



## DECISION MAKING BODIES

The draft exposure *Environmental Planning and Assessment Amendment Bill 2008* proposes a large number of new decision making and hearing bodies and it retains existing ones, except for the Commissioners of Inquiry. In an attempt to make some sense of what is a very complex picture, an analysis is made of each with a note of the origin and powers and obligations of each.

### **Planning Assessment Commission** S23A –F

#### **Background**

The proposed Planning Assessment Commission (PAC) is an independent statutory body at arm's length from the Minister. Its major role is to make decisions presently taken by the Minister under Part 3A and the Major Projects SEPP.

While there has been a number of statutory planning bodies in NSW and other States at various times and at present, the PAC's immediate model is the Development Assessment Commission (DAC) in South Australia. As with the SA model, an important feature is that the PAC has no staff – this avoids conflict between two groups of public servants, which has been a feature with other models where there is a Department and a statutory body, each with staff.

#### **Proposal**

##### *Membership:*

- Between 3-8 members, a full time or part-time chair, other members part-time.
- Members, appointed by the Minister, must have at least 1 of the following expertise: planning, architecture, heritage conservation, environmental conservation, urban design, property development, land economics, transport or government and public administration.
- Note that there does not have to be a balance of representatives; there could be a majority of members from one profession or industry group.
- The Minister can appoint additional members for specific functions.

##### *Tenure*

- 3 years and can be re-appointed.
- Can only be dismissed (apart from the usual bankruptcy etc) by the Minister on an ICAC report recommending dismissal.

##### *Role*

- Determine Part 3A projects if delegated by the Minister.
- Provide advice on a range of planning or development matters or administration of the Act.
- Review environmental aspects of any development application.
- A range of other matters, including review any function of a regional panel or an IHAP conferred on it by order by the Minister (then it has the function of the body).

##### *Procedure*

- Regulations to provide procedures, including that lawyers only are allowed to appear in specified circumstances (even though the PAC can compel witnesses and documents).
- No appeals or right of review where a hearing conducted (s23F). This is like the Part 3A hearings except that *in this case the hearing body makes the decision*.

## **Assessment**

### *Efficiency and effectiveness*

- Should reduce the workload of the Minister and allow him to concentrate on policy and urban and regional management.
- Moving decisions away from the Minister should increase the effectiveness of the system by fostering greater trust in the system and may therefore allow the proper exercise of discretion in appropriate cases.

### *Probity*

While the separation of decisions from the direct control of the Minister should improve transparency and reduce potential conflicts of interest, there are some concerns.

- Wide range of interventions e.g. IHAPs dealing with council decisions, where the Minister can have the PAC intervene.
- Appeal rights:
  - The absence of an appeal right where a hearing has been conducted is wrong in principle.
  - The banning of lawyers as members or with a right of appearance is unnecessary and in the latter case, is likely to be ineffective, especially where no appeal rights apply. As with other attempts in other tribunals, those who can afford legally trained non-lawyer advocates will be at an advantage.
  - No third party reviews, apart from designated development, so elevating something to the PAC will dispose of that right.
  - Need to see the proposed Regulations before accepting proposals.
- Membership
  - This is crucial. Given the expertise requirements the choice is very wide.
  - Some oversight of the appointment of members to the PAC is essential to avoid the potential for politicisation of its membership.

## **Recommendations**

The Associations support the establishment of the PAC subject to:

- Seeing the details of the proposed regulations.
- Removing the ban on legal representation.
- Appeal rights for applicants and third parties being available.
- Restricting opportunities for intervention.
- Oversight of decisions regarding membership and operation of the PAC by a Parliamentary Committee similar to the committee on the ICAC. It would be possible to add this responsibility to the existing ICAC Committee to save costs.

## **Independent Hearing and Assessment Panels**

S23I

### **Background**

A number of the larger urban councils have established Independent Hearing and Assessment Panels (IHAPs) which conduct hearings into difficult DAs and provide a written report and recommendation to council, which then makes the decision. The purpose of the panel is to conduct a proper hearing and ensure that everyone has the opportunity to be heard.

The practice has been that the panels consist of four persons, three of whom are professionals in the usual fields including the chair, who is usually a lawyer. The fourth is usually a local community member.

The panel of four is drawn from a larger panel. Apart from the community members, the panel members do not live or work in the municipality. Parties appearing do not know who will be on the particular panel so lobbying is not possible. Any conflicts of interest, for example, having a work or personal relationship with those appearing, must be disclosed.

Staff will review the report and recommendations of the Panel and the Council will make a final decision. Importantly, councils do not receive any further oral decisions.

So far, there has been a good response to IHAPs from councillors, staff, applicants and objectors. Cost runs to about \$30-50,000 pa. Appeals have been less and shorter. The IHAP hearing is in the place of what can be lengthy 'hearings' in front of meetings of council, which can use up considerable staff time. The cost is probably neutral but the improvements in process and satisfaction have been considerable.

### **Proposal**

- The Bill proposes to regulate the operation of IHAPs while generally leaving it optional to set one up.
- It is proposed that the Director General of Planning will provide a list of 'experts' (undefined) who *are* to be used if a council wants to establish an IHAP.
- The Minister will make the procedures etc for the conduct of IHAPs and determine remuneration.
- *An environmental planning instrument (such as a SEPP) can require a council to set up an IHAP.*

### **Assessment**

#### *Efficiency and Effectiveness*

Generally it is not necessary to legislate for IHAPs. It would be quite sufficient for the Director General to administratively provide assistance to councils, for example, some names of people who could be available to be panel members. He could also provide a model set of procedures. Otherwise it should be left to councils. Those that have had IHAPs (some for up to ten years now) have operated them successfully and with no complaints. Processes should not be regulated unnecessarily.

Also the list is to be of 'experts'. Unlike the other proposed bodies of experts, the expertise is not detailed. Membership of the other decision bodies has carefully excluded lawyers from the list of experts. It is the experience of IHAPs that having a legally trained Chair is very beneficial to ensure due process is followed. An increased number of appeals due to the panel not following proper processes is a real possibility if members are not sufficiently qualified and experienced in planning law.

Presumably, the community members would not be considered experts so they could not be members of IHAPs. The community members have been positive participants of the existing panels, bringing a local knowledge of the area.

#### *Probity*

With four members whose names are not known to those presenting until the day of the hearing, which is usually concluded that day, there is virtually no chance to exercise any undue influence on an IHAP.

The main advantage of the IHAPs, compared with the other panel proposals, is that they do not take power away from staff or councils. The normal legal powers, responsibilities, accountabilities and liabilities remain. All that is done is that, instead of making oral representations to a meeting of council, they are made to the panel, which then makes a proper report on those representations.

Some say that there is not a real separation of powers in that the council still gets to make the final decision - There are still opportunities for undue influence to be exercised. But the opportunities are much less. There is a proper hearing by truly independent persons – not staff, who might have been too involved in getting an application to this point. There is a public report with reasons and a recommendation. If the council refuses a recommended application, and there is an appeal, an order for costs against council may be awarded if the decision supports the IHAP recommendation.

The positive consequence is that the council sees the IHAP as its body. It is not something that has been imposed. There have been no campaigns by councillors against IHAPs; on the contrary those councils with IHAPs have strongly supported them.

## **Recommendations**

- The Associations support the use of IHAPs in an advisory role to councils and the development of best practice guidelines to assist councils in their establishment and operation.
- The Associations opposed the proposed prescription of IHAPs in legislation as being unnecessary. Assistance to IHAPs can be given administratively and without any sense of compulsion. The IHAPs should remain under the administration of councils that adopt them, not the Minister.
- The imposition of an IHAP by an environmental planning instrument is unnecessary and would be counterproductive to the efficient and effective operation of IHAPs.

## **Joint Regional Planning Panels**

23G – H, Schedule 4

### **Background**

The genesis of the Joint Regional Planning Panels (JRPPs) is a planning committee that oversaw a major planning exercise for the City of Adelaide in the 1970s. A high level committee of State public servants and elected councillors managed the planning. When the Plan was adopted and the development controls from it were given legislative force, the committee was retained in the form of the City of Adelaide Planning Commission.

The statutory role of the Adelaide model was adopted for Sydney with the Central Sydney Planning Committee (CSPC). State nominees were in the majority, so there is a 4-3 membership, although the Lord Mayor is chair. Unlike the Adelaide model the CSPC is essentially just a development control body, although it does sometimes get involved in planning work. The idea of key State public servants being members has been lost. Compared with the IHAPs, the CSPC procedures do not conform to the principles of a fair hearing:

- It behaves more like a council than a hearing body. The deliberations are in public and proceed with resolutions and debate. Note that a JRPP has to conduct its business in public so there doesn't seem to be the opportunity to operate like a proper hearing body and retire to consider its verdict.
- A proper response to the oral submissions is not provided, nor is there detailed reasons for decisions that are contrary to staff recommendations.
- Further, members seem to caucus before coming out to hear from those making submissions and the impression sometimes is that the hearing is just for show.
- As they are permanent and known members, members could be canvassed.
- The council members are in a difficult position. Who becomes the council nominee – representatives of the majority party or a fair share? And are the council representatives bound to represent council's decisions or are they a member in their own right?

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

### **Proposal**

#### *Membership*

- 3 appointed by the Minister with 1 of the usual qualifications, including planning, architecture, heritage conservation, environmental conservation, urban design, property development, land economics, transport, tourism or government or public administration. Clearly, public servants can be appointed as State nominees.
- 2 nominees of council – one of whom must have expertise in planning or architecture.
- If council does not want to provide nominees, the panel can still proceed.

#### *Chair*

State appointed member.

### *Term*

Members are appointed for 3 years and can be reappointed. Members are subject to restrictions regarding an ICAC adverse report but *the Minister and the applicable council may remove a member from office for any or no reason and without notice.*

### *Role*

- Designated development
- Nominated development over \$5m and where council has an interest
- Residential, commercial and retail development over \$50m
- Subdivision in the coastal zone that is currently Part 3A
- Applicant and third party merit reviews.

The PAC will take the place of a JRPP where there is no panel constituted.

### *Appeals*

Have to have decisions reviewed by PAC

Access to Court?

### **Assessment**

#### *Efficiency and effectiveness*

The JRPP is an additional public body to exercise a role that could be done by council with a compulsory IHAP or a subcommittee of the PAC. The council nominee is just face saving and doesn't give whole of council any sense of ownership. This will be the case particularly in coastal areas where councils alternate between development and conservation factions.

Similar to the PAC, persons with legal qualifications are not included in the list of expertise from which members can be drawn. Again, this has the potential to increase the number of appeals from the panels due to lack of due process.

Over time, the JRPP is likely to be subject to many complaints to the ICAC and Ombudsman. Some councillors may campaign on the basis that council's nominees are supporting unpopular developments. This is likely to lead to considerable infighting.

The JRPP can distort council priorities by demands on staff that have to be obeyed. Panel members are protected from liability although they act in the name of the council.

#### *Probity*

- The JRPP's role is very confused – is it an independent hearing body, an appointed council, or representative of the State Executive branch?
- There is no specific requirement to provide due process or reasons for decisions. This presents a high probity risk.
- There are none of the transparency provisions of IHAPs. The JRPPs will have permanent, known members who are open to local pressures, and with no real body to be accountable to or to monitor its performance - Effectively a council without even the need to present at an election.
- Council nominees, if councillors, are in a conflict of interest situation – should they vote for the council's position or make up their own mind? It will be the same with any public servant members from a department with policy interests in the area.
- The Minister or council can dismiss nominees at any time *for no stated reason*. There is no judicial type protection. Members could be under considerable pressure to do the Minister's or council's bidding even if they cannot be officially directed. This stands in contrast to the protection given to the now disbanded Commissioners of Inquiry.

### **Recommendations**

- The Associations oppose JRPPs as an unnecessary and expensive option.
- The Land and Environment Court should be retained for appeal and review work.
- Councils with an IHAP could undertake major development decisions and local developments in the coastal zone.

- A sub-committee of the PAC should act as consent authority for those developments where councils have a financial interest or projects are of genuine regional significance.

## **Planning Arbitrators**

### **Background**

In the *Local Government Act 1993* a provision was included to allow a council to review a decision. This was meant to merely allow a correction to be made when it was recognised that a mistake had been made. It was not intended to permit an amended development application to be reviewed.

When the provision was put into the *Environmental Planning and Assessment Act* it turned into a full-blown review, which allowed new plans so long as they were *substantially the same* as the plans that were refused. These reviews have raised probity issues for councils and objectors.

The only justification for planning arbitrators appears to that the Minister believes some applicants are not keen on appealing to the Court if their applications are refused.

### **Proposal**

- To set up a completely new system of Planning Arbitrators, operated by private consultants appointed by the Minister, to conduct hearings on reviews with regard to minor applications. Decisions of the arbitrator become the decision of council.
- Applicants can make a further appeal to the Court.
- Applicants can amend a proposed development that is to be reviewed but it must be substantially the same as that originally applied for.
- The Department will manage the system but the costs of operating will be left to councils, with only a small fee being charged for the service (likely to be less than \$700, which is the fee for a merit appeal in the Court for a small development). The Minister will determine rates of pay for arbitrators.
- The Minister will approve persons being put on the Registrar of arbitrators. The usual list of qualifications applies (as per PAC and JRPPs), including property development but no legally qualified members. *Note that the Minister can remove an arbitrator at any time for no reason and with no compensation payable.*
- It appears that arbitrators will be designated to particular Local Government Areas or particular kinds of development and that they will be appointed for 3 years and be able to be reappointed.
- Council staff and general managers will have to provide assistance to arbitrators and it will be an offence punishable by fine not to provide help.
- The procedure for dealing with complaints and investigating and disciplining arbitrators will be dealt with by the Department and will be set out in Regulations. It could be expected that the process will be similar to the Building Professionals Board process, given that the roles of the two positions are similar – private consultants undertaking public sector duties.)
- Councils will indemnify arbitrators for costs incur with respect to any legal challenge to their decisions. Like councillors, they will be excluded from any negligence claims done in good faith for the purpose of executing the Act so, effectively, council's professional indemnity policy will provide cover.

### **Assessment**

#### *Efficiency and Effectiveness*

#### Duplication and Cost:

- This is an entirely unnecessary addition to the planning system.
- No justification and no costing have been presented for what amounts to an additional appeal system to be undertaken by private consultants in the name of and at the cost of the council. Instead of paying for one appeal process, the community may have to meet the cost of two processes.
- There is no apparent mechanism for constraining the costs run up by an arbitrator, unless he or she is to be paid a lump sum for each matter, regardless of the time taken.
- The fee charged for the review will be far less than the cost.

- As noted below, there are grave probity risks with this model. The supervision task will be at least as expensive to operate as that established for the private certifiers and just as ineffective. Given the extent of an arbitrator's discretion there could be more and more complex complaints.

Distortion of council priorities:

- A review can be sought following a deemed refusal. An arbitrator can demand the completion of an assessment report as a matter of priority, thereby enabling an applicant to jump the queue. In a busy council, this tactic is likely to be used often.
- Councils will have no way of budgeting for arbitrator costs, in the same way as they have no way of budgeting for legal costs.

### *Probity*

There is a wide range of probity concerns.

A position open to undue pressures:

There will be only one or two arbitrators for each area and development type and they are appointed for 3 years. The arbitrator, who for the rest of the time will be in private practice with clients, will be very exposed as a long-term key player in the process. There will be considerable opportunities for undue pressures to be brought, despite the specific penalties. As the ICAC experience shows, it is difficult to prove bribery.

The position of the arbitrator should be contrasted with the position of permanent members of the court, where it is not known which commissioner will hear a particular matter until the day before.

The position of the arbitrator should also be compared with a member of an IHAP. Firstly there are four members and not always the same single person. Secondly, the panel members are not known until the time of the hearing with the recommendations being made on the same day. There are no opportunities to unduly influence the outcome.

Added encouragement for ambit claims:

Ambit claims are a major problem in many council areas, especially given the complexity of the controls and SEPP No 1. Councils often do not have the time or money to fight a determined applicant. The s82A reviews have added to the problems. The arbitrator system is just a more expensive s82A review.

It is likely that the arbitrator and his or her track record will be well known. If an arbitrator is known to be more sympathetic to ambit claim applications than council and its officers, then most applicants will automatically call on an arbitration as soon as there is a deemed refusal.

The process is likely to further encourage ambit claims, as an applicant will have firstly the council, then the arbitrator and then the court on which to press for acceptance of the claim. Given the potential high costs to council of the arbitration process and later the court process, there will be added pressure on councils to accede to ambit claims.

Unknown and ineffective complaints process:

The history of the complaints handling and disciplining of private certifiers demonstrates how difficult it is to operate an effective system. The penalty of a loss of livelihood is usually too great to be used.

The extent of discretion available to arbitrators is much greater than with certifiers and the financial consequences for applicants and neighbours could be very substantial e.g. consenting to a major extension that provides a view for the applicant at the expense of the neighbour.

Council has no say over the behaviour of the arbitrator although he or she will be operating in council's name. Complaints will be left to a complaint mechanism that is not yet known. It is quite

improper that the complaint and accountability mechanisms be left to regulations rather than being in the Act, especially if the regulations are not made until after the legislation has passed.

Political pressures:

As with all the private consultant members of all of the proposed panels, except the PAC, the Minister can dismiss them immediately and for no stated reason. This should be contrasted with the members of the court who are protected as judicial officers. There is great potential for political pressure to be brought on an arbitrator.

### **Recommendations**

The Associations strongly oppose the proposed system of planning arbitrators as being unjustified, a costly duplication of acceptable appeal processes, and a high probity risk.

As suggested previously by the Associations, the s82A review provision should be abolished and an appeal to the court should be reinstated as the only avenue following a council refusal.

To improve the current system the Associations recommend that:

- Councils should make greater use of IHAP hearings.
- Consideration could be given to an IHAP panel member being asked by council to conduct conciliation process before council makes a decision.
- Merit appeals should be retitled to reflect the essentially non-adversarial nature of the hearing.
- Access to the court for conciliation could be made even simpler. (If there is something wrong with an existing body, fix the body rather than creating an additional one.)

None of these recommendations would require legislative change.