerial taskforces was initiated with the enactment of the Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005 (‘the 2005 Amendment Act’). The Standard Instrument reform allowed for a standard Local Environmental Plan (LEP) template for the entire state. The specific form and content – i.e. ‘template’ – that principal LEPs were to adopt was subsequently prescribed in March 2006 in the Standard Instrument (Local Environmental Plans) Order 2006. The LEP template uses standard: zones (including standard zone objectives and mandated permitted and prohibited uses); definitions; clauses; and format. Councils can choose from 35 standard zones when preparing new principal LEPs for their local government area. The intention of the Standard LEP was to create ‘a common and simplified vocabulary to facilitate faster development assessment’ (Freestone and Williams 2012: 202). Its main drivers have been argued by Australian planning commentator and lawyer John Mant (2008) to be lobbying from producers of standard urban products (subdivisions, project homes, shopping centres and fast food outlets) and the mitigation of bureaucratic workloads. Implementation of the Standard LEP has been a resource-intensive exercise for local councils in NSW – although the exercise was intended to occur over a 2-5 year time period, as at April 2014 approximately 10% of councils were still to finalise standard instrument LEPs (DPI 2014a).

Part 3A

Also with the passage of the 2005 Amendment Act the government created a separate ‘streamlined’ assessment regime – Part 3A – for major projects, including state government infrastructure projects and state-significant development. Part 3A was established by the government in recognition of the complexity of a planning system of its own making. The application to major projects of the integrated development assessment provisions of the EP&A Act introduced in 1998, was dramatically curtailed by Part 3A. Confronted also by indicators pointing to a serious economic downturn, the intention of Part 3A was to consolidate the maze of numerous assessment and approval pathways for major projects determined by the Minister for Planning then possible under the EP&A Act.
The key aims of Part 3A were to enable business “to work with certainty, a minimum of risk, low transaction costs, and appropriate level of regulation”; to assist in the NSW Government’s “desire to afford opportunities for the private sector to participate in the delivery” of infrastructure such as projects for roads and transport, schools, hospital upgrades, and water and energy projects; and to cut red tape and to facilitate major private sector development and public infrastructure delivery “quickly and efficiently”. State Environmental Planning Policy (Major Development) 2005 was enacted simultaneously, and defined the types and scale thresholds for state significant development, and designated specific sites considered to be important in achieving state or regional objectives. Hundreds of projects eventually were identified and assessed under Part 3A procedures, including some controversial sites. However, Part 3A was criticised for limiting public participation and reducing environmental scrutiny, and thus undermining the objectives of the EP&A Act (Campbell-Watt 2006; Carr 2007). Moreover, the number of outright refusal of Part 3A approvals overall was miniscule relative to the large number of applications (EDO 2010). Even some sections of the development industry were becoming concerned, with the Urban Development Institute of Australia by early 2001 suggesting that Part 3A had “reached its use-by date” (SMH 2011). It came as no surprise that one of the first policy decisions made following the NSW State Election in March 2011 was for the incoming Government to repeal Part 3A in June 2011, replacing it with new provisions for state significant development (Part 4, Division 4.1) and state significant infrastructure (Part 5A).

Exempt and Complying Development SEPP
The next series of significant reforms began in 2007 with the release by the Department of Planning (DoP) of a detailed discussion paper titled Improving the NSW planning system. Included amongst the wide ranging reform proposals was the aim of increasing the level of exempt and complying development in NSW. These categories of development had existed since the 1997-98 reform, but had not reached the levels (a target of 60% of all developments) hoped for by the State Government (DoP 2007). By 2007 the number of development applications had increased by two and a half times whilst usage of complying development had fallen, with complying development certificates accounting for only 11% of all development decisions (DoP 2008). The main reason for this poor take-up was identified as local councils’ reluctance to embrace exempt and complying development in their local planning controls (DoP 2007). At the same time the NSW Independent Pricing and Regulatory Tribunal Report on the Investigation into the burden of regulation in NSW and improving regulatory efficiency included recommendations that DoP needed to consider ways to increase the use of, and achieve a more consistent approach to exempt and complying development (IPART 2006).

In response, the Department identified the preparation of a common set of standards – a ‘new mandatory default code for NSW’ – for different development types, with the goal of achieving 50% complying and exempt development (DoP 2007). Consequently, the vehicle employed to operationalise this code was State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (‘the Codes SEPP’), which commenced in February 2009. Specifically, the SEPP gives legal effect to a State-wide code for exempt development and a series of State-wide codes for complying development. Since its commencement the Codes SEPP has undergone numerous amendments and additions: so that currently embedded in the SEPP are codes for general housing: rural housing; housing alterations; general development; commercial and industrial alterations; commercial and industrial (new
buildings and additions); subdivision; and demolition. The effectiveness of the Codes SEPP may be measured by the steady increase, to 25% in 2012-13, in the percentage of development determined as complying development (DPI 2014b).

**Nation-Building Economic Stimulus Package**

In response to the 2008 Global Financial Crisis (GFC), the Australian Government announced a range of stimulus measures between October 2008 and March 2009. Collectively known as the Nation Building-Economic Stimulus Plan (NBESP), the primary initiatives were the December 2008 AU$10.4 billion Economic Stimulus Plan and the February 2009 AU$42 billion Nation Building and Jobs Plan. The Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 (‘NBJP Act’) was enacted by the NSW Government on 13 March 2009 to ensure the timely delivery in NSW of infrastructure projects funded by the Australian Government under the NBESP. A key objective of the NBJP Act was to fast track projects and the subsequent expenditure of NBESP funds, so that a steady flow of jobs was secured. Developments falling under the provisions of the Act included school buildings, social housing, community infrastructure and land transport infrastructure. The Act required the appointment of a NSW Infrastructure Coordinator General, to plan and oversee a program for the delivery of the infrastructure projects and also to exempt these projects from development control legislation (including the EP&A Act) where there was a demonstrated risk that a project would not meet deadlines imposed by the Australian Government for delivery.

The NBJP Act was intended to be a fixed-term legislative response to the NBESP, which itself was of a short-term duration (funding was limited to between 2008-9 and 2011-12). As such, the NBJP Act was subject to a scheduled 12 month review, which the NSW Government announced in March 2010. Included in the terms of reference of the review was whether the legislation should be retained and extended to cover approvals to other significant projects in NSW. The general tenor of responses to the review was that the legislation be repealed once NBESP funding had been exhausted and that the Act not be extended to cover approvals for other major projects such as significant commercial and residential private sector projects (see for example PIA 2010). The report of this review was released late in 2010 and while delivering positive findings – it supported the action of the NSW Government in legislating for the implementation of the NBESP in NSW and recommended that these planning powers remain until the stimulus program was completed – also recommended that the fast track planning powers under the NBJP Act not be extended to other types of development (Australian Government 2010). Accordingly, the NBJP Act was repealed on 1 June 2013.

**Planning Bill 2013**

By 2009 there were growing calls for a fundamental overhaul of the NSW planning system – effectively for a completely new planning act – emanating from bodies such as the NSW Legislative Council Standing Committee (2009), the Planning Institute of Australia and the Environmental Defenders Office (SMH 2009). Despite successive reform initiatives, the EP&A Act had become ‘a sclerotic labyrinth of tunnels’ (Broyd 2011: 35). Unrelenting reform – by early 2011 there had been 139 amending Acts (Productivity Commission 2011) – had created a planning system that, rather than cutting ‘red tape’, was perceived as both ‘fragmented and complex’ and ‘complicated and disconnected’ (Gurran 2007: 213). In this environment, planning reform became an issue at the March 2011 NSW State Election, with the incoming Liberal-National Coalition Government making a new planning act one of its goals. A period of
extensive consultation commenced in July 2011 with the establishment of an independent review of the planning system which published two issues papers in December 2011 and May 2012 (NSW Government 2011; 2012a); the release of a Green Paper (NSW Government 2012b), and an accompanying review of planning system best practice (Stein 2012), and finally a White Paper and Exposure Draft Planning Bill 2013 (NSW Government 2013a).

Despite this consultation process, the reforms and the Planning Bill met with strong opposition, particularly from an umbrella community group, the Better Planning Network (2013). Relevant areas of concern included issues such as the bill’s underlying pro-growth philosophy/objects, and fast tracking provisions such as proposed new categories of code assessable development. The Property Council of Australia for example in its submissions to the Draft Exposure Planning Bill succinctly surmised that the Planning Bill is the ‘primary land use and economic growth legislation for NSW’ (PCA 2013). A target of 80% code assessable development was proposed in the White Paper; significantly following opposition to this proposed target, the application of code assessable development was limited in the Exposure Draft Bill to nominated growth areas only. The bill was introduced into the NSW Parliament on 22 October 2013, but stalled as a result of significant amendments made on 27 November 2013 by the Legislative Council, including the complete excision of code assessable development. These amendments – 51 in total – were not acceptable to the Government, and further debate on the bill was deferred by the NSW Lower House (Hazzard 2013). At the time of writing, this political impasse has still not been resolved, with indications that further action may not be undertaken until after the upcoming State Election in March 2015.

CONCLUSIONS

Governments in Australia have undertaken planning reform by streamlining, fast-tracking and providing for ‘appropriate’ assessment procedures, and by simplifying planning controls. Greater commercialisation of state and local government administrative (including planning) units has occurred, while there has also been a distinct move to privatise planning decisions and regulatory functions through bodies such as expert independent panels and the private certification of building and development (Williams 2014).

Despite these reforms – or, its critics would say, because of them – the NSW Government has undertaken has undertaken persistent changes to the development assessment regime as part of its ongoing attempts to ‘simplify’ that State’s planning and development system. A sustained twenty year period of planning reform which has largely been characterised by attempts to fast-track and streamline development approvals, has, in recent years experienced significant community and political reaction, as witnessed by local council resistance to exempt and complying development, the repeal of Part 3A of the EP&A Act and opposition to key elements of the Planning Bill 2013 such as code assessable development. Whether future attempts to continue the long-standing neo-liberal theme of regulatory reform of the NSW planning system are successful will depend on factors such as the resolution of the Planning Bill standoff, the possibility of attempting reform through further amendments to the EP&A Act, the recent appointment of a new State Planning Minister, and the outcome of the next State Election in March 2015.

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