Urban Taskforce
AUSTRALIA

Striving for a better planning system

A response to the draft report of the Productivity Commission

Submission by the Urban Taskforce to the Productivity Commission in response to its draft research paper: *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*

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Urban Taskforce Australia Ltd. ABN: 21 102 685 174 | GPO Box 5396 Sydney NSW 2001
T 612 9238 3955 | F 612 9222 9122 | Level 12, 32 Martin Place Sydney NSW | Level 6, 39 London Circuit, Canberra ACT
admin@urbantaskforce.com.au | www.urbantaskforce.com.au

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The Urban Taskforce is a non-profit organisation representing Australia's most prominent property developers and equity financiers. We provide a forum for people involved in the development and planning of the urban environment to engage in constructive dialogue with both government and the community.

Executive Summary

While we are generally supportive of the Productivity Commission's draft report; we do have serious concerns about some of the proposals in relation to strategic land use planning.

Planning policy should not be determined as early as possible

Strategic planning should focus on giving support for broad housing, employment and shopfront development capacity, together with publicly funded infrastructure.

Long-term strategies that inflexibly lock in the private sector's development parameters are undesirable. That is why we do not think that "[d]etermining planning policy as early as possible in the planning to approval chain" is the way forward.

This will lead to prescriptive regulation of private sector urban development, poorly thought out rules or prohibitions, set in the abstract without the benefit of specific development proposals to provide context. It is not be desirable to try and resolve all conflicting public goals in the absence of specific development proposals.

It is wrong suggest that policy-making in the context of a development application is an unintended consequence of the current system. There are good reasons why the planning system allows policy decisions to be made on a case-by-case basis. It is difficult to develop hard and fast rules on the application of competing (and conflicting) generalised planning principles to specific development proposals.

Flexibility in the application of strategies

If the decision to prevent the development has been made in the abstract (at a strategic planning level) in all likelihood there would have been no firm proposal and no party to explain, defend or make the case for the development to the community. A binding strategic plan, without flexibility, means that the society loses the opportunity to re-visit poor decisions, made without proper information, in a strategic planning process.

It is unreasonable to expect landowners or planning authorities in such broad exercises, where development is not imminent, to spend the resources precisely mapping out the details of development that may not be seriously on the table for years into the future.

Without a willingness to depart from the strategy, the authorities responsible for it will never truly know whether investment, jobs and housing opportunities that are being lost to the community as result of the strategy's rigid application.

Political oversight of strategies is essential in any democratic society. However that political oversight will not deliver perfect plans. Plans will need to be applied flexibly. It is in the public interest that land use strategies created by politicians should be capable of being varied or applied flexibly by politicians.

Probity concerns should be dealt through governance reforms, such as an extended and national ban on all political donations.

There should be a role for courts, tribunals and commissions to authorise departure from strategies where strict application of strategies would be inappropriate, unreasonable or unnecessary, but such a power will not address more fundamental inadequacies in a document. In reality, systemic flaws in strategies will normally only be acknowledged by politicians themselves or their delegates acting with a ministerial blessing.

Why shouldn't, for example, a state minister remain at the apex of the decision-making structure, so that cases where public opinion is a significant factor can be called in and or dealt with by someone who both has a mandate and the skill-set in interpreting and balancing the different opinions of the wider community (and not just the opinions of the residents of a particular local government area)?

Targets in land use strategies

Numerical capacity targets should embrace a wide variety of scenarios, including moderate, middle and high growth outcomes and wide-ranging consumer preferences re dwelling types and building locations. Capacity targets on lot production, dwelling numbers, commercial and/or retail floorspace capacity should be set at high levels, well in excess of anticipated demand scenarios, in recognition that much of the land made available to development may turn out to be commercially unsuitable and to provide competitive tension between land owners.

The role of as-of-right schemes

A range of development outcomes that might present no adverse outcomes would not be permitted under as-of-right schemes. This does not mean "as-of-right" development are undesirable. They are still a good idea, so long as a merit/impact assessable scheme is still available, unconstrained by arbitrary rules, running alongside the as-of-right-scheme.

The inherent subjectivity of merit/impact assessment, particularly the different weightings that may be given to the same principles by different decision-makers, is an unavoidable feature of land use regulatory decision-making. There is no practical way to eliminate this subjectivity, without implementing broad prohibitions and rigid rules that will impose great social and economic costs on the community.

The key is to offer a two track system for large scale urban development. Firstly, one that offers the simplicity of black-and-white rules, but does not accommodate innovation, or development that was not envisaged or properly considered when plans were prepared. Secondly, a system that offers merit assessment, with more uncertain outcomes, based on the strength of the case that the proponent is able to advance. A two-track system provides for both flexibility (for imaginative, innovative development) and certainty (for predictable and anticipated development).

The difference between regulatory and market certainty

When talking about reducing risk, it is vitally important to distinguish regulatory risk from market risk. Planning systems should provide opportunities to reduce regulatory risk, but not market risk.

In the absence of competition (and the presence of the normal risks of selling into a cyclical property market), investment decisions are delayed. Increased competition *reduces* the prospect of investment being delayed. A planning system that promotes certainty by reducing or removing the possibility of competition between land owners (by, say, giving certainty that only a handful of land owners will be able to develop in the life of a regional land use strategy) will <u>delay</u> investment. "Certainty" may created, but the consequent delay in private investment is contrary to the public interest.

Eliminating unnecessary regulatory risks is desirable. For example, if a strategy identifies certain land for urban release government agencies should actually work to make this happen.

In NSW, for example, the substance of a new strategic plan should, on finalisation, immediately be transferred into a state environmental planning policy (SEPP) (to use the NSW terminology). In fact, the strategy and the draft SEPP should be exhibited and finalised in tandem. The Minister, local councils and other consent and concurrence authorities (such as the joint regional planning panels, the Planning Assessment Commission and the Roads and Traffic Authority) should be required to take into account provisions in a strategy favouring approval, as embodied in the SEPP, in determining development applications. It should not be necessary to pursue a rezoning in order to secure a development approval consistent with the strategy (although at times, formal rezonings may still need be pursued for land valuation and financing reasons).

An obligation to approve, in-line with a strategy, would be meaningless if development was approved with conditions that made desirable projects commercially unviable. As a result, such an obligation to approve would necessarily be accompanied by an explicit duty for a consent authority to consider the financial constraints on the economic viability of a desirable planning development when the applicant has elected to provide information on the subject.[1]

An obligation to approve would also not be fully effective, given the subjectivity inherent in approval decisions, unless there is also an opportunity for the applicant to pursue a full merit appeal review to body independent of the original decision maker.

Layered plans

We do not think that four layers of plans - strategic, city, regional, local – will be helpful. There is a real risk that this mutli-layered approach will breed inconsistency and conflicts. We favour a single strategic plan for each region.

Conflict resolution and public accountability

Provisions for conflict resolution (should a disagreement arise between planning agencies) will be most useful when one planning agency is a local council and the other is a state government agency. When they are both state agencies under ministerial control our experience is that the existence of a disagreement and its resolution is often opaque. At times, the disagreement is removed to a cabinet or quasi cabinet process without any public scrutiny. These complexities can be reduced by clearly placing a single state agency, and its single state minister, above all others in relation to the contents and implementation of strategic plans (this is much more than a simple monitoring role). In this way the lead agency can resolve matters be elevating them to their minister, and from the community's perspective, it is clear which public official is ultimately responsible.

Viability of centres

In our view, it is better to avoid considering the "viability of centres" at any point in the planning process. It is impossible to consider the issue of "viability of a centre" without considering the trade and adverse impact of competition on individual businesses. It remains our view that the planning system does a very poor job of assessing these matters. This is true whether the decision is made in development assessment, zoning or in strategic land use planning.

[1] Under existing planning law, a consent authority is lawfully able to consider whether desirable development is not economically feasible, and modify apply planning requirements, so as to ensure that such development is still able to take place (*R v Westminister City Council, Ex parte Monahan* [1990] 1 QB 87. This case has been applied in the context of NSW planning law by both the Land and Environment Court and the Court of Appeal. *City West Housing Pty Ltd v Sydney City Council* [1999] NSWLEC 246 [139]; *Randall Pty Ltd v Willoughby City Council* [2005] NSWCA 205 [36] (Basten JA with Giles and Santow JJA agreeing).[1] However, under the current law, a planning authority is under no compulsion to consider whether conditions sought by the authority will render desirable development economically unfeasible. That is, a decision to consider economic feasibility does not invalidate their decision, but there is not necessarily any positive obligation to consider economic feasibility issues if the consent authority is reluctant to do so.

Planning authorities should be expressly encouraged to provide development capacity well in excess of the minimum target. As long as they are trying to "protect the viability of centres" they will avoid doing this.

We urge the Commission to recognise that any retail floorspace and supply demand assessment will always be inadequate and is unlikely to truly predict the needs of the community. Any assessment of the demand depends on a series of assumptions and that the outcome of assessments can be highly sensitive to the assumptions that are made. It is often not possible to decide which assumptions are correct and as a result different experts may come to different conclusions about the level of demand. We anticipate that spot rezonings are going to continue to be crucial in ensuring that there is sufficient retail and commercial floorspace available to the community.

Planning law should distinguish between legitimate and illegitimate reasons for the planning system to direct the location of retail, office and entertainment development in strategic planning. Illegitimate reasons should be those that seek to force development in other locations in the guise of more efficiently utilising under-used infrastructure at those locations.

If the Productivity Commission is determined to support a role for considering the viability of centres, we would agree that there is some reduction in harm by prohibiting such consideration at development assessment.

If the option to "protect the viability of centres" is to be left open, we would favour a qualification, further limiting the circumstances in which this can take place. We would suggest that the potential impact of proposed commercial development on the commercial viability of other commercial development may only be taken into consideration by a planning decision-maker:

- for the purposes of strategic land use planning; and
- when there is a high degree of probability that proposed development is likely to have an overall adverse, severe, sustained and irreversible impact on the extent and adequacy of facilities and services available to the local community (having regard to the likely impact on existing facilities and services and the facilities or services to be provided by the proposed development).

Betterment tax

The prospect of an extra tax based on such a subjective assessment would discourage property investment. Additionally, this type of tax encourages governments and local councils to widen their tax base by imposing more zoning restrictions and further delaying land release.

Zoning reform

There can be just five to seven zones. Additional categories of zones are unnecessary.

Zoning reform is not fully effective if zones are simplified to reduce distinctions between uses, but floor space ratio, height controls and other controls are introduced to discriminate against uses in a single zone.

Environment Protection and Biodiversity Act

We believe that the substantive benefits of federal land use regulation in relation to urban development is minimal, and possibly non-existent.

The fact that the Commonwealth has an approval role but does not endorse holistic strategies weakens investor confidence in state land release policies.

The EPBC Act straddles vastly different policy areas. There is no need for a nuanced balancing of competing social, economic and environmental issues in highly protected areas, such as World Heritage Areas, but private land is different. In relation to private land, *there is* a need to consider not

only the legitimate interests of the private land holder but also the need to satisfy social and economic goals articulated through state and regional strategies and the need to promote investment certainty and confidence. At a state level this problem has been managed by segregating protected area management legislation, policy and administration from the state town planning authorities.

We favour the development of a more generic approvals bilateral for urban development across the board.

Along with the abolition of dual state/federal environmental listings, the Commonwealth should delegate full approval authority for urban development to state officials (along with any policy guidance the federal government wants to give) so that land use decisions can be made on an integrated basis

The EPBC Act should automatically recognise state offset and biobanking schemes both when decisions are made as to whether an activity is a "controlled action" *and* at the approval stage. Without such recognition, innovative policies, such as biobanking, are unlikely to succeed.

Merit appeals for applicants for urban development approvals are a standard part of state planning systems and should be standard for urban development under the EPBC Act. Appeal rights offer some degree of protection for applicants and their financial backers from arbitrary and political decision-making.

1. Introduction

We congratulate the Productivity Commission for its thorough and comprehensive analysis of planning, zoning and development assessment in Australia. The draft research report represents the most comprehensive effort taken to document and analyse the problems with the planning system in decades.

Many previous review attempts, by others, have ended-up skating over the surface once the reviewers were overwhelmed by the (unnecessary) complexity of land use regulation in Australia. Others have ended up focusing on narrow aspects of the planning system. We are pleased that the Productivity Commission, consistent with its excellent reputation for rigour, has avoided falling into this trap.

In general terms, we think the Productivity Commission's report is of a very high standard, and represents a considered and largely accurate contribution to the public debate on planning, zoning and development assessment in Australia. While we do not agree with all of its contents (and in particular, the matters we further expand upon in this submission) we do think that the Productivity Commission's report can and should form the basis of a microeconomic reform agenda around town planning laws across Australia. The community cannot continue to bear the huge social and economic costs being imposed under the current approach.

The Commission's wide-ranging draft report validates serious concerns regularly voiced by the development industry. Australia's lumbering town planning laws and its inefficient development levies are a key cause of the housing supply crisis. They are causing urban congestion by preventing new homes and new workplaces being built where they are needed. They are also preventing competition amongst retail landlords, leading to over-crowded shopping centres and less consumer choice.

We agree that the planning system suffers from "objectives overload".

Many people expect the town planning system to solve the world's problems. But, in truth, town planning is nothing more than a system for prohibiting and permitting development. It is not well suited to be a vehicle for achieving, for example, social change or reconceptualising a city.

The draft report also said that inflexible rules create a need for ad-hoc 'fixes' to the planning and zoning system, resulting in increased uncertainty, inefficiency and an anti-competitive playing field. This is the same message we have consistently given to government. (Although this should not be interpreted as a call for inflexibility.)

We agree that planning authorities should be imposing fewer prohibitions and have more sensible rules up-front. So many prohibitions are just arbitrary and they do not stand up to scrutiny. Many often need to be varied.

The draft report finds that planning laws adversely impact on competition. It says that a new entrant's effects on existing businesses should be "eliminated as an appropriate planning consideration". We agree strongly with this finding. This is yet further evidence that the lack of competition amongst Australia's retail landlords is a consequence of town planning laws.

The report said that development levies need to be governed by better criteria. We welcome their finding that any 'system-wide' infrastructure upgrades necessary for infill development should be funded by government out of borrowings rather than development levies. They've also found that broadly dispersed social infrastructure should also be funded from government through general revenue, not development levies. If implemented by governments, this would be a significant step forward. Many existing levies - which are stopping new projects getting off the ground - would not pass the tests proposed by the Productivity Commission.

We note the Productivity Commission's message for those who want state government to refrain from making planning decisions. The report said that no single local council or group of citizens can be expected to adopt the overarching perspective needed by state and territory governments and that leadership will be required at the elected political level.

Whether it's 'Part 3A' in NSW, 'priority development projects' in Victoria or the work of the Urban Land Development Authority in Queensland, there *is* a clear need and a role for state government leadership in the planning process. Without, local councils are free to block development to satisfy the demands of their existing residents, at the cost of the broader community's need for housing and well-located jobs.

The Commission has released its draft report with just four weeks for interested parties to respond with submissions. We understand that there is no opportunity for an extension of time due to the period by which the Commission must report back to the Council of Australian Governments (COAG).

In the time available to us to prepare this submission we have not been able to respond robustly to all points of interest to us in the draft report. Nor are we able to detail additional matters that we think should have been dealt with, or might be dealt with in greater depth. As a result we have focused on a small number of key issues:

- strategic planning;
- viability of centres
- betterment tax;
- infrastructure levies; and
- the *Environment Protection and Biodiversity Act*.

2. Strategic planning

The Productivity Commission's "leading practice 1" relates to the "Early resolution of land use and coordination issues using strategic plans". According to the Commission:

> Determining planning policy as early as possible in the planning to approval chain and obtaining commitments to undertakings is highly desirable. Key elements include:
>
> - strategic land use plans that are not just aspirational but also make specific decisions about alternative land uses, timing, infrastructure and the provision of services (to contribute to social, economic and environmental objectives)
> - strategic land use plans that are integrated across different levels of government and across different government departments and agencies to make consistent decisions about relevant matters, ranging over infrastructure, environment, housing and human services
> - strategic land use plans that are statutory to promote compliance and certainty
> - a consistent hierarchy of future oriented and publicly available plans — strategic, city, regional, local — ensuring that when strategic plans are updated, the other plans are also quickly updated
> - provisions for conflict resolution should a disagreement arise between planning agencies
> - effective implementation arrangements and supporting mechanisms for all plans, including:
>
> – clear accountabilities, timelines and performance measures
>
> – better coordination between all levels of government and linked, streamlined and efficient approval processes
>
> – one clear authority which monitors progress against the strategic plan
>
> – a designated body responsible for the coordination of infrastructure in new development areas with:
>
> ... sufficient power to direct or otherwise bind infrastructure providers to their commitments to deliver the immediate and near-term infrastructure needs of settlements (as determined and agreed through a structure planning process)
>
> ... the ability to elevate significant strategic issues and/or decision making to the level of Cabinet where it is relevant to do so (as South Australia's Government Planning and Coordination Committee is required to do)
>
> – committed budget support (primarily for new infrastructure) to promote certainty and investment.[2]

Strategies can only be beneficial (from a private sector perspective) if they provide clarity about a government's planned urban infrastructure investment. However, if a strategy sets out to establish development potential and development not envisaged by the strategy is explicitly or implicitly prohibited, the strategy has the potential to be a harmful regulatory document.

In NSW, for example, "section 117" directions are in force preventing a rezoning from being progressed if it is not consistent with a strategy.[3] Development approval may also be refused when they are not consistent with a strategy, even when the development concerned is permissible in a zone.[4]

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[2] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments: Productivity Commission Draft Research Report Volume 1* (2011) xxviii-xxix.
[3] Local Planning Direction 1.4(e); Direction 5.1(4); Direction 5.3(2); Direction 7.1(4).
[4] In 2003 the NSW Court of Appeal declared that environmental planning instruments are not the only documents that can be used to block new development, and that a consent authority is able to refuse permissible development by referring to a wide range of material outside the formal planning processes on "public interest" grounds: Terrace Tower Holdings Pty Ltd v Sutherland Shire Council (2003) 129 LGERA 195 [81].

Councils normally treat numerical dwelling targets in strategies as caps on the future development capacity to be permitted in their area. For example, in 2008 the Urban Taskforce criticised elements of the draft local environment plan for Lane Cove for not taking sufficient advantage of opportunities to provide pedestrian friendly compact living communities around public transport nodes. Lane Cove Council's defence for the failure to permit greater residential growth around public transport and town centres was that the plan "was required to be prepared in order to satisfy residential and employment growth targets under the Metropolitan Strategy for Sydney".[5] In another example, in 2010, Hornsby's mayor, Nick Berman, told the *Sydney Morning Herald* that he wanted to limit the additional dwellings to be built in the shire to the numbers set out in the Sydney Metropolitan Strategy.[6]

In our view, great caution should be exercised to ensure that principles articulated with reference to the government infrastructure investment component of an infrastructure plan, are not automatically applied to the regulatory component of the plan (i.e. that part of the plan that effectively caps, prohibits or regulates private sector residential, commercial, retail and/or industrial development).

For example, when planning *government* infrastructure it *is* highly desirable that strategic plans be specific, and long term. This enables infrastructure investment to be locked in and allows private sector actors to invest in projects that are complementary to the government's infrastructure commitment. However, applying the same principle to those parts of a strategy that establish development potential for a region can be problematic. It's difficult enough to reliably predict the housing and business premises needs of the community within a five year horizon, let alone a ten or fifteen year horizon - and even the initial assessment of the community's needs may not be accurate. For this reason, **a long term strategy that inflexibly locks in the private sector's development parameters is undesirable.**

Briefly, we agree that:

- Strategic land use plans should not just be aspirational and if they are, they serve almost no useful purpose. Aspirational plans should be dispensed with. Plans should only be put in place if they directly result in changes to land use controls, or directly guarantee the provision of public infrastructure or both. We set out some more in depth views on this point in section 2.4 below.
- Land use plans should make specific binding decisions about the timing of public infrastructure delivery and the provision of government services.
- Strategic land use plans should be integrated across different levels of government and across different government departments. They should be forward looking and not merely describe what is happening now.
- Committed government budget support (primarily for new infrastructure) is vital to promote confidence in the strategy.

Briefly, we also have some concerns:

- We do not think that "[d]etermining planning policy as early as possible in the planning to approval chain" is desirable at all. This will lead to prescriptive regulation of private sector urban development, poorly thought out rules or prohibitions, set in the abstract without the benefit of specific development proposals to provide context. It will not be desirable to try and resolve conflicting public goals in the absence of specific development proposals. See sections 2.1 and 2.2 for our more detailed reasoning for this.
- Strategic planning should focus on giving support for broad housing, employment and shopfront development capacity, together with publicly funded infrastructure. Numerical capacity targets should embrace a wide variety of scenarios, including moderate, middle and high growth outcomes and wide-ranging consumer preferences re dwelling types and building locations.
- Capacity targets on lot production, dwelling numbers, commercial and/or retail floorspace capacity should be set at high levels, well in excess of anticipated demand scenarios, in recognition that

[5] Correspondence from Mr Peter Brown, General Manager, Lane Cove Council to the Urban Taskforce 18/11/2008, ref: 41811/08.
[6] "We don't want to accept any more development than we have to," Councillor Nick Berman said. "I'm ... trying to preserve the low-density character of the bulk of the shire.": "Council ponders units on fire prone land", *Sydney Morning Herald*, 23 June 2010, <http://smh.domain.com.au/real-estate-news/council-ponders-units-on-fireprone-land-20100623-ywf9.html>.

much of the land made available to development may turn out to be commercially unsuitable and to provide competitive tension between land owners.

- Strategic land use plans should be statutory, as suggested by the Commission, but plans should not seek to give private sector proponents "certainty" as to the range of investments that might be made by other private sector players. That is, strategic land use plans should not try and protect investors from market risk, although it should seek to reduce regulatory risk when it is practicable to do so. See section 2.3 for our more detailed reasons on this.
- We do not think that four layers of plans - strategic, city, regional, local – will be helpful. There is a real risk that this mutli-layered approach will breed inconsistency and conflicts. We favour a single strategic plan for each region.
- Provisions for conflict resolution (should a disagreement arise between planning agencies) will be most useful when one planning agency is a local council and the other is a state government agency. When they are both state agencies under ministerial control our experience is that the existence of a disagreement and its resolution is often opaque. At times, the disagreement is removed to a cabinet or quasi cabinet process without any public scrutiny. These complexities can be reduced by clearly placing a single state agency, and its single state minister, above all others in relation to the contents and implementation of strategic plans (this is much more than a simple monitoring role). In this way the lead agency can resolve matters be elevating them to their minister, and from the community's perspective, it is clear which public official is ultimately responsible.

The following sections address some of these matters in further detail.

2.1 No land use strategy is perfect

The idea of the all-encompassing land use plan is an attractive one. However, any government land use planning process is vulnerable to some key institutional problems. These problems are "institutional" in the sense that they are the inevitable consequence of the governmental nature of planning in a western democracy. They have been spelt out by Dr Sam Staley, Director of Urban and Land Use Policy for the Reason Foundation and a Senior Fellow at The Buckeye Institute for Public Policy.[7] The following discussion employs his analysis.

2.1.1 Closed systems and hierarchies

Government planning takes place in a "closed" framework where means and ends are simultaneously determined.

For example, the relationship between population growth and housing is a complex one.

A *lack* of housing supply can dampen or stop population growth. A BIS Shrapnel/Urban Taskforce study (*Going Nowhere*) has found that Sydney's inability to produce enough homes led to a sharp fall in the NSW share of overseas migration.[8] Prior to the dramatic rise in property prices in the late 1990s and early 2000s, NSW maintained a steady share of national net overseas migration, at about 42 per cent. Over the past decade, the NSW share of overseas migration has fallen substantially, settling at about 30 per cent in the most recent years. The Urban Taskforce/MacroPlan *People Power* report examines the possibility that the Federal Government's forthcoming "sustainable population policy" will seek to cap the population of major cities via restrictions on new dwelling construction (the report concluded that efforts to keep a major city's population static would eventually result in population decline).[9]

On the other hand, an excess housing supply can boost population growth. It does this by assisting in encouraging people who may have otherwise departed from a region to stay, and might provide opportunity for more people to locate in an area to take advantage of its relative affordability.

[7] Samuel Staley, 'Urban Planning, Smart Growth, and Economic Calculation: An Austrian Critique and Extension' (2004) 17:2/3 *The Review of Austrian Economics* 274-275.
[8] Urban Taskforce Australia and BIS Shrapnel, *Going Nowhere* (2010).
[9] Urban Taskforce Australia and MacroPlan Australia, *People Power* (2011).

By simultaneously determining both population growth and housing supply goals, a strategy hopes to be self-fulfilling. Essentially, a strategy supplies dwelling numbers (means) and the targeted population and jobs (ends) at the same time. If the plan works, excess population is discouraged because there is insufficient housing.

Of course, to be successful this process assumes (and requires) that either that:

- land development activity will take place as a response to a government strategy, rather than the preferences of consumers, i.e. home buyers, shoppers and employers; or
- a strategy's authors perfectly understood the requirements of consumers and businesses and the strategy reflects their preferences with precision.

Planning authorities will normally say that they have taken to account the "needs" of consumers, but usually they do not claim to understand their preferences.[10] The distinction is simple. The preferences of consumers reflect what they actually want and are willing/able to pay a market price, if given the opportunity.

The "needs" of consumers, in a strategic planning context, normally reflects the outcome of a demographic study, which involves making a series of assumptions about household and business requirements, and imposing the planning authority's own preferences as to how those requirements might be addressed.

For example, land use planners often assume that a demographic change towards one person households, in itself, creates a need for smaller homes (more medium and high density development and less detached housing and smaller detached housing). However, the empirical evidence shows that consumer preference for detached housing has remained relatively unchanged, with increased demand for larger homes.[11]

A case in point is the NSW Government's Lower Hunter Regional Strategy. It acknowledges that, at the time of the strategy's introduction (2006), greenfield housing represented 75 per cent of all new housing, with the remaining 25 per cent of housing located in existing zoned urban areas.[12] The strategy then sets out to require a shift to 60 per cent of new housing from greenfield, with 40 per cent from infill development. This shift was not justified by any reference to the willingness/ability of home buyers to pay a commercial price (i.e. a price that covers land acquisition, development and construction costs plus a developer's margin) for that dwelling type in the Lower Hunter. Instead the strategy asserts that shrinking household sizes will create a preference for smaller homes.

The rationale of the strategy, in this regard, is a gross over-simplification. One reason household size is likely to shrink, is the ageing of the population. An ageing population leads to a higher incidence of single and couples living without children. The planning authority interprets this as proof that a larger share of new dwellings in the Lower Hunter must be made up of the kind of compact homes normally found in infill development. This is not necessarily the case.

A recent study by the UNSW-UWS Research Centre (funded by the government-backed Australian Housing and Urban Research Institute) found that there was a strong preference for older Australians to remain in their own home for as long as possible. The study concluded that 'downsizing' may have appeal for some home owners and those who see a benefit in releasing overly-large land and dwellings to younger, larger households. However, the study also concluded that the demand amongst older Australians is not there for very small dwellings or one-bedroom units, as might be suggested by the

[10] NSW Department of Planning, *A City of Cities: A plan for Sydney's future* (2005) 3; NSW Department of Planning, *Lower Hunter Regional Strategy* (2006) 14; NSW Department of Planning, *Lower Illawarra Regional Strategy* (2006) inside cover;
[11] Maryann Wulff, Ernest Healy and Margaret Reynolds, "Why don't households live in small dwellings? – Disentangling a planning dilemma?", (2004) 12(1) *People and Place* 57.
[12] NSW Department of Planning, *Lower Hunter Regional Strategy* (2006) 5.

predominance of single- and couple-households. [13] While this does not necessarily mean that demand for infill housing will not increase in the future (if/when preference of older Australian change) such a change cannot be treated as fait accompli.

It is desirable for a strategy to anticipate the possibility that there may be a shift of baby boomers from detached housing into smaller medium and high density homes. A sensible, forward looking strategy would plan for this scenario and seek to provide capacity for the requisite medium and high density homes in its strategic vision. However, a sensible strategy would also cater for the possibility that senior Australians will age in place for decades to come.

This is where the institutional limitations of government begin to arise. If government were to openly plan for both scenarios, it would face political pressure to provide infrastructure to support both the increased infill development capacity and the expanded greenfield development capacity (when in truth both expansions may not happen in full). Similarly, it will have to politically defend itself from attacks from those who oppose outward urban expansion (for, say, environmental grounds). Government will usually want to avoid having a political debate it regards as unnecessary. Politicians will ask: "Why should we defend large-scale greenfield development when our advisors tell us it probably won't be needed? Why should we make ourselves vulnerable to political pressure on infrastructure funding when our advisors think that the infrastructure need probably won't arise?"

As a result, government and council strategic planners tend to only envisage one key scenario and plan accordingly – even when the scenario is highly sensitive to changes in assumptions. This minimises the financial and political cost to government of planning for multiple alternative scenarios. Of course, it imposes significant costs on the community when key assumptions turn out to be incorrect.

(Contrast the approach of state planning authorities who base strategic planning around a single population projection, while the Australian Bureau of Statistics produces three main projections, whilst acknowledging there are a possible 72 individual combinations of various assumptions.)[14]

Many key assumptions made by government plans turn out to be incorrect. More incorrect assumptions are made than correct ones. This reflects another institutional problem that government faces. How good can a single public sector agency ever be truly expected to understand and predict the detailed preferences of the private sector? This is something individual private sector players get wrong all the time. The only reason some businesses become very good at what they do is that ones who get it wrong often go bust and are weeded out. No such market discipline exists (and can exist) in relation to the public sector.

In the case of the Lower Hunter Regional Strategy, government elected to presume that baby boomers will sell their detached houses and demand medium and high density homes. By making this a core assumption of the strategy, they have concluded that less new detached housing stock (i.e. greenfield development) will be required because more young families will be able to simply buy into the stock of established housing no longer required by gaining baby boomers. This is convenient to both government (because it mean less financial provisions need to be made for urban infrastructure to support greenfield development) and it is convenient to those who have a philosophical or ideological disposition to more compact urban footprints. It narrows the political debate that government needs to have (i.e. it only has to argue against those that oppose infill development, rather than having two simultaneous debates with those who oppose greenfield and those who oppose infill development.

Can strategic plans be improved by studying the preferences of households and businesses and then plan accordingly? It *is* desirable for strategic plans, insofar as they impact on the provision of homes and business premises by the private sector, to be framed around the preferences of home-buyers and businesses. However, this is not easy and planning is more likely to fall short, than it is to make an accurate prediction.

[13] Bruce Judd, Diana Olsberg, Joanne Quinn, Lucy Groenhart and Oya Demirbilek, *Dwelling, land and neighbourhood use by older home owners: AHURI Final Report No. 144* (2010).
[14] 3222.0 - *Population Projections, Australia, 2006 to 2101.*

Considering again the example offered above: the split of housing between detached (greenfield) development and smaller medium and higher density homes. When asked their preferred dwelling type, prospective home buyers may overwhelming express a preference for detached housing. Does this mean that strategic planners should avoid planning for medium and high density homes? Not at all. That's because many other factors are also important to home buyers, including price, proximity to employment, proximity to transport, shopping and services and proximity to existing social and family networks. Home buyers make a complex trade-off between competing preferences when they make the decision to buy a home.

Individuals who place a value on high consumption amenities may be prepared to live in a more compact urban environment if it gives them greater access to such amenities at an affordable price.[15] Individuals may be willing to live in a more dense urban environment in return for the chance to enjoy nice weather, nearby beaches, mountains, and lakes or they may be willing to do so in order to obtain desired government policies such as the efficient provision of low pollution, low crime and good schools.[16] Consumption amenities may also arise due to the wide product variety and cultural amenities that high density can support. [17]

Of course, if, in a given region, home buyers can have ready access to all of these things, without making the trade-off for a more compact home, then strong consumer demand for medium and higher density housing may not emerge. For example, with the exception of holiday homes with water views, there has been little increase in demand for medium and high density housing in the Lower Hunter since the most recent regional strategy, favouring increased medium and high density development, was introduced in 2006. Unlike a larger city such as Sydney, there are few real congestion problems in Newcastle, so those that live in low density housing on the city fringe can still enjoy a high level of access to the city centre. Unlike Sydney, it is not necessary to make a trade-off a preference for a detached home against a desire to live close to the city centre.

In any event, the economic evidence makes it clear that the intensity of land use is determined by the value of land.[18] The propensity for this to occur varies across different metropolitan areas.[19] It is evident that most strategic plans are prepared without consideration of whether or not land values in the existing footprint will rise enough to lead to increased use of capital in land development (to foster more intense uses).

Dense cities are known to boost productivity through the agglomeration benefits of having so many workers, consumers and businesses together in close proximity. Nevertheless, some research suggests that the productivity differences required to justify, in economic terms, high levels of density considerably exceed estimates of the higher productivity such crowdedness offers.[20] That is, the economic value of high density locations cannot be justified by the benefits of proximity alone, some external factor must be present which contributes to additional productivity boost to establish the economic viability of the dense urban area.

Economists suggest the additional element needed to provide the economic justification for density may depend on locational fundamentals such as the presence of consumption amenities, easy access to raw materials, navigable waterways, seaports, and other transportation infrastructure.[21] Productivity may also depend on government policies such as regulation, taxes, and service provision. [22] Governments do not have a good record at predicting whether or not the economics of a location will be such that private sector investment in more dense urban environments is warranted. Typically

[15] Jordan Rappaport, A productivity model of city crowdedness (2008) 63(2) *Journal of Urban Economics* 715, 721.
[16] Ibid.
[17] Ibid.
[18] John F. McDonald, *Capital-land substitution in urban housing: A survey of empirical estimates* (1981) 9(2) *Journal of Urban Economics* 190, 209.
[19] Ibid.
[20] Jordan Rappaport, A productivity model of city crowdedness (2008) 63(2) *Journal of Urban Economics* 715, 721.
[21] Ibid.
[22] Ibid.

government plans have followed private demand for urban density, rather than creating or predicting such demand.

Whatever regard is ostensibly given to the desires of consumers, the sheer uncertainty of the future, means that a series of value judgements must be made by planning authorities. As a result the strategies inevitably are influenced by the ideologies, preferences of the authors, and the political environment in which the plan is devised.

Significantly, land use strategic plans tend to impose a hierarchy of land development activities that public authorities find convenient, rather than the households and businesses that depend on the new homes and premises. That is, in evaluating competing options, the costs of faced by the public authorities charged with preparing a plan are inevitably given greater weight than the costs that would be borne by households and businesses.

For example, the Lower Hunter Regional Strategy's current emphasis on 40 per cent of the Lower Hunter's housing needs being met through infill development, conveniently boosts the notional overall housing figure to be provided to 115,000, when in truth, a very large part of the 46,000 infill dwellings are unlikely to be economically viable. This allows planning authorities to assert that sufficient dwellings will be provided, but without planning for the infrastructure necessary to support that number (were the dwellings to be provided in a composition that reflected home buyer preferences). The strategy meets the needs of government and planning authorities, but does not meet the needs of home buyers.

The Lower Hunter Regional Strategy frankly admits the fact that the convenience of public authorities has been given greater weight than the preference of home buyers:

> Whilst the amount of greenfield development [prior to 2006] to some extent reflects consumer preferences, it also places a significant burden on State and local governments in terms of infrastructure provision and the ability to identify sufficient new urban areas to meet demand.[23]

No analysis is carried out to measure or assess whether the private costs borne by consumers and businesses because their preferences cannot be satisfied are justified by the extent of the external or social costs that would be borne by the community as a whole if the market was permitted to respond to the preferences of home buyers.

The point of this discussion is that strategies inevitably will not be prepared in a way that aligns with the preferences of consumers and business premises. Therefore no strategy can ever truly achieve its stated objectives.

The 'means and ends' system set up by planning strategies are also vulnerable to outside shocks if some goals or unintended consequences are not adequately addressed (e.g., supply-side shifts in the housing market, higher building costs or unanticipated behaviour by key market players, such as major landowners).

A fair proportion of the development potential ostensibly made available under any strategy will not be taken up by industry, because a product that is able to be built will not fully align with the preferences of businesses and consumers. Meanwhile, development that might align with the preferences of businesses and consumers is unable to proceed because it was not part of the strategy (and there will not necessarily be any good reason or analysis why the prohibited development should not take place).

2.1.2 End-state planning

In general terms, strategic planning is motivated by an idealised end-state. Planning authorities adopt a vision of an ideal form and conception of how the community will function.

[23] NSW Department of Planning, *Lower Hunter Regional Strategy* (2006) 5.

Often this end state aligns more closely with views of the authors of strategies, than the community itself. Strategies are written by tertiary educated public servants. This demographic is less likely to reside in outer suburban areas, more likely to reside in a house, terrace or low-rise apartment in an inner suburban area, less likely to shop in large-format low cost retail environments, less likely to eat in major fast-food chains, more likely to commute by public transport to work in an office in a commercial centre. Perhaps not coincidently, in our experience strategies generally under-provide for:

- the development of new suburbs on the edge of a city;
- high density residential development in inner suburban locations;
- large-format retail generally;
- employment in locations where public transport is not an option, such as business parks; and
- major chain fast food formats.

Such strategies tend to over-provide for commercial offices in suburban centres.

An end-state is often envisioned in contradictory ways.

In some cases, the vision is positive - an urban area's future form is specified. In other cases, the end state is expressed negatively, excluding certain types of development (e.g. development of large rural, open spaces).

To continue with our example of the Lower Hunter Regional Strategy we observe that various end-states are contemplated. Some are innocuous. Others are not.

For example, the strategy envisages that new release areas will be designed based on "neighbourhood planning principles". Among other things these principles require

> [p]ublic transport networks that link frequent buses into the rail system.[24]

Infill development will, apparently,

> maximise use of existing and future infrastructure, including public transport ...[25]

The residents of the Lower Hunter are currently heavily reliant on motor vehicles to get themselves to and from work, more so than either the Illawarra's or Sydney's residents.[26] Lower Hunter residents produce more vehicle kilometres travelled per capita (26.2), than Sydney residents (19.7).[27] Ninety-one per cent of the Lower Hunter's commuters travelled to work by motor vehicle in 2006.[28]

In February 2010 AECOM, a consultancy firm, was appointed by Transport NSW to develop a "transport management and accessibility plan" for the Newcastle city centre.[29] The State Plan sets the target of increasing the share of commute trips made by public transport to and from Newcastle central business district during peak hours to 20 per cent by 2016.[30] According to AECOM, the existing (in 2006) public transport journey to work mode share to Newcastle City Centre during the peak period is 14.1 per cent.[31]

According to the report, with no improvements to the public transport or road network in Newcastle's city centre, the proportion of people travelling by public transport would increase only slightly from 14.1 per cent in 2006 to 15.1 per cent in 2031 because more people are expected to live near bus and train services.[32] Even with more dense urban development around Wickham, Civic and Newcastle stations,

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[24] Ibid 26.
[25] Ibid 9.
[26] Ministry of Transport, *TransFigures April 2008* (2008) 7.
[27] James Naylor, *Lower Hunter Transport Needs Study* (2009) 22.
[28] Ministry of Transport, *TransFigures April 2008* (2008) 7.
[29] AECOM, *Newcastle City Centre Renewal: Transport Management and Accessibility Plan: Summary Volume* (2010) 1.
[30] NSW Government, *NSW State Plan: Investing in a Better Future* (2010) 11.
[31] AECOM, *Newcastle City Centre Renewal: Transport Management and Accessibility Plan: Summary Volume* (2010) 7.
[32] Ibid.

AECOM estimates that there would only be a 10 per cent increase in train travel, increasing the proportion of public transport travel from 14.1 per cent (in 2006) to 15.2 per cent in 2016, and 15.9 per cent in 2031.[33]

The AECOM report identifies a barrier to further increases in the use of public transport for commutes to the Newcastle City Centre:

> Nearly 11,000 car parking spaces are provided in the Newcastle City Centre and immediate surrounds, with a fairly even split between on-street, off-street and private off-street parking. With only 7,500 car trips into the same area each day, there is an *oversupply* of parking. *Managing* the parking supply (both in *the price and the number of spaces*) would reduce private vehicle usage and encourage more public transport trips.
>
> Availability and pricing of parking is a particular challenge in achieving the State Plan mode share target. ...
>
> *In the longer-term, parking prices in Newcastle should be increased to a level comparable with other major centres in NSW reflecting the true costs of parking*, which include the need to provide road space or land and the need for the road infrastructure to enable more cars to drive into the city centre. *This would see the price of long-term commuter parking double over the next five to ten years.* (emphasis added).[34]

As part of this, the city council would "specify maximum parking amounts for new developments" in its development control plan.[35] The paper says this would be about "allowing developers to provide less parking with supporting justification",[36] but of course, "maximum" car parking limits are about preventing developers from ensuring that new developments have sufficient car parking places. Such policies have been tried and failed in South Sydney and North Sydney, where more cars were forced to park on the street.

AECOM believes its proposals would achieve a 15.7 per cent peak period public transport mode share in 2016, increasing to 16.5 per cent in 2031,[37] although this still falls well short of the State Plan target of 20 per cent in 2016.

When faced with evidence that consumers would stay in their cars because of the relative convenience in that form of travel, and the availability of car parking, the government's consultants started to devise regulatory measures that will create a problem (insufficient car parking) in order to achieve the desired end-state. AECOM cannot be blamed for this. As the government's consultant, they were not permitted to question the underlying policy (i.e. whether achieving the State Plan 20 per cent target) was desirable or necessary.[38]

Designing whole communities around new public transport services in the Lower Hunter may be a pointless exercise if the government has no intention of providing them and if commuters would still find their cars a preferable means of transport even when public transport services are available.

The problem with end-state planning is that once a future state of affairs is deemed to be desirable, the clumsy regulatory powers of the state then begin to be employed to try and engineer the outcome. The original reasons for a particular end-state being envisaged may never have been robust, or if they were, they may no longer be strong. None of this will be apparent years down the track, yet the strategy may still be rigorously adhered to by regulatory bodies.

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[33] Ibid.
[34] Ibid.
[35] Ibid 17.
[36] Ibid 17.
[37] Ibid 8.
[38] It should be noted that the former Minister for Transport, John Roberston declared that "[t]he NSW Government doesn't support the introduction of a congestion charge in the Newcastle CBD, nor would we support a doubling of parking fees": Office of the Minister for Transport, Media Release "NSW Government releases transport studies", 15 November 2010.

2.1.3 Complete knowledge

The presumption underlying modern strategic planning is that all the relevant factors for determining housing demand and supply, land availability, and the interrelationships between commercial, industrial, and residential land development are known and foreseeable.

Uncertainty is rarely acknowledged or adequately addressed. Thus, when plans are adopted the expressed intention is that they will be modified on rare occasions and amendments are subject to onerous review and approval processes. This limits opportunities for private sector innovation or spontaneity.

Again, the Lower Hunter Regional Strategy provides a useful example of how the (flawed) "perfect knowledge" assumption works in practice.

The document contains 35 separate statements that the strategy will "ensure" that something take place. This overlooks the fact that the strategy in itself:

- does not guarantee government investment in infrastructure;
- cannot guarantee rezoning decisions or development approval;
- cannot guarantee either the presence of homebuyers or businesses in a particular market segment;
- nor can it guarantee private capital to achieve the strategy's outcomes.

Typical of the strategy are the following statements:

> the Strategy will ... *ensure* activity within the Lower Hunter complements rather than competes with the economies and communities of adjoining regions (emphasis added).[39]

Isn't competition a good thing? We shudder at the thought of the various land use controls that will be employed to deliver on this assurance.

The Strategy goes on to say that it will

> [p]rovide for up to 115 000 new dwellings by 2031 *ensuring* the potential to accommodate both the changing housing demands of smaller households and reduced occupancy rates of the existing population as well as meeting the housing demands for an additional 160 000 people (emphasis added).[40]

Are we sure that 115,000 homes will meet the needs of additional people? What if projected occupancy rates are wrong? They have been before. What if there are more than 160,000 people? Note that only "up to" 115,000 homes will be provided. The 115,000 homes number is intended to be an explicit cap on overall dwelling production.

> *Ensure* a mix of housing types in proximity to employment to provide the necessary supply of labour locally (emphasis added).[41]

What if the strategy's mix of housing types turns out not be commercial or does not match homebuyer preference? What if the strategy does not accurately comprehend the future distribution of the labour force?

These uncertainties are largely not addressed in the document. Nonetheless, there is a limited acknowledgement of the issue:

> Monitoring of population growth will ensure that the Strategy can respond to growth rates higher or lower than expected.[42]

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[39] NSW Department of Planning, *Regional Strategy Update Report 2009* (2009) 7.
[40] Ibid 10.
[41] Ibid 22.

The document does not explain how the strategy will respond. In fact there is no mechanism for a response. If the strategy proves to be incorrect or unhelpful it must either be changed (likely to be a cumbersome time consuming process extending over years) or a public decision-maker must act outside of the strategy.

(As it turns out, population growth in the Lower Hunter has been above the original projections which provide for population growth at about half the traditional level. Under the strategy an average of about 4,600 new dwellings - apartments or houses - should be built each year, including about 2,760 in greenfield areas. The Department of Planning's Metropolitan Development Program report tells us that just 2,566 new dwellings were built in 2006-07 and 2007-08. Of those, only 485 were in new development greenfield areas - that's less than 250 a year.

Since the strategy was finalised in 2006, a single "update report" was published in 2009, that made no changes. The strategy itself says:

> Strategy is to be comprehensively reviewed every five years, so that it can adjust to any demographic and economic changes. This will assist local councils will their five-yearly review of local environmental plans, required under recent reforms to the planning system.[43]

Given the exceptionally long lead times involved in land supply (15 years according to the National Housing Supply Council, but, much longer, in our view, in NSW) it's difficult to imagine how this process of five yearly review will ensure that the strategy remains relevant.

We note that the Department of Planning maintains that a review of the Strategy will commence this year. This may turn out to be the case. But in early last year, they were maintaining that the review would commence in the second half of 2010. It did not commence because the outgoing government decided that a strategy review would clash with the state election period.

It is not beneficial to the community to delay or prevent major private sector investment that might be assessed as desirable on its merits, merely because it is inconsistent with a strategy. In practice strategy reviews are infrequent (or non-existent), highly subject to political timetables, and major investors will often not wait around for a strategy to be reviewed. They walk and take their money to other projects, other regions and other countries.

Strategic plans cannot know and foresee all.

2.1.4 Political optimisation

The presumption underlying modern strategic planning is that planners and policymakers will include all the relevant information in their decisions about what kinds of factors influence the growth of a community, and that all relevant preferences will be revealed accurately and optimally through the political process.

Notionally, the legislative role in policy making offsets the technical role played by professional planners. In theory, the political process helps ensure that the work of strategic planning is not purely technocratic and the outcomes reflect the community's requirements.

The need for political oversight of strategic planning arises from the modern planning system's reliance on the principle of democratic deliberation of land use.[44] This is said to provide for more holistic decision-making practices and enable people to re-assert collective social control over urban development patterns, allowing for the widest consideration of the costs and benefits to society at large.[45] This is said to require a commitment to the notion of "consensus-building" and "citizenship" rather than "competition" and "consumerism" and involves a subordination of private markets to

[42] Ibid 4.
[43] Ibid 44.
[44] J Forester, *Planning in the Face of Power* (1989); P Healey, *Collaborative Planning* (1997).
[45] Ibid.

collective democratic control.[46] According to dominant urban planning theories, individuals may only be reconnected with their communities based on "voice" mechanisms that can transform peoples' values through a process of democratic deliberation in which the virtue of different ends is judged according to the articulation of the "best reasons".[47]

This is a key area of tension in any strategic planning process. **Strategic urban plans are <u>not</u> merely a process of aligning urban development to infrastructure capacity.** It has morphed into a system of regulatory control ostensibly directed to re-shaping urban communities based on a stated 'vision' (see end-state planning above). Therefore when we talk about "planning rules" we are rarely referring to regulatory impositions based on strictly objective criteria (as would be the case with engineering or building standards). What we tend to be talking about is rules that are informed by subjective responses to competing arguments about the ideal shape, look and feel of urban communities.

Government planners fulfil what they believe is a technical function and often resent the political direction they receive as to the content of their plans. A draft plan prepared by public servants will rarely even make it to public exhibition without substantial re-writes courtesy of the political process. Once exhibited many plans are further revised based on community feedback.

Plans may be improved or made worse as a result of political oversight in the preparation, public exhibition and finalisation stages. It's worth considering both these situations.

<u>Firstly</u>, the purpose of the public exhibition and other community consultation on a plan is to ensure that the views of key players in the community *are* fully addressed by the technical staff preparing a plan. If the technical staff fail to appreciate the desires of homebuyers, business owners, etc, the consultation process is an opportunity for them to speak up and draw attention to the flaws in the proposed planning direction.

In our experience, plans can often be improved as a result of direct dialogue with developers. Regretfully, most draft plans are not revised as much as they should be. Politicians are often concerned that the community will react negatively if governments are seen to be *too* responsive to the views of developers. In any event, developers who happen to be present at the time that strategic plans are prepared cannot speak for all developers who might seek to develop in any area in the future. They may also, at times, be incorrect. (When developers are wrong in the marketplace, they are financially penalised. There is no financial penalty when they are mistaken in strategic planning discussions when their land is not the issue.) Consultation with developers may improve plans, but it cannot make them perfect.

However, there are other more significant limitations to the effectiveness of the political process for corrected errors and gaps in strategic planning.

Most home-buyers are *not* engaged in government strategic planning processes and would not know how to relate their own preferences for a home to a government policy document. In fact, a strategic plan is typically intended to have a life of between five and thirty years, and most people who will buy a home in this timeframe will not be in the housing market at the time that plans are prepared. For example, at the time a plan is prepared someone may be happily married and think they will never need to buy a new home again, but three years later they may be on the road to divorce, and find themselves thrown back into the housing market.

Future homebuyers will generally not be alert to the government's intentions at the time that the strategic plan was prepared.

Similarly, most businesses that might be willing to invest their capital in commercial ventures in a region over a given timeframe were probably not on the scene at the time that the government prepared its land use strategy. There is no meaningful way for these home buyers or businesses to engage in

[46] P Healey, *Collaborative Planning* (1997)
[47] Ibid 216.

strategic planning process that take place years before they were even aware that they might want to make an investment in, or purchase a property.

Even in relation to the current preference of home buyers and businesses, it can be difficult for the political process (i.e. community consultation) to draw out their preferences and adequately reflect them in a strategy. Dr Sam Staley has explained that:

> [F]ormal public planning [is] inherently incapable of collecting or processing the information that would be socially relevant. Producers (and by extension planners) are faced with a "knowledge problem," understanding what consumers want and finding the most efficient means for producing those goods and services. **Knowledge itself is comprised of two components: articulate and inarticulate** (Lavoie 1985). Articulate knowledge represents the tangible expression of wants and preferences. This is the kind of information that could be gleaned from market surveys, focus groups, or interviews with buyers. Moreover, this is information that can be objectively measured. In the residential housing market, objective information could include criteria such as the size of a preferred house in square feet, the number of bedrooms, the size of the lot, access to shopping or work in time or linear miles, etc.
>
> **The more important component, however, is inarticulate or implicit knowledge. While consumers may be able to express certain aspects of their preferences, other key ingredients may not be articulable.** Often, customers will buy a product based its look or feel and an expectation about whether that product will satisfy their needs. Some of this inarticulate knowledge may be aesthetic; other aspects may be functional. In the real-estate market, how a house sits on a lot may have important impacts on the perception (or expectation) of privacy, or its functionality (e.g., steep driveways in winter climates). Similarly, objective criteria may not be able to capture key aspects of a neighborhood that are important to future residents and consumers.
>
> Actual buying behavior reflects a complex interaction of articulate and inarticulate knowledge. Part of the consumer's decision reflects an assessment of measurable tradeoffs—how much lot is the consumer willing to trade off for the size of a house? Other parts of the decision are inarticulable or unknowable—will this house serve the needs of a growing family?
>
> These are tradeoffs that consumers make based on objective information, experience, expectations about future events, and personal preference. Inarticulate knowledge is the source of most uncertainty in the market and the primary component of its dynamic nature. Articulate knowledge by its very nature can be measured and, in theory, be forecasted with a reasonable degree of precision.
>
> Market prices serve as an intermediating data point that provides summary information to consumers about products (and potential revenue for producers). (Horwitz 1998) The decision to purchase (or produce) a product depends on a synthesis of our understanding of preferences as well as hunches, "feelings," and judgements based on inarticulable information from experience. Economic preferences can only be known when they are "revealed" through their decisions about what to buy and for how much. **The inarticulate knowledge cannot be replicated in formal planning, and thus accurate predictions or forecasts about consumer buying patterns are virtually impossible.**
>
> Markets, in contrast, are capable of processing this knowledge because of the dynamic institutional context in which consumer information is processed. Money prices provide a commonly accepted metric that intermediates between entrepreneurs and consumers who can act only on partial information. Money facilitates these transactions because it is tangible, has a commonly accepted value (under a stable monetary regime), and is fungible. Thus, movements in prices emerge as reflections of the subjective values of consumers and producers about goods and services available in the market (Horwitz 1998).
>
> But **the information provided by market transactions in not completely transparent.** On the contrary, entrepreneurs are constantly looking for market opportunities "missed" by others (Kirzner 1973). Thus, the market process is an institution of discovery, where buyers and sellers are constantly assessing what customers want, what consumers are willing to pay for, and what production methods most effectively and efficiently provide those goods and services (Hayek 1978). The dynamism of the market process allows the revealed preferences of consumers to be incorporated into future decisions on both the producer and consumer side of the ledger. The market is disciplined by the profit and loss system (absent third-party intervention such as a government) (bold added).[48]

[48] Samuel Staley, Urban Planning, "Smart Growth, and Economic Calculation: An Austrian Critique and Extension", *The Review of Austrian Economics*, 17:2/3, 265–283, 2004, 274-275.

It is not possible for any type of political process, such as community consultation, to fully and adequately reveal the inarticulate or implicit knowledge of home buyers and intending funders of new business premises. Ultimately, these preferences are best revealed through observation of market activity. The danger exists that strategies that are rigidly applied prevent that market activity from occurring. On the other hand a strategy that can be departed from or applied very flexibly will still permit market activity to occur. If a strategy has to be departed from a great number of times it will be apparent that the strategy is inadequate. **Without a willingness to depart from the strategy, the authorities responsible for it will never truly know whether investment, jobs and housing opportunities that are being lost to the community as result of the strategy's rigid application.**

Secondly, strategic plans can be made worse as a consequence of political oversight and community consultation because strategies can be used as a vehicle for introducing rules and prohibitions that are based on public opinion or ideology, rather than a sound technical basis. (Although we would note that the "technical" work of government planners is usually not value neutral.)

The evidence consistently shows that political ideology can influence decisions made concerning the regulation of land use.[49]

The ideological basis of many planning controls can lead to arbitrary, inconsistent and irrational rules. You do not need to accept our word for it; consider the recent words of the majority in the NSW Court of Appeal (Justice Basten, with President Allsop agreeing):

> [I]t has also been said with some justification that a search for logic and consistency within planning instruments is often doomed to fail. As has been explained by Tobias JA, **to seek "planning logic in planning instruments is generally a barren exercise** ... Why one use is permissible and another similar use is prohibited will often be a matter of speculation. ... [In the present case it] may be conceded that there is no obvious logic ... (bold added).[50]

Rules that lack the rigour of a technical standard are more easily challenged when they are preventing good social and economic outcomes (and rightly so). Inevitably, people question the need to rigidly apply a strategy, or support a departure from the strategy when:

- public opinion changes;
- the market demand for new development changes (e.g. the emergence of widespread consumer demand for apartment living in the largest capital cities); and/or
- the social and economic costs of a given restriction or prohibition have increased or have become more apparent.

The social and economic costs of rules originally imposed for subjective reasons often involve:

- inefficient use of public infrastructure;
- increased motor vehicle use;
- increased congestion;
- reduced competition in the retail sector;
- reduce competition amongst land owners to sell potential development sites to developers;
- an inadequate supply of housing in places of high demand;
- higher residential, retail and commercial rents; and
- lack of housing affordability.

[49] Jeffrey Dubin, Roderick Kieweit, Charles Noussair, 'Voting on growth control measures: preferences and strategies'(2009) 4(2) *Economics and Politics* 191; Elisabeth Gerber, Justin Phillips, 'Development ballot measures, interest group endorsements, and the political geography of growth preferences' (2003) 47(4) *American Journal of Political Science* 625; Matthew Kahn 'Do liberal cities limit new housing development? Evidence from California' (2011) 69 *Journal of Urban Economics* 223.
[50] *Hastings Co-operative Ltd v Port-Macquarie Hastings Council* [2009] NSWCA 400 [39].

It is also important to understand that most members of the "community" being consulted on a given strategic plan would not actually be aspiring home buyers (or business owners looking to acquire new business premises). As a result community consultation is likely to be skewed in favour of home owners and businesses already established in an area. Existing home owners in a local area have a financial incentive to discourage new construction because it reduces the scarcity value of their property asset.[51] Incumbent business operators, who play an important role for local government at election time, have strong vested interest in mobilising campaigns against new developments that may place them under competitive pressure.[52]

This closed system approach tends to exclude consideration of the interests of future residents, neighbouring local government areas and non-resident third parties.[53] This becomes particularly problematic when communities are faced with accommodating innovative development proposals.[54] By their nature, innovative proposals break from traditional existing patterns of development.[55] Yet, planning procedures give the most weight to participants with an inherent interest in preserving existing development patterns, and the least to the future residents or the beneficiaries of community changes.[56]

In short, **political oversight of strategies is essential in any democratic society. However that political oversight will not deliver perfect plans. Plans will need to be applied flexibly.**

It is in the public interest that land use strategies created by politicians should be capable of being varied or applied flexibly by politicians. Tomorrow's politicians are no less qualified to make decisions on behalf of the community than today's. In fact, they are better placed to make such decisions because they may be in possession of information that today's politicians lack. We do the community no service by tying the hands of tomorrow's politicians and/or by making them go through cumbersome processes to depart from the flawed work of their predecessors.

We note concerns about probity that are sometimes raised when politicians authorise departures from strategies. In our view, **probity concerns should be dealt through governance reforms**. For example, for many years we have advocated a blanket ban on political donations from anyone. In NSW there is now a ban on political donations by property developers (among others). In our view the ban should be broader in NSW, and a generalised ban should be introduced nationally.

Some say that the power of politicians to authorise departures from strategies should be exclusively handed over to independent commissions. **There *should be* a role for courts, tribunals and commissions to authorise departure from strategies where strict application of strategies would be inappropriate, unreasonable or unnecessary, but such a power will not address more fundamental inadequacies in a document.** There may also be a role for such bodies to act as delegates for ministers, with the active blessing of a minister. However it is unrealistic to expect a commission appointed by a government to turn around and openly admit to the government that its high level strategic plan is wrong without tacit government approval. No government is likely to give a commission such a power in relation to one of its own plans. **In reality, systemic flaws in strategies will normally only be acknowledged by politicians themselves or their delegates acting with a ministerial blessing**. It is important that there is an ability for ministers and/or their delegates to readily act on such acknowledgements.

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[51] William Fischel, 'Does the American way of zoning cause the suburbs of metropolitan areas to be too spread out?' In: Altschuler, Alan et al. (Eds.), *Governance and Opportunity in Metropolitan America. National Academies Press*, Washington, pp. 151–191; Fischel, William A., 2001. ; Carolyn Dehring, Craig Depken, Michael Ward, 'The Homevoter Hypothesis: How Home Values Influence Local Government Taxation School Finance and Land-use Policies' (2008). 'A direct test of the homevoter *hypothesis'Journal of Urban Economics* 64, 155.

[52] A Fels et al. *Choice Free Zone* (2008).

[53] Ibid. See also: Edward Glaeser, Bryce Ward, 'The causes and consequences of land use regulation: evidence from greater Boston' (2009) 65(3) *Journal of Urban Economics* 6 265.
Laarni Bulan, Christopher Mayer, C. Tsuriel Somerville, 'Irreversible investment, real options, and competition: Evidence from real estate development' (2009) 65 *Journal of Urban Economics* 237.

[54] Ibid.

[55] Ibid.

[56] Ibid.

2.2 Subjectivity in the application of a strategic plan

2.2.1 There is inevitable tension in the competing objectives of strategic land use plans

As the Productivity Commission observes:

> Planning systems are characterised by 'objectives overload' including unresolved conflicting objectives, long time lags and difficult-to-correct planning mistakes.[57]

Competing public policy goals are routinely prescribed. The goals are usually expressed in a generalised way and there are usually tensions between them.

For example, the Lower Hunter Regional Strategy's "key elements" contain a number of inherent tensions:

- The Strategy seeks to "[p]rovide for up to 115 000 new dwellings by 2031 ... meeting the housing demands for an additional 160 000 people" which may, in some circumstances, clash with the need to "maintain the character of existing suburbs".[58]
- The Strategy sets out to "provide greater housing choice" which may conflict with the desire to "achieve a more sustainable balance of infill to greenfield development".[59]
- The Strategy says it will"[e]nable the release of up to 69 000 new greenfield lots" but at times this goal may not be achievable whilst also promoting a "more efficient use of infrastructure".[60]

Leslie A Stein, a barrister and former Chairman of the Western Australian Town Planning and Appeal Tribunal and former Chief Counsel to the Sydney Metropolitan Strategy, reflected on this issue in his work: *Principles of Planning Law*, published by Oxford University Press. Stein observed that:

> The object of town planning is the implementation of a plan to carry out goals that encapsulate and describe idealised future states. The goals reflect ideological orientations ... It is tempting for all regulators to speak of a 'sustainability agenda' because it summarises a set of indisputable goals ... the difficultly in the precise formulation of it components is secondary to the sentiments it evokes. ... [I]t is difficult to describe the 'policy' of planning: goals and values, in words of clear expression.
>
> Planners still envisage themselves to be agents of social change but their agenda of economic sustainable development or New Urbanism depend upon effective implementation in legal instruments. Unfortunately, the devices of the regulatory system are primarily designed as a means of control restriction and permissibility. **The implementation of planning agendas by restriction does not necessarily encourage and promote; it often prevents and denies** (bold added).[61]

In essence, planning decisions are subjective and will vary depending on how a decision-maker decides to weight the criteria used. The NSW Land and Environment Court also recognised this reality when it observed, in a landmark case, that in planning decisions:

> [T]here is room for opinions to differ in weighing the same objective criteria. [62]

As long as public opinion or ideology is a guiding factor in setting planning rules and assessing projects against those rules, a high level of subjectivity will inherently exist in the system. It also means that rules will continue to be fluid because rules set by reference to public opinion or ideology will not stand robust scrutiny in the long run if/when it becomes apparent that they carry high social and economic costs.

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[57] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments: Productivity Commission Draft Research Report Volume 1* (2011) xxiii.
[58] NSW Department of Planning, *Lower Hunter Regional Strategy* (2006) 10.
[59] Ibid.
[60] Ibid.
[61] L Stein, *Principles of Planning Law* (2008) 87-12.
[62] *New Century Developments Pty Ltd v Baulkham Hills Shire Council* [2003] NSWLEC 154 (Lloyd J) [60]

2.2.2 Development assessment on merits is a real policy decision, not just a "defacto" one

The Productivity Commission says that

> This regulatory system is not like most other regimes which have a clearer delineation between policy making, regulation writing and then enforcement. Because some important policy issues are not fully resolved at the strategic planning stage, de facto policy-making is occurring at the development assessment end. [63]

We agree with this analysis, with one exception: there is nothing "defacto" about the policy-making that takes place in development assessment on its merits. The planning system formally recognises merit based decision-making as a type of policy decision.

For example, NSW section 79C(1) of the *Environmental Planning and Assessment Act 1979* requires the bulk of development applications (that is, all development applications processed under Part 4) to be assessed against a long and prescriptive list of considerations.

> The provision is set out as follows:
>
> In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:
>
> (a) the provisions of:
>
> (i) any environmental planning instrument, and
>
> (ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority ..., and
>
> (iii) any development control plan, and
>
> (iiia) any planning agreement ..., and
>
> (iv) the regulations ...,
>
> (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
>
> (c) the suitability of the site for the development,
>
> (d) any submissions made ...,
>
> (e) the public interest.

The effect of section 79C is that even when a particular development is expressly identified in a plan as "permitted", there can be no assurance of approval when an evaluation against vaguely expressed factors such as "social and economic impacts", "suitability of the site" and "the public interest" point to refusal. While objective information must form the basis of any decision made pursuant to section 79C, there is room for opinions to differ in weighing the same objective criteria.[64] Compliance with the requirements of the local environmental plan (LEP) and development control plan (DCP) is not any assurance of development approval.[65] Hence, development assessment under section 79C is a policy decision in substance and in form – there's nothing defacto about it.

Consider just one case (one of many): *Inghams Enterprises Pty Ltd v Kira Holdings Pty Ltd.*[66] The NSW Court of Appeal struck down a consent granted by the Land and Environment Court for a residential development that complied with the *Liverpool Local Environmental Plan*. The basis for the decision was that the proposed development was incompatible with existing development nearby. In that case a statutory requirement to consider:

- the social effect and the economic effect of the development in the locality;
- the relationship of that development to the development on adjoining land or on other land in the locality; and

[63] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments: Productivity Commission Draft Research Report Volume 1* (2011) xxv-xxvi.
[64] *New Century Developments Pty Ltd v Baulkham Hills Shire Council* [2003] NSWLEC 154 (Lloyd J) [60]
[65] *Mobil Oil Australia Pty Ltd v Baulkham Hills Shire Council (No 2)* [1971] 2 NSWLR 314, 319; *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195, 209-210; *BGP Properties Pty Ltd v Lake Macquarie City Council* [2004] NSWLEC 399 [117]-[119].
[66] (1996) 90 LGERA 68

- the existing and likely future amenity of the neighbourhood,

necessitated that the development be refused, as a matter of law.

Justice Coles of the NSW Court of Appeal said that

> the correct legal approach to a consideration of a s 90 ... [a predecessor provision to section 79C] ... [is] that development consent should not be granted unless, having weighed the factors requiring consideration pursuant to s 90, it could be said, on balance, that consent should be granted.[67]

That is, it is open to a consent authority to refuse development approval, even when the application complies with relevant development controls.

In the *Principles of Planning Law* Stein observed that:

> The introduction of a system of development control [i.e. development assessment], by its very nature, implies flexibility with respect to the specific dictates of the plan. The fact that the plan is therefore not conclusive in its own right means that the final planning decision is recognised to be a matter of discretion rather than a fixed set of rules for the use of land. When planning legislation creates a system of development control, it accordingly has its intent to shift some of the planning power from the zoning provisions to a discretionary decision. At that point, the role of the development plan or planning scheme changes to one of guidance ... As development control is about present assessment of a proposal against the existing plan it implies that the plan, even though subject to a time-consuming planning process, is only a framework for development and the relationship between what is proposed and what exists must be resolved on a case-by-case basis. [68]

The risk that an apparently conforming development will be refused is inherent in every development application. To quote Stein again:

> ... [A] development application may involve complex planning questions that are not easily understood. As an example, a development application for a new house that blocks a neighbour's view requires a subtle analysis of the degree of interference, the consistency of the new house with others that have had the same effect, and the consequence of this decision on other possible applications. The absence of a policy framework or predefined standards means there is no anchor for the reasoning that must follow. The resolution of the issue may then involve the views of planning officers informed by their own predilections, lobbying by neighbours or the applicant, an attempt by the applicant to redefined the application in light of objections, and other political influences all of which are obstacles to speedy resolution of the application.[69]

It's worth noting that even when development is likely to be approved, there is a risk that conditions may be imposed that will frustrate the ability of the proponent to actually carry out the development.[70] An applicant must not only seek an approval; they must ensure that no unacceptable conditions are imposed.

However, there is some (but not enough) balance to this process. While a consent authority may have wide discretion to refuse consent to a project that ostensibly complies with specific development controls, it is also possible that approval may be granted despite (some) inconsistent controls.

In NSW, development approval issued under Part 4 of the *Environmental Planning and Assessment Act* and project approvals under Part 3A are capable of overriding development standards laid down under environmental planning instruments.[71] This is necessary, given the highly prescriptive (and frequently irrelevant, outdated, political and poorly justified) nature of controls that were prepared in the absence of any specific development proposal. This discretion has been part of the Part 4 process since the *Environmental Planning and Assessment Act 1979* came into effect, and the system could not function without it.

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[67] *Inghams Enterprises Pty Ltd v Kira Holdings Pty Ltd* (1996) 90 LGERA 68, 77.
[68] L Stein, *Principles of Planning Law* (2008) 127 -129 .
[69] Ibid 132 -133 .
[70] *Finlay v Brisbane City Council* (1978) 36 LGRA 352.
[71] See section 75R(3) in relation to Part 3A; see the *State Environmental Planning Policy No 1—Development Standards* in relation to part 4.

In relation to local environmental plans, Part 4 allows standards to be varied in development assessment when the application of the standard would be "unreasonable or unnecessary in the circumstances of the case".[72] This can occur when:

- the objectives of the development standard are achieved even though a proposal does not comply with the standard; or
- it is established that the underlying objective or purpose is not relevant to the development proposal; or
- it is established that the underlying objective or purpose would be thwarted if compliance was required; or
- if it is shown that the development standard has been virtually abandoned by the Council's own actions in granting consents departing from the standard; or
- if it is established that the zoning of particular land was unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land.[73]

The Land and Environment Court laid down a planning principle detailing the circumstances where a consent authority may give little weight to a council's development control plan (a subsidiary document to a local environmental plan).[74] For example, a consent authority may give little weight to a development control plan if:

- the plan was adopted with little or no consultation;
- the plan has been selectively applied by council; or
- the plan would lead to an inappropriate planning solution, especially an outcome which conflicts with State, regional or local policies.

The wide latitude given to a consent authority to either refuse planning permission (despite compliance with specific controls) or grant planning permission (notwithstanding inconsistent controls) make it clear that the approval of individual projects following a merit assessment is a policy function. **It is wrong suggest that policy-making in the context of a development application is an unintended consequence of the current system.**

As the next section explains, this is not a bad thing. **There are good reasons why the planning system allows policy decisions to be made on a case-by-case basis.**

2.2.3 Determining policy earlier than necessary is a recipe for over-prescription

For the reasons outlined above, we do not support the Productivity Commission statement that

> Determining planning policy as early as possible in the planning to approval chain and obtaining commitments to undertakings is highly desirable.[75]

This is an invitation to the planning authorities to prescriptively and comprehensively lay down detailed and inflexible rules and prohibitions in the absence of specific development proposals. This means that planning authorities will end up prohibiting developments:

- without fully understanding what they are banning and why;
- without considering the merits of individual development proposals;
- without hearing from proponents (generally, future proponents will not be on hand when strategies are formulated);

[72] *State Environmental Planning Policy No 1—Development Standards* cl 6.
[73] *Wehbe v Pittwater Council* [2007] 156 LGERA 446, 456-458.
[74] *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472 [87] (McClellan CJ).
[75] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments: Productivity Commission Draft Research Report Volume 1* (2011) xxviii.

- based on the community views current at the time of strategy, rather than community views at the time that a firm development proposal is presented to the community;
- without the kind of data that a proponent is able to assemble and present to justify their case.

This kind of over-prescription is, of course, already a feature of the planning system. However, we think the Commission's proposal will make the situation worse.

For example, planning authorities sometimes seek to ban or prohibit high density development of a site at a strategic planning level, because their desktop analysis tells them that the site cannot be developed at high density whilst meeting solar access (sunlight) requirements. If this decision is made in the abstract (i.e. the current landholder is passive, or lacks the resources to contest the planning authority's decision) the prohibition is made, and intensification of the land prohibited. However:

- as the land owner changes, or ore resources are assembled; and
- an experienced architect is hired,

it may be possible for a design to be created which will ensure that the solar access requirements are met.

Or, even if solar access requirements cannot be met, there might some other outstanding and innovative design features that might warrant varying the solar access requirements.

A binding strategic plan, without flexibility, means that the society loses the opportunity to re-visit poor decisions, made without proper information, in a strategic planning process.

2.2.4 "Consistency" in decision-making may not be relevant when the circumstances differ

The Productivity Commission says that

> ... the zoning regime also has a number of 'special' agencies and processes set up to by-pass the normal path to development approval — often in an attempt to get speedier or more consistent decisions from the system.[76]

Urban development produces a bespoke product. Each new building is unique; each parcel of land presents its own challenges and opportunities. When people claim there is inconsistency between decisions, they often overlook the inevitable differences between cases (although, at a distance, without studying individual sites and proposed design solutions, the cases may appear similar). Additionally even very similar projects can warrant different treatment when separated by time. This is because the public interest factor and/or market conditions (housing shortfall, etc) may have altered, necessitating a different decision.

The reality is that **it is difficult to develop hard and fast rules on the application of competing (and conflicting) generalised planning principles to specific development proposals.**

Consider the common considerations that must be addressed in subdivision rezoning/applications:

- current housing pressures and the benefits of offering hosing choice;
- the benefits of offering an additional competitor to existing developers selling residential lots;
- the benefits of offering more housing closer to key infrastructure;
- additional state and local government infrastructure requirements;
- urban design outcomes;
- the scenic value of the area;
- the presence of acid sulphate soils (usually occurring in low-lying parts of coastal floodplains, rivers and creeks);
- the possibility of bushfire hazards;

[76] Ibid xxv-xxvi.

- the gradient of the land;
- the soil erodibility and instability of soil;
- the proximity of wetlands;
- flood risk and the range of potential engineering responses to manage the risk;
- the presence of archaeological sites and the significance of the sites;
- the presence and management of riparian corridors and the importance of the watercourse (which may only flow continuously or only infrequently); and
- the presence of significant flora or fauna and threatened species (Commonwealth or state listed).

It would be impossible for these matters to be resolved at a strategic land use level, without an unnecessary mass sterilisation of development potential. In the absence of a firm, worked up development proposal, strategic plans are rarely sufficiently informed to make good decisions to prohibit or impose rules on development. The balancing of competing priorities will be purely arbitrary if they take place without the context of a specific development proposal. The rules and prohibitions that emerge will be blunt and lack nuance. How, for example, should trade-offs between housing supply and competition, preservation of scenic views and good urban design outcomes be mandated?

To take this issue to another context consider some of the common considerations for the approval of high density residential development:

- the need to provide a variety of housing types and housing choice;
- the benefits of higher density development around transport nodes and commercial and retail centres;
- the need for revitalisation, rehabilitation and redevelopment of residential areas;
- the need to ensure that building design does not adversely affect the amenity of the locality;
- the quality of the building's design from the perspective of its future occupants;
- the need to maintain desired character and proportions of a street within areas (for example, the impact on the established street wall pattern);
- consistency with the prevailing built form;
- the presence/management and adaptive re-use of any heritage items;
- the need to minimise overshadowing and ensure an appropriate level of solar access to all properties;
- the need to ensure that the bulk of the development is not inappropriate;
- the impact of the development on important views or vistas from public places;
- view sharing principles (relevant to the impact on views enjoyed by private property owners);
- the topography of the site and surrounding area, and whether the topography lends itself to the building's bulk and height;
- the infrastructure needs of the development;
- reduced pressure on infrastructure elsewhere which may be made possible by the development;
- the desire to create spatial systems that relate to human scale and topography;
- the desire to create focal points that relate to key infrastructure such as train stations or large vehicular intersections;
- the need to reinforce important road frontages in specific centres;
- the desirability for openings between buildings to be mid block; and
- public opinion.

In the absence of a specific proposal, how can a strategic plan determine whether relatively reduced pressure on infrastructure elsewhere made possible by a development is of sufficient benefit to outweigh the increase in overshadowing that a development may cause? If decisions on over-shadowing are always made in the abstract, the complex trading off between competing policy objectives could not occur.

For example, in the abstract, a strategy may say that no development should be approved that would increase the shadowing of any park or public square. What if a developer seeks approval for development that slightly increased the overshadowing in a public square for a handful of days a year, but also adds to the size square (by surrendering private land), actually increasing the amount of space that is not shadowed, all year around? The authors of the land use strategy did not think of this possibility, so it will not provide for it. But it still makes sense, if a decision-maker might want to agree to it as a sensible trade-off between two policy goals.

It is no answer to say that a strategy should reflect all the possible trade-offs, because the number of trade-offs is infinite, given the unique complexities of each development site and proposal. A single site might be developed in 100 different ways (in terms of height, shape, uses, open space, etc). That's a complex enough exercise, without trying to contemplate all of those permutations and combinations on a regional basis in a single land use plan.

The reality is that a series of value judgments may need to be made on some or all of these factors (for both greenfield and infill development). Some of these factors may conflict or be in tension with other factors. Often, whether or not a given principle is satisfied will be a question of degree, to be finely balanced against other principles which may be strongly satisfied. It is not practicable to conclusively resolve these matters in the abstract, at a strategic level, in the absence of a particular proposal. If for no reason, that, without an active proposal and proponent willing to spend money to research the necessary information, do the design work, and hire someone to argue the case, the authors of a strategy are unlikely to be in possession of sufficient information to make a truly meaningful decision.

Case study: Freshwater village

Consider a recent decision by the Sydney East Joint Regional Planning Panel to reject a proposal for a mixed use commercial/retail/residential development within the Freshwater village centre on Sydney's Northern Beaches. The proposal involved the demolition of all existing buildings over eight lots and the construction of four new buildings of varying heights and seven townhouses.

Council officers initially recommended that the development be approved, but the panel rejected their recommendation. They set out three reasons for their decision:

- *The panel* felt that the proposal breached both the eleven-metre and the three-storey height limits. *Council officers* had said that "the non-compliance with the height requirement does not result in unacceptable or unreasonable impacts on adjoining and surrounding properties that would be symptomatic of overdevelopment".
- *The panel* felt that proposal was inconsistent with the "desired future character" of the Harbord (Freshwater) Village Locality. *Council officers* had said that "the proposed development has been found to be consistent with the Desired Future Character Statements for each locality". The difference of opinion seems to be that the panel thought that every large building in the proposal should have a retail or business component, while the officers thought that it was enough that most buildings had that component.
- *The panel* said that the public opposition to the proposal was "overwhelming". There were nearly 2,000 objectors as well as the local and State representatives of the community. The panel said the volume of their opposition was sufficient to conclude that it represented "the public interest".[77] *Council officers* did not take into account the public concerns.

[77] <http://jrpp.planning.nsw.gov.au/DevelopmentRegister/tabid/62/ctl/view/mid/424/JRPP_ID/384/language/en-AU/Default.aspx> at 30 March 2011.

Unlike the council officers, the joint regional panel seemed to have no regard to the NSW Government's draft subregional strategy. In giving their support to the project, council officers found that the redevelopment of the site will assist in achieving its subregional strategy status as a "small village".

This decision by the joint regional planning panel shows how a large not-in-my-backyard campaign by local residents can justify refusal in "the public interest". Even though joint regional planning panels are predominantly expert bodies, they still do make decisions that explicitly respond to community campaigns. In this regard, this panel has acted no differently to a group of local politicians.

This case study helps us illustrate three points.

Firstly, if the public are to be asked their opinion, and their opinion is to be decisive as to whether development is allowed to proceed, isn't it better that the public have an opportunity to hear a proper 'for' and 'against' case? For all its faults, the process outlined above at least gave the public a firm proposal to judge, will actual plans and an applicant willing to make their case. **If the decision to prevent the development has been made in the abstract (at a strategic planning level) in all likelihood there would have been no firm proposal and no party to explain, defend or make the case for the development to the community.** We also note that, in this matter, the applicant has a right to appeal on the merits to the Land and Environment Court. There might be no such a right if, as the Productivity Commission suggests, planning policy decisions are to be made earlier in the decision-making chain.

Secondly, if a development is to be refused by panel members because of public opinion, should it not also be possible to approve a development because of public opinion? And why should experts be given the exclusive power in interpreting public opinion? **Why shouldn't, for example, a state minister remain at the apex of the decision-making structure, so that cases where public opinion is a significant factor can be called in and or dealt with by someone who both has a mandate and the skill-set in interpreting and balancing the different opinions of the wider community** (and not just the opinions of the residents of a particular local government area)**?**

Thirdly, the process of balancing different principles in the context of a particular proposal is often not black-and-white. Different groups of competent experts can reasonably reach different conclusions. If all rules were to be turned into black-and-white rules, we could expect them to be far more restrictive than the rules in place now.

Case study: High density residential building in Chatswood

Consider this example.[78] The NSW Government recently overrode a 2001 master-plan to approve a $134 million commercial and residential project in the Chatswood central business district. The development was permitted under the relevant zoning, but was inconsistent with the master-plan that had been in place for 10 years. The approval allows for construction of a 43 storey building, including: 4,876 square metres of commercial space, 295 residential apartments and 7 levels of basement parking. Under the master-plan - which covered a larger area than just this particular site - only a purely commercial office building could be built. The strategic planning intent was that the building should be exclusively commercial to satisfy demand for office jobs.

However, on detailed review based in part on the analysis provided by the applicant, it was concluded that only a very small portion of future jobs in Chatswood - around 380 jobs - will be provided in the office precinct between 2006 and 2031. This detailed work would not have happened, but for the resources an active applicant was able to bring the equation (both through the work of their won consultants and through the application fees they paid which enabled the Department of Planning to fund its own work).

The 2001 master-plan was a more broad-brush exercise, relating not just to the site of the building, but the sites of five other buildings. Once sufficient analysis and scrutiny was brought to bear; the "office

[78] <https://majorprojects.affinitylive.com/public/ee43dfd6c0bd4749afd86e92d5f9f6e9/MP09_0154_Final%20report.pdf> 30 March 2011.

jobs" argument did not stack up, leading the government to take a different view from that articulated in the original master-planning process.

It is unreasonable to expect landowners or planning authorities in such broad exercises, where development is not imminent, to spend the resources precisely mapping out the details of development that may not be seriously on the table for years into the future.

It is also less likely that even the private sector would make a good decision in such circumstances, because they are not yet in the position where the project is "real", i.e. when they have tried to go the board or shareholders to raise capital for it, and/or they have approached the banks to securing project finance. Without those disciplines, even private sector actors may make decisions that may later need to be re-visited. This is a fundamental weakness in the proposition that more serious planning decisions should be brought forward in the process (to a strategic, rather than development assessment, level).

Case study: St Leonards mixed use building

A further example of the highly nuanced process of balancing competing priorities is offered by another case considered by the Sydney East Joint Regional Planning Panel.[79] In that matter the expert panel, which includes two council nominees, unanimously approved a mixed use building in St Leonards that exceeded the height controls by two storeys, despite an adverse recommendation by both council staff and an urban design advisory panel.

Development standards were varied despite the fact that there were claims by councils staff that it was not compatible with surrounding development and the desired character for the St Leonards Town Centre. The development did comply with the relevant floor space ratio.

It is difficult to imagine how this matter might have been resolved sensibly at a strategic land use planning stage. The issues were sufficiently finely balanced, that it took careful consideration of the specifics of the development proposal to reach a decision. In the abstract, we are certain that a land use strategy would merely have ruled this proposal out.

Each project and site will often be unique. The application of the same principles to different sites is likely to yield a different balancing perspective and a different outcome.

The inherent subjectivity of this process, particularly **the different weightings that may be given to the same principles by different decision-makers, is an unavoidable feature of land use regulatory decision-making. There is no practical way to eliminate this subjectivity, without implementing broad prohibitions and rigid rules that will impose great social and economic costs on the community.**

As-of-right development

We strongly support the introduction of "as-of-right" code-based assessment (akin to the Queensland approach). However, this would only be a positive step if a full merit assessment is still possible alongside the code-based assessment.

We should briefly explain why. "As-of-right" development is useful for establishing a "safe" space for regulators. Regulators are conservative and risk averse. They will create a development envelope which a regulatory can be satisfied, in all cases, and will present little risk of adverse community outcomes.

While they will acknowledge that it may be possible to design projects that have no adverse community outcomes as part of an as-of-right scheme, they will be nervous about losing the ability to veto such projects, because there is no specific proposal are on the table, and they will be concerned at the possibility that some proposals may not ultimately be successful.

[79] <http://www.jrpp.nsw.gov.au/DevelopmentRegister/tabid/62/ctl/view/mid/424/JRPP_ID/239/language/en-AU/Default.aspx>

For example, they might provide for a floor space ratio of 2.5:1, whilst being prepared to admit that in some circumstances a 3:1 floor space ratio could be acceptable (for example, if the developer was able to demonstrate that the development would generate less traffic that would normally be expected for a 3:1 development). However, only the 2.5:1 would be included in any as-of-right code, because the planner would be concerned about creating a "loophole" in the non-discretionary approval system that could be "exploited" by a developer.

In short it is certain that a range of development outcomes that might present no adverse outcomes would not be permitted under as-of-right schemes.

This does not make "as-of-right" development undesirable, so long as a merit/impact assessable scheme is still available, unconstrained by arbitrary rules, running alongside the as-of-right-scheme.

Such a regulatory structure gives the holder capital flexibility.

Those owners of capital with a low appetite for regulatory risk who wish to present less imaginative proposals can take advantage of the code-based assessment path. Those with a greater ability to accommodate some regulatory risk with innovative proposals would be able to pursue a full merit assessment outside of the code.

If there is generalised push to remove policy-orientated decisions away from the assessment specific proposals, the community will be denied innovative development, and we will see even more prescriptive and inflexible planning controls.

A two track system

In short, **the key is to offer a two track system for large scale urban development.**

Firstly, one that offers the simplicity of black and white rules, but does not accommodate innovation, or development that was not envisaged or properly considered when plans were prepared.

Secondly, a system that offers merit assessment, with more uncertain outcomes, based on the strength of the case that the proponent is able to advance.

A two-track system provides for both flexibility (for imaginative, innovative development) **and certainty** (for predictable and anticipated development).

2.2.4 "Consistency" in decision-making will be undesirable when public opinion changes

If strategic planning is a vehicle for democratic deliberation of land use,[80] then it is impossible to ignore the role that public opinion has in the preparation of strategic plans.

John Maynard Keynes once said:

> When the facts change, I change my mind. What do you do, sir?

If a key driver for an aspect of a strategic land use plan was public opinion, and the public's opinion has changed, surely that should justify a decision to act outside of the strategy?

In our experience, public opinion on many key issues in relation to urban development is variable. For example, following a sustained anti-development campaign by small businesses, community sentiment may be against more large format retail being introduced into an area. However, two years of price rises, as local businesses take advantage of the lack of price competition, may help shift community sentiment in favour of increased competition and consumer choice.

[80] J Forester, *Planning in the Face of Power* (1989); P Healey, *Collaborative Planning* (1997); P Healey, *Collaborative Planning* (1997);

Should the community now have to wait another two to three years while the whole strategy is re-written? What if the government or council does not have the resources or political commitment to re-write the strategy in any event? **There should be nothing sacrosanct about a strategy prepared two years ago, if the circumstances that led to a particular approach being taken have changed.** It is too cumbersome to expect all changes to be made in holistic review once or twice a decade. Life and our economy are much more fluid than that.

For example, during the course of 2007 and early 2008 the NSW Department of Planning released ten subregional strategies in draft form (although subsequent requirements published by the Director-General required these drafts to be applied in rezoning decisions as if they were finalised).[81] The sub regional strategies contained a prescriptive hierarchy proposed of centres. The hierarchy was developed via a political negotiation between local council public servants, local councillors and the Department of Planning with ministerial oversight.

There was no rigour whatsoever as which localities were designated in the hierarchy. As way of accommodating the political discussions, the hierarchy set down in the 2005 Metropolitan Strategy was varied, to include an additional category of "small village", which provided for centres that could have no supermarket. This enabled localities that should have been classified as "villages" (which allowed one supermarket) to be classified as "small villages" to appease locals who were concerned at the potential for the introduction of large format retail.

In early 2008 the Urban Taskforce released a report by Professor Allan Fels that exposed the micro-regulation of retail development and the quota system enforced via the draft subregional strategies. Public sentiment visibly shifted, and the Planning Minister backed away from the draft subregional strategies. The initial strategies were not amended but the Department of Planning issued a "clarification" to try and water down the adverse effects of the hierarchy. The last two strategies issued use different text from the first eight. The Department of Planning did not continue the "small village" classification in the Metropolitan Plan it released for Sydney in 2010 (however, there is still an overly-elaborate hierarchy).

This example illustrates the simple proposition that land use strategies are government policy documents. They are therefore influenced by the normal political negotiation process that governs all such documents. Accordingly, when a provision of a document (such as the introduction of the "small village" category to prevent supermarkets) is based purely on responding to public opinion, a politician's judgement that public opinion has changed might be necessary to require the politician to relax the prohibition in response. Of course, at times, this decision might be made by a public servant or commissioned under delegation by a minister. But ultimately a politician will need to be accountable for such decisions and be at the apex of the decision-making structure.

It is not practicable to wait for a formal review of the subregional strategies. It took two years for them to be released in the first place (much longer than originally anticipated). They are still in place as "drafts", a further three years after they were released. Strategy re-writes are resource intensive, and holding up and sterilising development because the public mood was initially misread as unnecessary and counter-productive.

2.3 Reducing risk by promoting certainty

According to the Productivity Commission it is desirable to have:

> strategic land use plans that are statutory to promote compliance and certainty ...[82]

[81] NSW Department of Planning, *A guide to preparing local environmental plans* (2010) 4.
[82] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments: Productivity Commission Draft Research Report Volume 1* (2011) xxviii-xxix.

We interpret "certainty" as being about reducing or eliminating unnecessary risk. This sounds attractive, but **it is vitally important to distinguish regulatory risk from market risk**. The planning system should seek to minimise the former, but avoid tampering with the latter.

That is, the planning system *should* seek to provide certainty to the private sector by having clear rules, simple processes, swift processing times and low predictable costs.

It should *not* be the role of the planning system to provide certainty to investors in one location, by giving them assurance that they will be protected from competition in other nearby locations. **Planning systems should reduce regulatory risk, but not market risk.**

Regretfully, rules are often put in place in the planning system to protect sections of the private sector from *market* risks. All this will do is provide certainty for oligopolistic landlords and provide few options for those seeking to satisfy unmet market demand. Reformed planning systems should focus on minimising unnecessary *regulatory* risks.

Frequently proponents *do* ask planning authorities to give them seek market certainty. This is only logical from their perspective. If they can reduce the commercial risks of the investment by using regulation to eliminate the prospect of competition, they can turn a capital requirement which would require a property development style (higher risk) premium into a utility-style (lower risk premium). They will typically argue that, by protecting them from market risk, a planning authority will help ensure their development goes ahead. The theoretical and empirical evidence shows this not to be true.

The following discussion explains our position in some depth.

2.3.1 Uban development is capital intensive and lumpy

The process of urban development is extremely capital intensive and lumpy. For example, a greenfield land developer will seek to stage a development, but inevitably an initial investment (in land acquisition, road building, utility construction) will require a minimum level of lot production. Once a commitment is made, the investment becomes 'irreversible' in the sense that the costs of not proceeding at the planned volume of production will be significant. Developers who have borrowed and used their own cash to pay for infrastructure will significant additional holding costs if they allow roads, utility services, etc to remain idle or underutilised.

Economists observe that developers face 'asymmetric adjustment costs', because once they have made their initial commitment it is more expensive for them to adjust production downward, than upward.[83] When adjustment costs are asymmetric, having 'too much' capital stock in place is worse than having 'too little'.[84]

For example, a road that is big enough to service 1,000 lots will be more expensive than a road that will only need to service 500 lots. If a developer commits to the 1,000 lot road, significant capital will be tied up in unproductive infrastructure if it subsequently turns out the developer can only sell 500 lots into the market.

A developer who had built the larger road will (if market conditions change adversely and lot production is reduced) face much higher holding costs that than were anticipated when work commenced on the road. In many instances, if they have committed irreversibly to the road, the developer may find it more cost effective to proceed with the original (higher) level of lot production. That is, the cost of the additional investment may be less than the additional holding costs associated with the otherwise underutilised capital.

[83] Caballero, 1991R.J. Caballero, On the sign of the investment-uncertainty relationship, American Economic Review 81 (1991), 279, 279.
[84] Ibid.

In short, developers who over-invest, but cannot realise their plans, will face greater cost penalties than businesses in other industries where the costs of increasing or reducing production are comparable.

The irreversible nature of this capital investment is understood by developers and it influences their decision to initially proceed with a venture. Academic modelling has used simulations to show that the optimal hurdle price triggering new *irreversible* investment can be two to three times as large as the trigger value when investments are *reversible*.[85]

2.3.2 The impact of uncertainly on urban development decisions

The urban development's capital intensive and lumpy nature influences how land owners behave when confronted by uncertainty that may impact on the net present value of an investment proposition.

This uncertainty can be induced by market conditions (such as the risk of falls in property prices or changes in consumer preferences) or in regulatory complexities (such as the risk of higher than anticipated development levies, or lower than anticipated lot yields). The property market is highly cyclical and subject to highly discretionary regulation. Many landowners hold portfolios that are concentrated in a particular local market where they hold great expertise, but where there are no existing methods to hedge local market risk.[86]

The impact of uncertainty on business decisions has been subject to extensive academic debate and analysis over a 40 year period.

For example, Columbia University's Ricardo Caballero published a peer reviewed theoretical analysis suggesting that in the absence of a fully competitive market, there would be a negative association between investment and uncertainty (that is, all other things being equal, the greater the uncertainty, the less investment will occur).[87] On the other hand, his modelling suggested that in a competitive market the relationship between investment and uncertainty was not strong.[88] That is, the irreversible nature of an investment was not a determinative factor, even in the presence of increased uncertainty, *if a market is competitive*.

Stanford University's Steven Grenadier concluded that the impact of competition on business decision-making was "dramatic".[89] In his view, increased competitive access to an investment opportunity (for example, the supply of new housing to a particular submarket) leads to "a rapid erosion" in the benefits of delaying an investment.[90] That is, a business decision is more likely to be based solely on the value of the project's net present value at a given point in time. In other situations (i.e. a non-competitive market) the best time to invest is when the asset value exceeds the investment cost by a large premium.[91] This means a developer in a non-competitive market may decline to invest, even though the project has a positive net present value, because the lack of competition offers the opportunity for a greater premium at a later investment date.

Academics from Boston University and the University of Amsterdam concluded that, even with uncertainty, investment may proceed, despite elevated risks, if it lowers not just production costs but also the likely price of future expansion.[92] Future expansion may be rendered less expensive, if early investment offers strategic influence on competitors' output decisions, inducing them to be less

[85] Dixit and Pindyck, 1994A.K. Dixit and R.S. Pindyck, Investment Under Uncertainty, Princeton Univ. Press, Princeton, NJ (1994).
[86] Laarni Bulan, Christopher Mayer, C. Tsuriel Somerville, 'Irreversible investment, real options, and competition: Evidence from real estate development' (2009) 65 *Journal of Urban Economics* 237, 238.
[87] Caballero, 1991R.J. Caballero, On the sign of the investment-uncertainty relationship, *American Economic Review* 81 (1991), 279–288.
[88] Ibid 286.
[89] R. Grenadier, Option exercise games: An application to the equilibrium investment strategies of firms, Review of Financial Studies 15 (2002), 691–721
[90] Ibid 718.
[91] Ibid.
[92] Kulatilaka and Perotti, 1998N. Kulatilaka and E.C. Perotti, Strategic growth options, Management Science 44 (1998), 1021–1031, 1029.

aggressive and increasing the investor's market share. In this scenario, the key motivator for the investment taking place is the *pre-emption of competitors*. If competitors are absent, or unable to act for some time due to regulatory constraints, the pressure to act strategically in this way diminishes.

In an empirical study, researchers from Brandeis University Columbia Business School and the University of British Columbia, carried out a detailed analysis of a sample of 1,214 medium and high density developments in Vancouver, Canada built from 1979 through to 1998.[93] They found that, all other things being equal, increases in risk led landowners to delay new investments. A one-standard deviation increase in the return volatility reduced the probability of investment occurring by 13 percent. The increase in risk was equivalent to a 9 percent decline in real prices. Significantly, the study found that when there is an increase in the number of potential competitors located near a development the inverse relationship between (idiosyncratic)[94] risk and development disappeared.

These results provided firm empirical evidence backing the earlier theoretical analysis by academics, in support of the proportion that in urban development:

- **in the absence of competition and the presence of risk, investment decisions are delayed; and**
- **increased competition *reduces* the prospect of investment being delayed.**

Accordingly, the study affirms that the presence of competition diminishes the value of waiting to invest.[95] The erosion in value of the investment opportunity due to activities of one's competitors creates incentives to invest earlier. Hence firms in competitive markets are not able to capture the full benefits to waiting that a monopolist enjoys.

A planning system that promotes certainty by reducing or removing the possibility of competition between land owners (by, say, giving certainty that only a handful of land owners will be able to develop in the life of a regional land use strategy) **will <u>delay</u> investment.**

<u>2.3.2 Case studies where certainty is offered at the expense of competition</u>

Let's consider how planning policies promote "certainty" whilst reducing or eliminating competition.

Case study: Right Place for Businesses and Services/Improving Transport Choice

The Productivity Commission says in its draft report that:

> The New South Wales planning documents include strong directives on centres policies and it was claimed (Department of Planning (NSW) 2005, p. 104) that out-of-centre development was actively discouraged in Sydney. The draft Centres Policy (released in 2009) suggests that out-of-centre development should only be permitted if 'there are no suitable within-centre or edge-of-centre sites and there is a demonstrated net community benefit' (Department of Planning (NSW) 2009b, p.24). The Metropolitan Strategy for Sydney to 2036, released in December 2010, has eased this position to focus activity 'in accessible centres and limiting out-of-centre commercial development' (Department of Planning (NSW) 2010f).[96]

The Commission should not overlook the fact the Metropolitan Strategy has <u>not</u> resulted in the rescission of two other significant policy documents. In NSW, Local Planning Directions issued under section 117 of the *Environmental Planning and Assessment Act 1979* state that

> A draft LEP shall locate zones for urban purposes and include provisions that give effect to and are consistent with the aims, objectives and principles of:
>
> (a) Improving Transport Choice – Guidelines for planning and development (DUAP 2001), and

[93] Laarni Bulan, Christopher Mayer, C. Tsuriel Somerville, 'Irreversible investment, real options, and competition: Evidence from real estate development' (2009) 65 *Journal of Urban Economics* 237.
[94] Idiosyncratic risk is the possibility of variation in the returns on an investment flowing from factors specific to that investment.
[95] Laarni Bulan, Christopher Mayer, C. Tsuriel Somerville, 'Irreversible investment, real options, and competition: Evidence from real estate development' (2009) 65 *Journal of Urban Economics* 237, 248.
[96] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments: Productivity Commission Draft Research Report Volume 1* (2011) 247.

(b) The Right Place for Business and Services – Planning Policy (DUAP 2001).[97]

These two documents are clearly very important.[98]

Integrating Land Use and Transport: Improving Transport Choice - Guidelines for Planning and Development describes a centre as

> containing the highest appropriate densities of housing, employment, services, public facilities within an acceptable walking distance - 400 to 1000 metres - of major public transport nodes, such as railway stations and high frequency bus routes with at least a 15 minute frequency at peak times.[99]

Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy identifies preferred locations for large-scale office development and higher order retail, entertainment, commercial and public facilities.[100] Since then the list of major centres in the ILUT has been superseded by the list of strategic centres set out in the 2005 Metropolitan Strategy.[101] This strategy defines 25 current centres and eight emerging strategic centres as part of the NSW Government's 25 year strategy.[102] No specific process is identified for the designation of any further emerging strategic centres in the future. Importantly many areas where high quality public transport is available have not been designated as centres, or have only been designated as lower-order centres. Other regions that are poor in public transport, have less designated centres.

A list of smaller centres ("local centres") across Sydney is also being identified for additional jobs and dwellings over the life of the Metropolitan Strategy.[103] These have been listed in a series of draft subregional strategies.

Given that an estimated 85 per cent of shopping trips made into existing centres are by car, rather than public transport, it is unclear why new retail sites should be exclusively located in areas serviced by public transport.[104] This preludes the location of retail in, say, business parks, where those employed on site might choose to walk to, or catch a shuttle bus to, the local shopping facilities. It would also preclude locating a shopping centre on a major corridor experiencing a high volume of traffic. Shopping centres in such locations can divert cars from the narrow streets of already heavily congested centres such as Burwood and Chatswood.

The policy sets out to influence investment decisions in favour of centres:

> Centres with a mix of land uses are well established in existing urban areas but their success relies on continued investment. Investment confidence must be cultivated through consistent decision-making that supports centres.[105]

The policy's understanding of economics is poor. It does not distinguish between regulatory risk and market risk. In a free market economy, investment decisions are risky. The presence of risk does not

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[97] *Local Planning Directions*, Direction 3.4(4) issued under Section 117(2) of the *Environmental Planning and Assessment Act 1979*..
[98] They have a curious history, because they were released by the government as drafts, in the *Integrated Land Use and Transport* (ILUT) planning package, which was never formally agreed to by cabinet. Yet these two policies have been formalised and do apply by reason of the above direction, even though the related draft *SEPP 66 - Integration of Transport and Land Use* has been withdrawn.
[99] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport*: *Improving Transport Choice - Guidelines for Planning and Development* (2001) 9.
[100] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy* (2001) 8.
[101] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 104.
[102] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy* (2005) 23.
[103] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 93.
[104] This figure is an estimate based on industry observation across a range of major shopping centres. An analysis of Sydney's weekday trips by the Bureau of Transport Statistics shows that 89 per cent of non-walking trips for the purpose of shopping are undertaken by car: *2008/09 Household Travel Survey Summary Report, 2010 Release*. When walking is included as a transport mode in its own right, vehicle's mode share falls to 64 per cent, although it's likely that this under-reports car use because it is confined to weekdays, when public transport is more frequent, and where family members engaged in domestic duties may lack access to a car (due to its use by a wager earner in the household).
[105] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: Improving Transport Choice - Guidelines for Planning and Development* (2001) 27.

preclude an investment decision from taking place. Instead, an investor will seek returns, consistent with the risk. Only if the risks outweigh the expected returns will the investment decision not take place. Removing the risk by assuring potential investors that investment outside the designated centres will not be allowed, is more likely to delay investment, rather than bring it forward.

In any event, we are not aware of any convincing economic analysis that demonstrates that existing centres are so unattractive to consumers that they will only attract investment with a system of regulatory protection.

Case study: The Lower Hunter Regional Strategy

The Lower Hunter Regional Strategy proclaims that it is about

> creating long-term business certainty and attracting more investment and jobs.[106]

Under the strategy 115,000 new dwellings are required in the 25 year period stretching from 2006 through to 2031. However, the Strategy provides that 60 per cent of new dwellings will be provided in new release areas and 40 per cent will be provided in existing urban areas — that is, a 60:40 split in the provision of new dwellings.[107]

The strategy says that:

> *Sufficient* release area land has been identified in the Strategy to supply 69 000 dwellings (60 per cent of *total dwellings required*) (emphasis added).[108]

The NSW Government has asserted that the Lower Hunter region needs 69,000 dwellings in new release areas over 25 years, and has identified "sufficient" land to supply exactly this amount. Neither more or less. The Metropolitan Development Program report confirms the government's approach. It says greenfield lands have been identified with the potential to produce 74,000 homes – just 7 per cent above the anticipated need of 69,000 such homes.[109]

There is almost no margin of error. By way of comparison, when projecting population through to 2031 the Australian Bureau of Statistics (which cautions its projections are not predictions), it prepares three scenarios for each capital city, and the highest population project is 42 per cent above the lowest population projection.[110]

Nonetheless, it is a distraction to focus on the numbers in the overall 25 year plan. The key issue is the timeframe that land is made available. If land sufficient for all 69,000 dwellings were to be made available for development immediately, land available for development would definitely exceed demand in the short and medium term. In such a situation there would be considerable uncertainty as to which land would *actually* be developed in the near future, and this uncertainty would breed competition between landholders looking to sell to or joint venture with developers. As the analysis in section 2.3.2 showed, such competition reduces the prospect of investment in new housing being delayed.

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[106] NSW Department of Planning, *Lower Hunter Regional Strategy* (2006) 1.
[107] Ibid24.
[108] Ibid 25.
[109] NSW Department of Planning, *Metropolitan Development Program 2008/2009* (2010) 238.
[110] The highest projection for Darwin is 42 per cent of the lowest projection for that city. For the ACT the same figure is 32 per cent; for Adelaide the figure is 27 per cent; for Brisbane the figure is 23 per cent; for Perth the figure is 21 per cent; for Melbourne the figure is 12 per cent; and for Sydney the figure is 4 per cent: *3222.0 Population Projections, Australia, 2006 to 2101*. It is evident that the smaller the population unit being examined, the more sensitive long-term projections are to changes in assumptions. This raises significant issues for any long-term strategic land use planning outside of capital cities or across subregions within a capital city.

However, the reality of the Lower Hunter Regional Strategy is that the majority of the supposed 69,000 dwellings will not be green-lighted by authorities for development in the short and medium term. Instead, the Strategy says:

> To initiate the Urban Development Program a working group will be established comprising executive level members from State and local authorities. The working group will help to prepare an *initial staging and sequencing plan*, which will then be reviewed annually based on a Monitoring and Forecasting Program. The Monitoring and Forecasting Program will be prepared by the Department with input from State and local authorities and the development industry, to review housing supply and demand (emphasis added)[111]

The "initial staging and sequencing plan" has not been publicly released, nor have any subsequent versions (if any) been made available. We have seen no evidence of the promised industry consultation. Generally speaking the Department of Planning discontinued its program of high level consultation with industry over demand and supply issues around the time that the Lower Hunter Regional Strategy was finalised.

Nevertheless, it is not enough that land has been identified for release in the strategy. In order for the land to be actually rezoned for development, it must also be sequenced. We aware of landowners who are keen to progress the development of their land (as identified under the Lower Hunter Regional Strategy), but are unable to proceed because it has not yet been "sequenced" by the Department of Planning.

The strategy says that:

> Progress on targets established in this Regional Strategy will be monitored annually. The delivery of new housing and employment lands will also be monitored annually as part of the Urban Development Program, so that an appropriate additional supply of new residential land can be rezoned and brought into supply as needed.[112]

The only annual monitoring that is apparent to the community is the Metropolitan Development Program Report which contains actual dwelling completion figures that are generally at 18 months old by the time they are released. However the government does not appear to have accelerated the sequencing process in response to the lack of development activity clearly evidenced by the Metropolitan Development Program Report.[113]

Essentially, the government will not allow some landowners, who wish to proceed, to commence the process of statutory and infrastructure planning. The government is using its powers to delay some land owners from commencing work, on the basis that other land release sites have not yet been fully developed. This action reduces competition between landowners within the Lower Hunter region.

The landowners that are able to proceed have certainty that others may not proceed until after they have completed their development, but that the conferral certainty serves no public interest purpose (as it delays, rather than bringing forward private sector investment).

Modern public policy does not generally seek to limit the potential number of suppliers or quantity of a product to predicted need. Imagine if the government passed a law that said we will only have two domestic airlines, and each one may only offer a certain number of seats for sale?[114] While empirical evidence might suggest the market only requires two domestic airlines and the number of seats allocated may align with anticipated demand, the airlines would effectively be shielded from competition. That's because there would be no risk of new entrant airlines attempting to wrest market share from the incumbents. The two airlines that benefit would under very little pressure to provide a

[111] NSW Department of Planning, *Lower Hunter Regional Strategy* (2006) 25.
[112] Ibid 44.
[113] Under the strategy an average of about 4,600 new dwellings - apartments or houses - should be built each year, including about 2,760 in greenfield areas. The Department of Planning's Metropolitan Development Program report tells us that just 2,566 new dwellings were built in 2006-07 and 2007-08. Of those, only 485 were in new development greenfield areas - that's less than 250 a year.
[114] There used to be such a law when airlines were regulated and it was reappealed in the 1980s – no-one looks back to that era.

high quality, low cost service. Neither would need to fear the prospect of a young upstart company coming in and breaking up their duopoly.

A market where market share is simply divvied out amongst a fixed number of land owners is not a *competitive* market. If land owners were to do that themselves it would be subject to action under trade practices law. It should not be any more acceptable merely because the government does it via a regional strategy. **A land use strategy should provide *more* land for urban development than might be considered strictly necessary. This creates the possibility of competitive tension between land owners and developers who acquire the right to develop land.**

The absence of the threat of competition has increased economic incentives for landowners to hold-out and refuse to enter into agreements with developers to realise the development potential of their land.

2.3.3 Efforts to promote investment by reducing market risk are misdirected

Participants in the planning system often complain about uncertainty. It is true that there is too much uncertainty in the planning system and some types of uncertainty are a reason for a lack of investment, or may lead to investment only taking place when there is a sufficiently high risk premium.

However, policy-makers should not take such complaints as a call to seek to eliminate all risk (and therefore all uncertainty) from the development process. The process of urban development is fundamentally a higher risk business, at the opposite end of low-return, low risk business opportunities such as utility provision.

Policy makers must distinguish between regulatory risk and market risk. The planning system should seek to minimise the former, but avoid tampering with the latter.

Eliminating a regulatory risk means, for example, that a strategy identifies certain land for urban release and government agencies will actually work to make this happen. If this is the case, the strategy has played an important role in reducing regulatory risk, and therefore it has lowered the risk premium that is needed for the landowner/developer to attract capital for the development of the land.

On the other hand, a landowner whose land has been flagged for release under a strategy, might also want market risk eliminated. They might therefore insist that the land outside the strategy should not be released until land within the strategy is fully developed. They might also demand that previously published sequencing plans be rigidly adhered to. This would be in their interests because it would reduce their competition. Such a public policy approach would reduce the market risk they face when seeking the development land. However, does the reduction in the market risk mean that they will proceed with the investment in a timely way? The academic and empirical analysis suggests not (see sections 2.3.1-2.3.2 above).

Additionally, there will be instances where capital investment can and should take place in spite of regulatory risk. For example, if the strategy has not provided for sufficient land supply, and the market is severely constrained, there is likely to be rapid escalations in rents and prices. In such circumstances a landowner/developer may be willing to spend money to seek to develop land, even though the land has not clearly identified a sequencing plan or a strategy.

Clearly they will face higher regulatory risks (because approval for a strategy-inconsistent development is less certain), but the land supply shortage has pushed up rents and prices, so they may feel that the increased regulatory risk will be offset by a higher anticipated rate of return. There is nothing wrong with a developer/landowner acting in this way. It is in fact desirable.

The reality is, strategies and sequencing plans are often not revised, even in the face of clear evidence that they are wrong and creating shortfalls in supply.

The last thing policy makers should be doing is dissuading people from seeking to develop their land to satisfy unmet demand, merely because the land was not flagged in a strategy.

2.4 Strategy governance

A strategy document is only useful if there is a genuine commitment to its implementation by all the relevant authorities. The difficulties that can emerge when there is insufficient commitment and/or co-ordination across state government agencies have recently been highlighted by the Commonwealth:

> A major failing with many metropolitan plans is poor implementation due to inadequate administrative processes or inadequate policy commitment. This creates uncertainties and inefficiencies for all stakeholders, whether it be a local government seeking certainty of state investment in infrastructure to support an urban growth area; a developer wishing to market land as being close a public transport; individual community members making choices of where to live based on what facilities and services they will have access to; or lack of protection from encroachment of incompatible uses resulting in major pieces of economic infrastructure, such as a freight corridor or airport, not being able to be used to their maximum productive potential.[115]

2.4.1 State agencies

In NSW the leading implementation agency is the NSW Department of Planning, but other agencies also play a vital role such as NSW Treasury, Transport NSW, the Roads and Traffic Authority, the Department of the Environment, Climate Change and Water, NSW Health, the Department of Education.

The Commonwealth observes that:

> Ideally state agencies/departments, with input from relevant external stakeholders, including local government, would contribute to the development of a state development strategy and infrastructure implementation plan, which works in conjunction with a metropolitan/regional scale plan.[116]

To continue our example of the Lower Hunter Regional Strategy: this process did not take place prior to the preparation and release of the strategy. Instead, the existing Lower Hunter Strategy merely invokes the previously published *State Infrastructure Strategy 2006–07 to 2015–16* and identifies pre-existing infrastructure projects in the short-to-medium term that (among other things) support population growth and demographic change in the Lower Hunter.[117]

The lack of agreement between state government agencies *after* the finalisation of the Lower Strategy has been evidenced by the difficulty individual developers have had determining what, if any, payment should be made to government as an appropriate contribution to state infrastructure.[118] This process was plagued by disagreement and dispute – not only between developers and agencies, but between the agencies themselves.

Arguably, after the finalisation and publication of the Lower Hunter Regional Strategy, the NSW Government *did* undertake a more intensive process of infrastructure assessment. However, the outcome of this process was not published until January 2011, more than four years after the Lower Hunter Strategy itself was finalised.[119] It is not yet clear whether or not this will represent the final word on the subject of infrastructure funding and delivery.

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[115] Australian Government, Our Cities: *The Challenge of Change: Background and Research Paper 2010* (2010) 112
[116] Ibid.
[117] NSW Department of Planning, *Lower Hunter Regional Strategy* (2006) 43.
[118] The Lower Hunter Strategy provided that where development or rezoning increases the need for state infrastructure, the Minister for Planning may require a contribution to the infrastructure having regard to the State Infrastructure Strategy and equity considerations: NSW Department of Planning, *Lower Hunter Regional Strategy* (2006) 11.
[119] On 21 January 2011, the NSW Government released the public consultation documents for its proposed $8,800 levy on new homes in the Lower Hunter and a $42,100 levy on each hectare of new Lower Hunter industrial land. The material included a brief schedule of state infrastructure that was said to be attributable to the 25 years worth of growth provided for under the Lower Hunter Strategy.

Even now, the published material only includes a single A4 page for each of the Lower Hunter and the Illawarra.

There are no timelines specified for the delivery of infrastructure – other than a broad-brush 25 year horizon for the Lower Hunter, and an even more relaxed 40 year horizon for the Illawarra. The documentation directs the reader to 'Budget Paper No. 4' to see the government's firm commitments, but this document does not even mention most of these projects.

No scope of works is presented or defined for named projects. Some descriptions are very generic, so it will be difficult to hold the government to account. For example the list of infrastructure includes upgrades of two anonymous sections of the (very long) Princes Highway that have been valued at $14 million. It is not clear, for example, what intersection improvements are included (if any) in the Newcastle Link road upgrade.

The government has disclosed how much of each infrastructure project it thinks should be recovered through levies, but it has not disclosed the full cost of these items. This means, in most cases, it's not possible to tell how the cost of the project has been apportioned between existing residents and new residents.

Financing costs have been built into the figures - apparently to take into account the fact that some infrastructure will be delivered prior to the receipt of levies. However no information has been presented as to which infrastructure has what financing component. Nothing is said about how much is to be borrowed, the applicable interest rate and the expected pay-back period, or anticipated take-up rates.

2.4.2 Local government

Under the planning laws, local government also has a vital role to play in the implementation of the strategy.

In NSW local councils are charged with:[120]

- reviewing and revising local environment plans and development control plans setting (setting out controls such as minimum and maximum lot size, height controls, site coverage requirements) that may impact on the implementation of the strategy;
- determining whether individual rezoning proposals (necessary to translate the broad text of the strategy into legally enforceable land use controls) will be considered by the NSW Department of Planning under the "gateway" process;
- assessing individual development applications whose capital investment value is less than $100 million (and the new state government has promised to increase the role of local government further);
- formulation of local council development levies ("section 94 contributions") which, if set too high, or are uncertain, can impact on the commercial viability of development; and
- delivery of infrastructure that may be important to the success of development plans.

The Commonwealth recently observed that:

> A factor in the successful implementation of the approach to local coordinating planning with State budgets ... is likely to be the number of local government authorities within each city region. The fragmentation of the capital cities, except Brisbane, into numerous councils, and similarly some of the smaller regional cities like Wollongong, Newcastle and Launceston having multiple councils, presents a major challenge to the effective management of cities.[121]

[120] For example, in the case of the Lower Hunter Regional Strategy, the Lower Hunter has five local councils (Newcastle, Lake Macquarie, Port Stephens, Maitland and Cessnock).
[121] NSW Department of Planning, *Lower Hunter Regional Strategy* (2006) 113.

The problem of fragmented local councils in the implementation of broader community-wide goals has long been a subject of analysis. Many urban researchers have argued that the planning system is a "closed system decision making process."[122] Such a system is characterised by a defined set of stakeholders that can directly influence the outcome of a decision.[123]

Development systems become closed primarily through two factors – the basic preferences of the local voting population, who tend to be averse to change, and the planning laws, which tend to magnify the preference of those resident voters.[124] Existing home owners in a local area have a financial incentive to discourage new construction because it reduces the scarcity value of their property asset.[125] Incumbent business operators, who play an important role for local government at election time, have strong vested interest in mobilising campaigns against new developments that may place them under competitive pressure.[126]

This closed system approach tends to exclude consideration of the interests of future residents, neighbouring local government areas and non-resident third parties.[127] This becomes particularly problematic when communities are faced with accommodating innovative development proposals.[128] By their nature, innovative proposals break from traditional existing patterns of development.[129] Yet, planning procedures give the most weight to participants with an inherent interest in preserving existing development patterns, and the least to the future residents or the beneficiaries of community changes.[130] Growth management and consistency requirements create a presumption against change.[131]

Planning authorities will reduce their own legal risks if they continue to enforce the status quo, but considerable litigation and judicial review if they pursue policies that favour spontaneous or unanticipated changes.[132]

Local councils, as elected institutions, are politicised. By their very nature their ideology is subject to change with the election cycle, which is usually not aligned with any forward looking strategic plan. The evidence consistently shows that political ideology can influence decisions made concerning the regulation of land use.[133] It is quite likely that, at any given point time, the ideology of at least some councils within a region will not align with the underlying philosophy inherent in the regional strategy.

At present in NSW, other than the Part 3A process,[134] there is no mechanism to ensure that the high level approach taken by the state in the interests of the whole region, is adopted by each of the local councils within the region.

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[122] S Staley, "Markets, smart growth and the limits to policy", *Smarter Growth* (2001) 201-217.
[123] Ibid.
[124] S Staley and EW Claeys, "Is the future of development regulation based in the past? Toward a market-oriented, innovation friendly framework", *Journal of Urban Planning and Development* (December 2005), 202-213, 203.
[125] William Fischel, 'Does the American way of zoning cause the suburbs of metropolitan areas to be too spread out?' In: Altschuler, Alan et al. (Eds.), *Governance and Opportunity in Metropolitan America. National Academies Press*, Washington, pp. 151–191; Fischel, William A., 2001. ; Carolyn Dehring, Craig Depken, Michael Ward, 'The Homevoter Hypothesis: How Home Values Influence Local Government Taxation School Finance and Land-use Policies' (2008). 'A direct test of the homevoter *hypothesis' Journal of Urban Economics* 64, 155.
[126] A Fels et al. *Choice Free Zone* (2008).
[127] Ibid. See also: Edward Glaeser, Bryce Ward, 'The causes and consequences of land use regulation: evidence from greater Boston' (2009) 65(3) *Journal of Urban Economics* 6 265.
Laarni Bulan, Christopher Mayer, C. Tsuriel Somerville, 'Irreversible investment, real options, and competition: Evidence from real estate development' (2009) 65 *Journal of Urban Economics* 237.
[128] Ibid.
[129] Ibid.
[130] Ibid.
[131] Ibid,
[132] S Staley and L Gilroy, "Smart Growth and housing affordability: Lessons from statewide planning laws", *Policy Study No 287*, Reason Foundation, Los Angeles.
[133] Jeffrey Dubin, , Roderick Kieweit, Charles Noussair, 'Voting on growth control measures: preferences and strategies'(2009) 4(2) *Economics and Politics* 191; Elisabeth Gerber, Justin Phillips, 'Development ballot measures, interest group endorsements, and the political geography of growth preferences' (2003) 47(4) *American Journal of Political Science* 625; Matthew Kahn 'Do liberal cities limit new housing development? Evidence from California' (2011) 69 *Journal of Urban Economics* 223.
[134] Part 3A of the *Environmental Planning and Assessment Act 1979*. The new state government has pledged to repeal this aspect of the planning law.

The Commonwealth has observed that

> there is debate over wasted resources and opportunities associated with smaller local authorities versus a local desire for adequate representation and decision-making power.
>
> In cities that have many small councils there may be merit in a national and community discussion involving all levels of government on reforming Local Government through the creation of larger entities that can plan, finance and coordinate over larger population areas, and achieve greater economies of scale in service delivery and asset management.[135]

In the absence of a single council for regions subject to a strategic land use plan, other changes to the planning system will be required to overcome the governance problems identified in both the academic literature and by the Commonwealth Government.

2.4.3 Improving governance and implementation

The Productivity Commission suggests that strategic plans should not be aspirational and should be given statutory status. We agree. We thought it might be helpful to spell out what we mean by statutory status (it can mean different things to different people; for example mere reference in the statute would have little effect).

The NSW planning system currently works by prohibiting all development that is not identified as being permitted. The tools for these prohibitions are "environmental planning instruments". These are generally known as either "state environmental planning policies" (SEPPs) or "local environmental planning plans" (LEPs).

Regional strategies identify the *future* development needs of a community, and therefore, the bulk of the development envisaged is generally prohibited by existing environmental planning instruments.

It might be natural to assume that, when a strategy is finalised and published, it is published as an SEPP, so that its provisions have immediate effect under the state's planning laws. However, it is *not* the practice in NSW. Instead, these documents exist as non-statutory ghosts outside the explicit terms of the Act.[136]

As a result such strategy documents, while lauded by government as evidence of their forward planning, may ultimately count for nothing when comes time to implement to strategy by making decisions under the *Environment Planning and Assessment Act*.

For example, if a developer is ready to proceed with a housing development that was envisaged under a strategy, a casual bystander might assume that he or she could simply lodge an application. Regretfully, this is not how things work. The Land and Environment Court has made it clear that an unequivocal environmental planning instrument takes precedence over non-statutory regional planning policies.[137] So if land identified for urban release in a regional strategy is current zoned *rural* under an environmental planning instrument, a developer has no right to lodge an application for approval of a non-rural development.

In NSW a meaningful application can only be made under Part 4 (the conventional development approval stream) if the local council, and then the Minister of Planning, has agreed to rezone the land and this process has been completed. The power to grant a rezoning is more in the nature of a quasi-legislative or policy making power rather than an administrative decision.[138] Accordingly, a decision-

[135] Australian Government, *Our Cities - building a productive, sustainable and liveable future* (2010) 53.
[136] *Direct Factory Outlets Homebush v Strathfield Municipal Council* [2006] NSWLEC 318 [24].
[137] Ibid [26].
[138] *Bienke v Minister for Primary Industries and Energy* (1994) 125 ALR 151, 163; *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31, 48; *Save the Showground For Sydney Inc v Minister for Urban Affairs and Planning* (1997) 95 LGERA 33, 53.

maker is not compelled to rezone land in response to a request from the applicant, even when acceding to such a request would give effect to a non-statutory strategy.

An alternative to the cumbersome process of first securing a rezoning and then making a development application, is Part 3A. An application can only be made under Part 3A if the Minister for Planning has elected to authorise the making of a concept plan application. This is a discretionary decision and, again, a Minister cannot be compelled, through any legal mechanism to exercise this discretion in favour of an application, even when it would give effect to a non-statutory strategy. In any event, NSW's new government has promised to repeal Part 3A.

The difficulty is that a regional strategy, which purports to be forward looking may not survive a change in government, a change in minister, or even a change in key Departmental officials. The strategy need not be formally abandoned; all that might happen is that the minister ceases use it as a reference point for his or her decisions. (This certainly was the case with the 2005 Sydney Metropolitan Strategy, which fell out of favour with government after the key personnel who authored the strategy moved on.) Even when the same government or minister remains in office, local councils are independent, yet are charged with making discretionary decisions by planning laws, without any obligation to actually implement the strategy.

In NSW the substance of a new strategic plan should, on finalisation, immediately be transferred into a state environmental planning policy (SEPP) (to use the NSW terminology). **In fact, the strategy and the draft SEPP should be exhibited and finalised in tandem.**

The Minister, local councils and other consent and concurrence authorities (such as the joint regional planning panels, the Planning Assessment Commission and the Roads and Traffic Authority) **should be required to take into account provisions in a strategy favouring approval**, as embodied in the SEPP, **in determining development applications.** It should not be necessary to pursue a rezoning in order to secure a development approval consistent with the strategy (although at times, formal rezonings may still need be pursued for land valuation and financing reasons).

An obligation to approve, in-line with a strategy, would be meaningless if development was approved with conditions that made desirable projects commercially unviable. As a result, **such an obligation to approve would necessarily be accompanied by an explicit duty for a consent authority to consider the financial constraints on the economic viability of a desirable planning development when the applicant has elected to provide information on the subject.**[139]

An obligation to approve would also not be fully effective, given the subjectivity inherent in approval decisions, unless there is also an opportunity for the applicant to pursue a full merit appeal review to body independent of the original decision maker.

[139] Under existing planning law, a consent authority is lawfully able to consider whether desirable development is not economically feasible, and modify apply planning requirements, so as to ensure that such development is still able to take place (*R v Westminister City Council, Ex parte Monahan* [1990] 1 QB 87. This case has been applied in the context of NSW planning law by both the Land and Environment Court and the Court of Appeal. *City West Housing Pty Ltd v Sydney City Council* [1999] NSWLEC 246 [139]; *Randall Pty Ltd v Willoughby City Council* [2005] NSWCA 205 [36] (Basten JA with Giles and Santow JJA agreeing).[139] However, under the current law, a planning authority is under no compulsion to consider whether conditions sought by the authority will render desirable development economically unfeasible. That is, a decision to consider economic feasibility does not invalidate their decision, but there is not necessarily any positive obligation to consider economic feasibility issues if the consent authority is reluctant to do so.

3. Viability of centres

The Productivity Commission says that:

> Restrictions aimed at protecting the viability of existing businesses are usually unnecessary and unjustifiably restrict competition.

We strongly agree with this finding. However we take issue with the Commission's follow up point:

> Those [restrictions] aimed at preserving the viability of centres *may be justified* if they produce a net benefit overall and are considered at a strategic planning rather than development assessment stage (emphasis added).[140]

In our view, **it is better to avoid considering the "viability of centres" at any point in the planning process**, for reasons we detailed at length in our original submission. **It is impossible to consider the issue of "viability of a centre" without considering the trade and adverse impact of competition on individual businesses. It remains our view that the planning system does a very poor job of assessing these matters.** This is true whether the decision is made in development assessment, zoning or in strategic land use planning.

3.1 Case studies where strategic land use planning protects centre viability

It is worth considering circumstances where decisions are currently made at a strategic planning level to "protect the viability of centres". In each case the planning authority concerned would maintain that the controls produce a "net benefit" overall.

3.1.1 Case Study - City of Sydney Draft LEP

For instance Sydney City Council has placed their new draft local environmental plan on exhibition. The *draft Sydney Local Environmental Plan 2010* includes a mixed use land use zone. Zone B4 Mixed Use applies to a large portion of the southern area of the Sydney Local Government Area in the vicinity of Green Square. Some zone objectives and permitted land uses may support business development in this zone. The zone objectives include:

> To provide a mixture of compatible land uses.
>
> To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.[141]

These objectives are useful and coupled with a wide range of permitted land uses would make this zone attractive for development. Other than heavily polluting and hazardous industries, all manner of land use is permitted. Unfortunately, the mixed use zone includes a final zone objective which says

> To ensure uses support the viability of centres.[142]

This objective is clearly one that has been introduced to ensure that new development in a mixed use zone, even if permitted, can be restricted to support the viability of centres elsewhere. This objective is an example of how the outcome of a strategic planning process (i.e. a zoning plan) can be used to protect existing businesses located within existing centres.

This protectionist principle is further reinforced when reference is made to the Special Character Areas - Retail Premises Maps attached to the draft *Sydney Local Environmental Plan*. Sheets CL2_017[143] and

[140] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments: Productivity Commission Draft Research Report Volume 1* (2011) 231.
[141] cl 2.6BB, Part 2 - Land use table. Zone B4.
[142] ibid
[143] Special Character Areas Map Retail Premises Map - Sheet CL2_017

CL2-018[144] of this series serve as good examples of the planning system being used to further restrict development and competition. These maps show a hatched overlay around an existing local centre. The hatched area sits across a mixed use zone that surrounds the centre. The meaning or impact of this hatched area is determined with reference to clause 7.23 of the *draft Sydney Local Environmental Plan 2010*. This clause says:

> **Large retail development near Green Square Town Centre [local]**
>
> (1) This clause applies to land identified as Category 2 on the Retail Premises Map.
>
> (2) The objectives of this clause are as follows:
>
> (a) to promote the economic strength of Green Square Town Centre and planned local centres by limiting large-scale retail development to those centres,
>
> (b) to support the provision of community facilities and infrastructure in the Green Square Urban Renewal Area.
>
> (3) Development consent must not be granted to development on land to which this clause applies for the purposes of retail premises with a gross floor area greater than 1,000 square metres.[145]

The effect of this clause is obvious. Even where retail land uses are permitted, the likelihood of competitive retail development is reduced by limiting the amount of floor area permitted in a location to protect existing and planned centres from competition.

The Economist Intelligence Unit cost of living survey found that, in 2007, prices in Sydney for food staples were on average 22 per cent higher in mid-priced stores than in large format stores.[146] For household and personal care products the prices were even higher - between 33 and 39 per cent more expensive on average.

The evidence clearly shows that large format chain stores are delivering groceries to Australian households cheaper than smaller independent stores. This should not come as a surprise. Large format chain stores have the benefit of scale in their supply chain, with an increased ability to negotiate on behalf of their customers, with international food manufactures. They have the capacity to run a just-in-time distribution operation with high frequency delivery of packaged and fresh food to supermarkets, reducing the need for storing merchandise on site and increasing the likelihood that the full range of products will be available. A larger floor space means that the cost of many fixed overheads is defrayed over a greater sales volume.

True supermarkets or large format stores range from 1,500 square metres (six checkouts) for a typical Aldi or IGA Supa store to 2,500 to 3,500 square metres (12 to 16 checkouts) for a full-line Woolworths, Coles, Franklins or Superbarn. By limiting retail floor area to 1,000 square metres or less in some parts of the mixed use zone, opportunities for price competition amongst retailers (and consumer choice) are reduced.

3.1.2 Case Study - Proposed Eastgardens Development

In another recent example, the NSW Government has rejected to redevelop a site at Eastgardens for 15 towers containing around 1,000 apartments and 35,000 square metres of retail floor space.[147] It appears that the proponent had sought ministerial authorisation for a concept plan application to be made under Part 3A and this authorisation was denied. A concept plan application is effectively an

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<http://www.cityofsydney.nsw.gov.au/Development/documents/CityPlan/DraftLEP2011/Sheet%20017/COS_CL2_017.pdf> at 30 March 2011.

[144] Special Character Areas Map Retail Premises Map - Sheet CL2_018 <http://www.cityofsydney.nsw.gov.au/Development/documents/CityPlan/DraftLEP2011/Sheet%20018/COS_CL2_018.pdf> at 30 March 2011.

[145] *Draft Sydney Local Environmental Plan 2010* cl 7.23

[146] A Fels; S Beare & S Szakiel, *Choice Free Zone* (2008) 62-64.

[147] <http://www.urbantaskforce.com.au/attachment.php?id=4100> at 30 March 2011.

application for a rezoning, so this was a strategic planning decision, rather than a development assessment decision.

As the site is currently zoned industrial, the applicant was unable to proceed. The Department of Planning did not accept the proposal because they wanted to retain significant employment land (how many people would be employed on 35,000 square metres of retail, versus existing industrial uses?). Furthermore there seems to have been concern over the suitability of the proposed uses and the "impacts of new retail uses on surrounding retail centres".[148] A major shopping mall is located in the immediate vicinity of the site. It is clear that the rezoning was refused, in part, because of the competition it would present to the existing shopping mall.

3.1.3 Case Study - Liverpool Business Centres and Corridor Strategy

A further typical example of strategic land use planning directed to "protect the viability of centres" in the *Liverpool Business Centres and Corridor Strategy*.[149] The strategy doles out projected growth in retail floorspace amongst landlords within the local government area:

- Liverpool Central gets "a new supermarket anchored centre with a retail floorspace of 5000m²";
- Liverpool North West gets "a medium-scale supermarket in the range of 2,800 to 3,000m²", with development of a new shopping centre of about 1.5 to 2 hectares to be located sufficiently away from the existing Carnes Hill, Hinchinbrook and Miller shopping centres "to ensure that impacts are reasonable";
- for the period of 2006 to 2031, Miller or the Valley Plaza shopping centres are to be given (and limited to) an additional 5,000m²;
- a new local centre with 5,000m² retail floorspace should be developed and Council should locate an appropriate site for this centre;
- for the period of 2006 to 2031, the new Middleton Grange shopping centre should comprise of almost 5,500m² and the retail floorspace of Carnes Hill shopping centre should be supplemented with an additional 5000m²;
- During the 2006-31 period, Moorebank may increase its retail floorspace by 4000m², Chipping Norton by 3000m² and Holsworthy by 1300m².

Strategic land use plans (and their associated studies) for retail development, such as Liverpool's, suffer from many flaws. These studies and plans are clearly geared to the idea that land supply should merely "accommodate" demand. The strategies seek to ensure that floorspace supply can be matched to market demand through regulatory controls. This preserves the market share of each centre, and the desired hierarchy of centres (for instance in the above example, Moorebank is assigned a paramount role, no clear reason is advanced why this is necessary or in the public interest).

Strategies that mechanistically dole out anticipated demand amongst an oligopoly of landlords are based on consultants' reports generating demand predictions. This suggests a process by which the regulatory system neatly serves up just enough zoned land to meet the requirements of market demand – not too much and not too little. Frankly, this is impossible.

3.2 Over-reliance on forecasted retail demand and its consequences

It is difficult for anyone, including government agencies, to accurately predict the shape of the retail and commercial sectors in five years, let alone, ten or twenty years. It is possible that some or all of the floorspace projected for a centre, local government area, subregion or region may not be economically feasible.

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[148] Ibid.

[149] <http://www.google.com.au/url?sa=t&source=web&cd=1&ved=0CBYQFjAA&url=http%3A%2F%2Fwww.liverpool.nsw.gov.au%2FLCC%2FINTERNET%2FtrimDownloadDocument.aspx%3Fnumber%3D236768.2007&ei=AWmUTfeDMZGWccLzyYwH&usg=AFQjCNHxdBUjsi2YI_lRIts-AFSgDCd8Iw> at 30 March 2011.

The 2005 Sydney Metropolitan Strategy addressed this issue when it said that:

> The supply of land available for development should always *exceed* market demand to ensure that land values are not unreasonably raised and lower the intended level of development (emphasis added).[150]

We note that subsequent NSW Government policies have not adopted this approach. Perhaps one reason why is revealed by a NSW Treasury submission to the NSW Department of Planning on centres policy, dated 13 May 2009. This document said that:

> An earlier draft of the Centres Policy included a policy position that the supply of floorspace for retail should always exceed demand. This is an inefficient way to address the notion that planning laws are restricting retail competition. Firstly, an excess supply of retail land may be at the expense of other sectors. Secondly, a policy position of perpetual excess supply will place continual downward pressures on retail land prices. This objective should not be reflected in any aspect of retail planning policy. [151]

This policy view is flawed for two reasons.

Firstly, in a more flexible planning system, with multiple permitted uses in each zone, merely because a zone permits retail development does not mean that it precluded development for entertainment facilities, office development, light industry or residential development. Even under the Department of Planning's highly prescriptive Standard Instrument the zones that do permit retail are capable of permitting a variety of other uses too (if planning authorities let them). There is no reason why allowing a plentiful supply of land on which retail development is legally possible should prevent other development occurring where that is the highest and best use of the land.

Secondly, the assertion that strong supply will place "continual downward pressures on retail land prices" and that "[t]his objective should not be reflected in any aspect of retail planning policy" betrays a fundamental misapprehension of both the proper purposes of the planning system and basic land economics.

The planning system is not supposed to be used to manipulate land value. While the planning system changes land values through its regulation, in theory, this is an unintended by product of its real purpose, which is to protect the community from unacceptable external costs generated by the decisions made by private individual and corporations seeking to maximise their own welfare. Nonetheless, it does not surprise us to find evidence that policy makers have an agenda to manipulate property prices through restrictive zoning. We have also believed that this was occurring. We assume that they are doing this out of a misplaced belief that rationing land tightly props up property values and therefore land tax and stamp duty levies. However, such a view is mistaken, because while the value of some land is propped up, other land values are depressed. If land was able to be used at its highest and best uses more consistently, overall land values would be higher, and land tax and stamp duty revenues would be higher too.

The NSW Treasury position revealed in this letter is nothing more than a transparent attempt to protect the land values of a small number of oligopolistic landlords, at the expense of a wider group of property owners, and the broader economy.

In any event, this would have to be the only area of public policy where a Treasury agency advocated rationing supply through regulatory intervention to avoid normal market activity placing the standard downward pressure on prices. We believe no special case can be made out for regulatory support of some retail land values in this way.

More generally it needs to be said that the market is far more unpredictable than strategic plans for retail assume. Additionally, at a given point in time, it is possible for different people to reach different conclusions about the strength of market demand. There is no certainty that any business or planning authority could have arrived at the right figure.

[150] Metropolitan Strategy – Supporting Information 123.
[151] A copy of this document is annexed to this submission.

Some businesses may choose to compete head-to-head with an existing business that is doing a poor job for consumers. The public interest favours this occurring, even when there is a risk that one of the two businesses may ultimately fail because there is insufficient demand to support both. In any event, the potential threat of a new business entering the local market is often enough to ensure that incumbents strive to do their best for consumers.

We note the following problems with the consultant's reports which underlie these processes (as typified in Liverpool case study section 3.1.3 above):

- Floorspace demand assessments will be partially based on population projections. Population projections can be subject to quite significant revisions over time, based on the uncertainty of key inputs, such as immigration levels, interstate and interregional migration, fertility rates, mortality rates, household size and housing supply. Population projections are not intended as predictions or forecasts, but are illustrations of growth and change in the numbers of households and families which would occur if certain assumptions hold. There is no way of measuring the probability of the assumptions' accuracy.
- The Australian Bureau of Statistics copes with the inherent uncertainty of population projections by providing alternative projections (each of which it readily concedes may be incorrect), however councils and planning authorities typically releases and relies on a single projection, creating a misleading impression of certainty, when no such certainty exists.
- Floorspace demand assessments are also partly based on the historical behaviours of consumers at given levels of income. The actual levels of income may be more or less than originally projected, and consumer behaviour may change (particularly in response to new technology, formats, competition or services) in ways that are inconsistent with historical averages.
- The composition of individual households – mainly the balance between households occupied by individuals, family and shared houses in the population have the potential to significantly change – this will impact on retail consumption patterns over time.
- Assessments of anticipated supply will often be inaccurate because of lack of consistent and complete data on floorspace supply in the pipeline (particularly infill land), uncertainty about the rate of development and the production capacity of the construction industry. Previously when the Australian Bureau of Statistics recorded floorspace, their figures were notoriously inaccurate (whole lots were recorded, plant nurseries used their garden areas, warehouses were included in retail figures, etc).
- The particular needs of new entrants and their willingness to fight head-to-head with incumbent retail players is unlikely to be reflected in any analysis prepared prior to the new entrant seeking to establish themselves in the market.
- Typically the time lag between an assessment being carried out and its actual implementation in a finalised zoning scheme will be considerable, by which time it may already be out-of-date.
- The most wonderfully accurate supply and demand assessment is likely to be outdated within three years of its preparation.

Strategic plans assume that floorspace demand and supply analysis give an easy answer to the community's social and economic needs. The value in such an analysis is not that it will give you a true picture of the future, only that it will go some way to mitigating the need for the government and private sector to deal with some time-consuming and resource-intensive spot rezonings. **We anticipate that spot rezonings are going to continue to be crucial in ensuring that there is sufficient retail and commercial floorspace available to the community.**

Strategies should provide for minimum (not maximum) amounts of retail capacity, but planning authorities should be expressly encouraged to provide development capacity well in excess of the minimum target. Any floorspace target that acts as a defacto ceiling on development will be used by incumbent landlords to lock out competition. That is, they will put in development applications to expand their existing shopping centres and 'use up' the floorspace provided for in strategies. The only

ceilings that should imposed on retail floorspace supply should be those related to infrastructure capacity in a given area, amenity concerns, etc. These factors are often best considered in development assessment.

We note that in Victoria, South Australia and Western Australia floorspace demand and supply assessments have been used to limit, rather than permit, retail development.

We urge the Commission to recognise that any retail floorspace and supply demand assessment will always be inadequate and is unlikely to truly predict the needs of the community. Any assessment of the demand depends on a series of assumptions and that the outcome of assessments can be highly sensitive to the assumptions that are made. It is often not possible to decide which assumptions are correct and as a result different experts may come to different conclusions about the level of demand.

Planning authorities should be expressly encouraged to provide development capacity well in excess of the minimum target. As long as they are trying to "protect the viability of centres" they will avoid doing this.

3.3 Planning law should distinguish between legitimate and illegitimate considerations

When the planning system seeks to "protect the viability of a centre" it works to stop development that may be entirely suited to a particular location, because government planners simply believe the development should be located on someone else's land.

For example, a planning authority may concede the need for retail premises to be permissible in a location near a train station, but may believe that retail premises on a larger scale (i.e. a supermarket) is not needed *at the given location*. Typically this will be because of the planning authority's view that there is still development capacity at some "higher order" centre within the region for additional supermarkets. The *need* for supermarkets (in a general sense) is not disputed, nor is the *need* for retail near the given train station. Nonetheless, the planning system has formed a view that the location is not suitable for retail on the scale of a supermarket.

In this example, the planning authority should be held to be acting illegitimately because the *purpose* of denying the given locality a supermarket was not in the public interest. That's because the decision on location and scale was based on a view that the supermarket should be located elsewhere, rather than a consideration of the impacts a supermarket would have on the urban environment at the given location.

Planning law should distinguish between <u>legitimate</u> and <u>illegitimate</u> reasons for the planning system to direct the location of retail, office and entertainment development in strategic planning.

Legitimate reasons should be those that are set out in appropriate criteria. We would suggest the "suitability criteria" (with the exception of one point on competing land uses) on pages 11-12 of the *Draft Centres Policy* released by the NSW Department of Planning in April 2009. These criteria are:

- access to public transport, or the infrastructure capacity to support future public transport;
- good pedestrian access;
- good road access for employees, customers and suppliers and, where necessary, capacity to provide new road infrastructure;
- close proximity to local labour markets with the skills required by business;
- urban design opportunities that create the potential to integrate with surrounding land uses;
- potential to increase the amenity of the local area;
- capacity to contribute to environmental outcomes; and/or
- environmental constraints, such as flooding.

It is not practical to comprehensively identify all possible (for practical and political centres in any land use strategic planning exercise; such exercises should merely establish broad criteria, such as that listed above, that could inform rezoning decisions.

***Illegitimate* reasons should be those that seek to force development in other locations in the guise of more efficiently utilising under-used infrastructure at those locations.** This forced development occurs by banning - or restricting the scale - of competing development, so as to favour development in the preferred location. Such measures are contrary to the public interest for three key reasons.

Firstly, banning a development in one locality does not necessarily mean the development will proceed in the planning authority's preferred location. If the Productivity Commission concedes that planning authorities can still prohibit development in one locality in the name of funnelling it to another locality to "protect a centre" it will be subscribing to this fiction.

Often there will be sound commercial reasons why the developer has decided not to develop on the land nominated by the planning authority. This could be the price demanded by the landholder, but also could be due to factors such as the existing levels of road congestion, travel time for the likely customer base, car parking limitations, lack of pedestrian traffic, etc. Important projects, and therefore economic and social benefits, are likely to be lost to the community as a whole because the commercial opinion of a planning authority on the viability of development will often not match up with the private businesses that have the access to private capital.

Secondly, action of this kind by a planning authority confers excessive market power on landholders in the authority's preferred location. With few or no landholders competing against each other, landholders do not need to price their land competitively to attract a development proposal. They are also more likely to let a developer walk away when they believe the planning system will prohibit the same development happening anywhere else within the local region. They will have the view that it is only a matter of time until the need for the given development (such as a supermarket) is so great, that a developer will have to pay the inflated prices the landholder is seeking. Even if this turns out to be true, the community will lose out on social and economic benefits while the development is delayed. Ultimately the customers of a delayed shopping centre will also end up paying more at the cash register in order to pay back the inflated price charged by the landholder.

The approach articulated by the Productivity Commission offers no protection against the formation of oligopolies of this kind through strategic land use plans.

Thirdly, while the planning authority may feel that infrastructure is being underutilised at their preferred development location, this does not mean that infrastructure is being fully utilised at the developer's preferred location. The suitability criteria suggested above requires consideration of infrastructure at the location preferred by the developer.

Applying the legitimate/illegitimate framework outlined above will prevent centres policies from rationing the number and size of centres to give power to incumbent landlords. There can be no justification for rationing. If a project broadly satisfies the site suitability criteria, a rezoning should be approved by the planning authority. If infrastructure, urban amenity issues, etc are dealt with (as they would be if the project meets the criteria) it is in the public interest for as many sites as possible to be rezoned, to ensure maximum competitive pressure on landlords and retailers.

If the Productivity Commission is determined to support a role for considering the viability of centres, we would agree that there is some reduction in harm by prohibiting such consideration at development assessment. This is better than the status-quo, although we anticipate that planning authorities would seek to downzone land where retail uses are currently permitted, but are subject to a "supporting the centres" test at development assessment (e.g. the enterprise corridor zone and the business development zone in NSW). **Provisions to require compensation when land is down-zoned (as exists in Queensland and covered in our original submission) might help mitigate the risk of this occurring.**

If the option to "protect the viability of centres" is to be left open, we would favour a qualification, further limiting the circumstances in which this can take place.

We would suggest that **the potential impact of proposed commercial development on the commercial viability of other commercial development may only be taken into consideration by a planning decision-maker:**

- **for the purposes of strategic land use planning; and**
- **when there is a high degree of probability that proposed development is likely to have an overall adverse, severe, sustained and irreversible impact on the extent and adequacy of facilities and services available to the local community** (having regard to the likely impact on existing facilities and services and the facilities or services to be provided by the proposed development).

4. Betterment tax

We note the references to a "betterment tax" in the Commission's report.

Betterment taxes typically involve "capturing" increases in land values in connection with infrastructure or land value improvements.

For example, from time-to-time there is a suggestion that the increase in property value that flows from new public transport infrastructure should be subject to a tax and the proceeds used to pay for the infrastructure. In reality, this model could not work because the locations that are typically talked about for new transit stations are mostly already highly attractive places to develop. In fact, almost without exception, those that have been publicly flagged have previously been formally identified for major higher density urban renewal well before new public transit services were ever discussed.

Property prices in those areas already reflect the existing close proximity of these localities to excellent infrastructure and government has already clearly signalled intention to permit greater density.

In any event, the premium that might be paid for development sites close to infrastructure is not unlimited. Generally speaking, the premium is already built into existing values in areas likely to be serviced by new public transport and there is unlikely to be an additional premium that could be taxed.

The Henry tax review rejected betterment taxes:

> Applying infrastructure charges through use of simple flat prices that do not well approximate actual avoidable costs can sometimes reduce housing supply. Where the charge exceeds the cost of providing infrastructure, it acts like a tax and can discourage development. This is more likely to occur where the size of the charge is not set relative to the cost of infrastructure but the developer's capacity to pay. In these cases, the charges may attempt to capture part of the increase in value resulting from the provision of infrastructure or from changes in zoning, that is, to impose a betterment tax .... However, the benefit to the developer is difficult to determine, and attempting to set charges on this basis can lead to negotiations that are protracted and nontransparent.
>
> ... betterment taxes can increase the uncertainty associated with land development. To operate effectively, betterment taxes need to isolate the increase in value attributable to the zoning decision or the building of infrastructure from general land price increases at the local level. This is often difficult since the value of land will move in anticipation of a change in rezoning. Sometimes this can occur many years before the re-zoning.
>
> Betterment taxes may be applied on an ad hoc basis and the rate of the betterment tax is sometimes left to discussions between developers and government as part of the planning approval processes, rather than being set in a transparent manner. Betterment taxation can involve lengthy disputes as, by setting the tax conditions, the dispute is really about how to share the economic rent.
>
> Additionally, having a betterment tax in place may encourage governments to create economic rent through additional zoning restrictions or delays in land release, in order to raise more revenue. Where zoning is used in such a manner, it is likely to stop land being developed to its most productive use — at least in the short run. A land tax applied to all types of land ... is likely to encourage governments to allow land to be used for its most productive use as this will increase the value of the land (and hence increase the revenue raised from land tax).

In short:

- There is difficulty in isolating increases in value attributable to decisions to build infrastructure or rezone land. Land values often increase well in advance of such decisions. The taxable increase in land value will be disputed in almost every case. **The prospect of an extra tax based on such a subjective assessment would discourage property investment.**
- **Additionally, this type of tax encourages governments and local councils to widen their tax base by imposing more zoning restrictions and further delaying land release.** This is likely to stop land being developed to its most productive and socially beneficial use.

5. Infrastructure levies

We welcome the Productivity Commission's opposition to levying development in existing urban areas for 'system-wide' infrastructure upgrades, but this is exactly what local councils are doing across Sydney, Newcastle, Wollongong and the Central Coast.

We also support the Commission's view that broadly dispersed social infrastructure should also be funded from government through general revenue, not development levies.

Levies in NSW routinely breach this requirement. These levies will, from July this year, amount to $18,000 a home. Under the *Environmental Planning and Assessment Act 1979*, "the provision of infrastructure" that may be funded by the so-called "special infrastructure contribution" is defined to include:

- the provision or extension of public services;
- the provision or extension of affordable housing;
- the conservation or enhancement of the natural environment;
- the carrying out of any research or investigation;
- preparing reports, studies or instruments.[152]

These expenses are not even expenditures of "infrastructure" in the ordinary sense of the word, never mind expenditure that would stratify the principles articulated by the Commission.

5.1 Case study - Western Sydney

For example, in Western Sydney, between $2,000 and $3,000 of the (from July 2011) $18,000 per lot special infrastructure levy relates to a $397.5 million (in 2005/06 dollars) program to secure land to address biodiversity conservation in a strategic way focusing on landscape scale outcomes within the Cumberland Plain and broader Sydney. [153]

5.2 Case study - Affordable housing levies

Affordable housing levies apply in Willoughby City Council and in the City of Sydney - ranging from between 0.8 per cent and 4 per cent of the value of a new home. These costs could amount to an extra $24,000 for a $600,000 new apartment – on top of levies for more convention infrastructure that can easily be as much as $20,000 a home (and more in some circumstances). (Note the NSW Government's cap has many loopholes, and one of them is that affordable housing levies are exempt from the cap.)

These "affordable housing" levies make new homes more expensive, so that a small number of rent-controlled homes can be built and operated by local councils or non-profit organisations. These existing levies across NSW will see new home buyers subsidising costs of a rent control scheme that only a tiny few will ever benefit from.

The plan taxes young families struggling to buy a home of their own to subsidise those who are renting. Not all renters benefit – only those lucky enough to win a place in one of the small number of rent control homes that schemes like this produce. Many will miss out.

It's entirely appropriate that government and local councils take action to help renters – but the last thing they should be doing is via taxes on home buyers. There's no such thing as a free lunch. You

[152] s 94ED.
[153] NSW Department of Environment and Climate Change and Water and the NSW Department and Planning *Sydney Growth Centres Strategic Assessment Draft Program Report* (2010).

cannot create new homes with subsidised rental unless someone is paying for them – and the state government has required that some new home buyers bear this burden. Any subsidies for struggling renters should come from the government, not from other home buyers.

5.3 Case study - percentage levies with no nexus

In NSW councils currently have the power to impose a percentage-based levy on development (sometimes called a "section 94A levy"). Councils have a free hand on how they spend this money. There is no requirement for there to be any connection between the developments that are burdened by the levy and the expenditure, of the money raised. Additionally, (unlike regular section 94 contributions) a developer cannot appeal to the Land and Environment Court for the charge to be set aside for a particular project. For this reason, the percentage-based development levies are more like a tax than a user charge.

The regulations have traditionally imposed a 1 per cent cap to ensure these charges do not get out of hand.

In the past four years, the former NSW Government moved to steadily to introduce more onerous levies in brownfield areas. This began in January 2007 when the then Minister for Planning changed the regulations to authorise a 2 per cent (of project costs) local council levy for developments in Wollongong's commercial core zone.[154]

On 7 December 2007, the government moved to change the law to allow a 3 per cent development levy, in a whole variety of zones set out in the *Liverpool City Centre Local Environmental Plan 2007* (with a 2 per cent levy in some other zones).[155]

On 21 December 2007, (four days before Christmas) the government followed on with a further change to the law to permit a 4 per cent development levy in the Gosford city centre.[156] On the same day the law was also changed to allow a new 3 per cent levy in the Parramatta city centre.[157] Fresh back from the Christmas break on 1 February 2008, the government changed the law to authorise a 3 per cent local council development levy in the Newcastle city centre.[158]

There appears to be no grounds for different rates to apply in different areas. For example, why is there only a 2 per cent contribution for residential development in Liverpool, yet residential development in Gosford is required to make a 4 per cent contribution?

There is a clear pattern here: development levies have been gradually ratcheted up from 1 per cent to 4 per cent in the space of one year. However, at least, by the end of 2007, it was only the Department of Planning's six "regional cities" that had been allowed to break the one per cent cap.

In May 2010 the NSW Government made a further change to the regulation to allow Sydney's highest ever percentage development levy to be imposed in Burwood town centre.[159] The levy adds 4 per cent to project costs and is supposed to raise up to $187 million.

In Burwood the planned levy means developers of:

- a 150 apartment block; or
- 15,000 square metres of office space,

would be required to pay $2 million in local council charges. This could easily make projects unviable.

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[154] *Environmental Planning and Assessment Amendment (Levies) Regulation 2007*.
[155] *Environmental Planning and Assessment Amendment (Liverpool City Centre Levies) Regulation 2007*.
[156] *Environmental Planning and Assessment Amendment Regulation 2007*.
[157] *Environmental Planning and Assessment Amendment (Parramatta City Centre Levies) Regulation 2007*.
[158] *Environmental Planning and Assessment Amendment (Section 94A Levies) Regulation 2008*.
[159] *Environmental Planning and Assessment Amendment (Burwood Town Centre Levies) Regulation 2010*.

This is an unheard of revenue grab by a suburban council. It is now the highest percentage development levy in Sydney and means that Burwood's development charges will exceed those of the Sydney CBD, Parramatta CBD and Liverpool CBD. This new levy will delay serious urban renewal around the Burwood town centre.

The Henry Tax Review, released in May 2010, criticised levies of this kind.

It concluded that development levies were only justifiable when they reflected "the avoidable costs of development".[160] The report explained that

> ... where infrastructure charges are poorly administered — particularly where they are complex, non-transparent or set too high — they can discourage investment in housing, which can lower the overall supply of housing and raise its price.[161]

The recently fluid nature of percentage-based development framework, and the apparently random levels of levies, has created considerable uncertainty. The Henry Review observed that:

> Where developer charges are set in an ad hoc fashion or are subject to unexpected changes, they can create uncertainty around new developments. If infrastructure charges are increased after a developer has bought land from its original owner, they cannot be factored into the price previously paid for the raw land. In this case, the charge would lower the expected return from the development. In addition, general uncertainty about charging is likely to discourage development activity, which could reduce the overall supply of housing and increase the price of housing. [162]

This illustrates why the stability of the pre-existing 1 per cent cap was important to business confidence and the willingness of developers to acquire sites in NSW.

As we mentioned above, these levies are not required to bear any relationship with actual infrastructure required by specific developments. On this point the Henry Tax Review said that

> In general, infrastructure charges will operate more effectively if they are set to reflect the cost of infrastructure, not to tax the profit of development.[163]

However, it is clear, for example, that the Burwood levy was set based on the perception of the industry's 'capacity to pay'. In fact, Burwood Council justified its levy, not on the detail of its infrastructure requirements, as much as a report by Hill PDA showing that the levy could be borne by industry. This was the main subject of discussion between the government and council. Even when the government required a lower levy, there was no actual change to the council's $187 million infrastructure plan, which is unlikely ever to be implemented.

The Henry Review said that levies can act

> like a tax and can discourage development. This is more likely to occur where the size of the charge is not set relative to the cost of infrastructure but the developer's capacity to pay. In these cases, the charges may attempt to capture part of the increase in value resulting from the provision of infrastructure or from changes in zoning, that is, to impose a betterment tax .... However, the benefit to the developer is difficult to determine ...[164]

The review explained that betterment taxes

> ...can increase the uncertainty associated with land development. To operate effectively, betterment taxes need to isolate the increase in value attributable to the zoning decision or the building of infrastructure from general land price increases at the local level. This is often difficult since the value of land will move in

[160] Commonwealth of Australia, Australia's future tax system: *Report to the Treasurer: December 2009: Part Two Detailed analysis: volume 2 of 2*, 427 [Recommendation 70]
[161] Ibid 428.
[162] Ibid 426-427.
[163] Ibid 424.
[164] Ibid.

> anticipation of a change in rezoning. Sometimes this can occur many years before the re-zoning. Betterment taxes may be applied on an ad hoc basis and the rate of the betterment tax is sometimes left to discussions between developers and government as part of the planning approval processes, rather than being set in a transparent manner. Betterment taxation can involve lengthy disputes as, by setting the tax conditions, the dispute is really about how to share the economic rent.
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> Additionally, having a betterment tax in place may encourage governments to create economic rent through additional zoning restrictions or delays in land release, in order to raise more revenue. Where zoning is used in such a manner, it is likely to stop land being developed to its most productive use — at least in the short run. A land tax applied to all types of land ..., is likely to encourage governments to allow land to be used for its most productive use as this will increase the value of the land (and hence increase the revenue raised from land tax).[165]

Bankstown and Willoughby councils are both presently seeking to waive the one per cent cap. Like Burwood, these are not "regional cities" and this suggests that the one per cent cap remains an unstable and unpredictable policy setting. Now that the door is open, an increasing number of councils are likely to push against it. It also only a matter of time before councils that have previously set 2 or 3 per cent levies seek to increase them to match Burwood's levy.

[165] Ibid.

6. Zoning reform

Inflexible and overly prescriptive zoning is a major problem with a planning system. Because the environmental planning instruments made under the Act are laws, and because they are incredibly rigid, it has become almost routine for a law to be changed in order for the day-to-day business of development to take place.

The current planning system combines the worst of the United States and United Kingdom systems. We have adopted the rigidity of United States zoning laws, but have not accepted their system of approvals where there is a presumption that – if building codes are met – development that is in-line with a zone will be approved. We have instead picked-up the United Kingdom system of planning approvals, where the consent authority has wide discretion to approve or not approve, but we have overlooked the fact that the UK does not have a rigid system of zoning.

In March 2006, the NSW Government gazetted the Standard Instrument for preparing new local environmental plans. The idea was sound: for the first time, local plans across NSW will use the same planning language, making it easier for communities to understand what is planned for their local area and the zoning controls.

All councils are required to use the Standard Instrument to prepare a new principal local environmental plan for their area, to be completed by 2011. An amendment to the Standard Instrument gazetted on 14 December 2007 took effect from 1 January 2008.

There are 35 zones provided for under the standard local environment plan to be adopted everywhere in NSW in the coming years.

These zones are principally defined by use, rather than the scale of buildings. This approach is out-of-keeping with modern developments in planning which emphasise that the planning system should concentrate on:

- the "form" (shape/configuration) of a structure; and
- the relationship of buildings to each other, to streets and to open spaces,

rather than trying to micromanage the uses that different pieces of land may be put.[166]

This approach would create more opportunities for a mix of housing, commercial and retail uses and transit and pedestrian oriented communities.

We support a planning scheme that permits the integration of housing, workplaces, shopping, and recreation areas into compact, pedestrian-friendly, mixed-use neighbourhoods. Pedestrian-oriented amenities such as retail and cafes should not be discouraged or prohibited.

In an urban renewal context, compact, mixed-used areas, making efficient use of land and infrastructure, make good planning sense. They create more attractive, liveable, economically strong communities. They facilitate a development pattern that supports pedestrian based communities and reduces dependence on motor vehicles by putting residents' and (in centres of employment such as business parks and light industrial areas) employees' daily needs within a short walk of home or work.

Planning schemes that concentrate on building form, rather than building use, are also less complex, contain more broadly defined zones and therefore less bureaucratic.

The current zoning scheme laid down by the standard template – particularly since it was amended in December 2007 and February 2011 - tries to force wasteful inefficient development disproportionately

[166] See A Duany, E Plater-Zyberk and J Speck *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream* (2000).

focused on a few areas zoned commercial centre at the expense of local centres, neighbourhood centres, corridors and employment lands - increasing dependency on the cars and promoting inefficient use of infrastructure.

In the City of Miami, instead of having 35 zones, their new zoning form-based zoning scheme focuses on seven zones. These are:

- Natural - consists of lands approximating a wilderness condition, permanently set aside for conservation in an essentially natural state.
- Rural - consists of lands in open or cultivated state or sparsely settled. These include woodland, grassland and agricultural land.
- Suburban - consists of low density areas, primarily comprised of detached and semi-detached homes.
- Urban General - consists of a mixed-use but primarily residential urban fabric with a range of building types including townhouses, terraces, small apartment buildings, and detached houses.
- Urban Centre - consists of higher density mixed-use building types that accommodate retail and office uses, townhouses and apartments.
- Urban Core - the highest density and greatest variety of uses, including civic buildings of regional importance.
- District zone - consists of the least regulated building and accommodates commercial and industrial uses.

The differences between Suburban and Urban General, and the differences between Urban Centre and Urban Core, are merely one of scale. If desired, this list of zones could be reduced to five zones, through the use of height limits or floor space ratios (but not both).

There can be just five to seven zones. Additional categories of zones are unnecessary.

The Productivity Commission has nominated NSW's use of the ostensibly flexible mixed use zone as a "leading practice". This zone sounds good in theory, but in practice what appears to be a single zone, is in fact still often, in substance, broken up into use-based areas of restriction.

For example, Burwood's town zone is zoned for mixed use, but the controls inhibit commercial and residential development co-existing. Commercial buildings have a floor space ration of 6:1 but residential buildings in the same location have a floor space ratio limit of 2:1. Effectively, residential development in the immediate vicinity of the train station (the best location for it) is prevented by an artificially low floor space ratio.

In Wollongong city centre's ostensibly flexible commercial core zone a building used only for residential purposes (as defined by the plan) is assigned a maximum floor space ratio of 3.5:1 on a site of 2,000 square metres or greater with a street frontage of 20 metres or greater. However, if a building is used for purposes other than residential, on the exact same site, it may achieve a floor space ratio of up to 6:1. This approach does not make sense.

In Ryde's ostensibly flexible high density residential zones, the plan imposes a floor space ratio on shop top housing (a residential building with retail on the ground floor), but not on purely residential flat development.

Zoning reform is not fully effective if zones are simplified to reduce distinctions between uses, but floor space ratio, height controls and other controls are introduced to discriminate against uses in a single zone.

7. The Environment Protection and Biodiversity Act

Ecologically sustainable development is an important principle that does, and should, guide urban development. This principle ensures that development meets the needs of Australians today, while conserving our ecosystems for the benefit of future generations.

In many respects, the Federal Government's *Environment Protection and Biodiversity Conservation Act* merely duplicates state legislation. This leads to bureaucratic duplication and red tape.
Australia needs a more efficient approvals process for urban development if our nation is to get the housing, commercial, retail and industrial development it needs.

7.1 The role of the EPBC Act

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is the Australian Government's "environmental" legislation. This legislation provides the legal framework to protect nationally and internationally important flora, fauna, ecological communities and heritage places. These are defined by the Act as matters of "national environmental significance".

The states also have legislation that seeks to protect the environment and/or promote ecologically sustainable development.[167] State legislation allows development to proceed as long as it does not lead to an unacceptable impact on the natural, built, social or economic environments.

While often criticised, there is no doubt that the state legislation is robust and able to ensure environmental protection in the decision making process. Decisions under state legislation are sometimes attacked by all sides in a debate, including environmental lobby groups and anti-development community activists. The criticisms advanced by the latter groups are often motivated by unhappiness with the substance of the final decision, rather than the quality of the environmental assessment that has informed that decision.

There are many instances where proposals become subject to assessment and approval pursuant to state and Commonwealth legislation. For example, 25 per cent of referrals made under the EPBC Act relate to urban development (16 per cent residential development and 9 per cent urban development).[168] All of these urban development projects are subject to both state and federal approval requirements. At a state level, the approval process is led by a planning authority, but typically involves approval/consultation with environmental agencies, fire services, roads authorities, water utilities, energy utilities and others.

This duplication in assessment and approval is an inefficient use of resources and adds unnecessary time delay to the approval process.

In a 2006 report commissioned by the government-backed Australian State of the Environment Committee, a number of projects were nominated by the then Department of the Environment and Heritage to illustrate the effectiveness of the EPBC Act. None of the case studies reviewed by the paper related to urban development projects, despite the fact that one quarter of EPBC Act referrals relate to urban development.[169]

We believe that the substantive benefits to this additional layer of federal regulation in relation to urban development is minimal, and possibly non-existent.

[167] In NSW the primary legislation addressing land use, management and the promotion of ecologically sustainable development is the *Environmental Planning and Assessment Act 1979*. In Queensland it is the *Integrated Planning Act 1997*. In Victoria it is the *Planning and Environment Act 1987*.
[168] *Independent Review of the Environmental Protection and Biodiversity Conservation Act 1999: Discussion Paper*, Australian Government Department of the Environment, Water, Heritage and the Arts 17.
[169] Chris McGrath, *Review of the EPBC Act* (2006).

7.2 Fragmented decision-making

Section 3(2)(a) says the Act

> recognises an appropriate role for the Commonwealth in relation to the environment by focussing Commonwealth involvement on matters of national environmental significance and on Commonwealth actions and Commonwealth areas ...
>
> However this statement weakens the principle of ecologically sustainable development by involving the Commonwealth in the approval process but limiting the Commonwealth's mandate to "matters of national environmental significance".

This discourages the Commonwealth from making decisions that integrate economic and social considerations together with environmental considerations in a single decision-making process (as is required by the principles of ecologically sustainable development).

For example, a state government may have both carefully planned the growth of housing in a region and also balanced the economic and social benefits of increasing the supply of housing against the environmental costs of increasing the urban footprint. It has adopted the strategy, but the Commonwealth may not recognise the finality of the strategy and instead focuses on a narrow range of environmental matters without considering the broader social and economic issues connected with the need to supply housing to the region.

Section 3(2)(b) and (c) says that the Act

> strengthens intergovernmental cooperation, and minimises duplication, through bilateral agreements ... and ... provides for the intergovernmental accreditation of environmental assessment and approval processes ...
>
> Yet, no broad-based bilateral agreements have been reached to allow states to undertake an approval role. This has *increased* intergovernmental confusion and *increased* duplication.

Section 3(2)(d) says that the Act

> adopts an efficient and timely Commonwealth environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed ...

The efficiency and timeliness of the Act are undermined by institutional arrangements that divide the authority for approvals for routine urban development between two levels of government.

In doing so there is a risk that one level of government (namely the Commonwealth) will not fully consider the full range of social and economic issues. Investment confidence in new urban development opportunities is already being undermined by policy conflicts between the state and federal government.

For example, there is a lack of federal recognition for:

- offsets when decisions about "controlled actions" are made; and
- biodiversity banking schemes at both a "controlled actions" stage and approvals stage.

The fact that the Commonwealth has an approval role but does not endorse holistic strategies weakens investor confidence in state land release policies.

7.3 Institutional arrangements within the federal government

The EPBC Act is an unusual piece of legislation, in that it is cloaked in the language and style of a natural resource management law but has increasingly assumed the role of federal town planning legislation.

In one breath it is addressing high level issues such nuclear activity, world heritage areas, Commonwealth marine protected areas, and in the next breath it is regulating urban land release in the Hunter region of NSW.

The difficulty that arises with omnibus legislation of this kind is that a decision-making approach that is appropriate for protected area, such as a world heritage site, is inappropriate when dealing with a request to carry out an activity on private land.

For example, in a world heritage area, the emphasis is rightly placed on protection alone. By designating areas as world heritage, the community as a whole has already taken the decision that in that particular area, the community's best interests are served by elevating protection above all other considerations.

There is no need for a nuanced balancing of competing social, economic and environmental issues in such an area. However, in relation to private land, *there is* a need to consider not only the legitimate interests of the private land holder but also the need to satisfy social and economic goals articulated through state and regional strategies and the need to promote investment certainty and confidence.

At a state level this problem has been managed by segregating protected area management legislation, policy and administration from the state town planning authorities.

7.4 Removing the duplication of approvals

The Urban Taskforce has grave concerns with government processes that duplicate and overly complicate the environmental assessment and approvals. Urgent legislative reforms are required for a more efficient and transparent system.

We note that the Commonwealth and state governments have, *at least in principle*, reduced some of the duplication. Bilateral agreements have been reached where state driven environmental assessment processes are recognised as meeting Commonwealth environmental requirements and are sufficient to deal with matters of national environmental significance.[170] Therefore the opportunity exists for the completion of one environmental assessment that meets both the State and Commonwealth legislative requirements. This is occurs by way of bilateral agreement between the Commonwealth and states. However, unless an "approvals bilateral" has been reached, there is still a need for *two approvals*, one from the state-based planning authority and the other from the Commonwealth Minister for the Environment, Heritage and the Arts.

For most urban development projects, this is an unfortunate, costly, time-wasting and pointless requirement. If the Commonwealth has agreed to accept that state environmental assessment processes are sufficiently comprehensive and able to ensure robust environmental assessment, then surely the Commonwealth must acknowledge that the same system is capable of "following through" to provide a transparent and justifiable approval.

The EPBC Act allows for such a system. Section 46 of the Act provides for an "approval bilateral", under which the Commonwealth may effectively delegate the approval role to a state. In other words, similar to the assessments agreements, the Commonwealth Minister for the Environment, Heritage and the Arts agrees to recognise state approval process as meeting the requirements of the EPBC Act under certain conditions. Unfortunately while there are a number of "assessments bilateral" in place, there is just one "approvals bilateral" applying specifically to the Sydney Opera House.

The benefits of a more integrated approach are clearly demonstrated through the consideration of two case studies.

[170] Although disappointingly, appropriate agreements have not yet been finalised with Victoria or the Australian Capital Territory.

7.4.1 Case study - Bondi Beach

On 25 January 2008, Bondi Beach was listed as a site of "national heritage significance". No one would dispute that Bondi is a place of heritage value to the nation. Appropriately, the listing does not include private property and is confined to the beach, water and surrounding public foreshore. However, the implications for proponents seeking approval for development within or near the listed area is significant.

The beach and foreshore is currently managed by the local council. If the council thought that there was a need for improvements to the Bondi pavilion or car parks, such development could trigger the need for an approval under the EPBC Act. This is unnecessary as these activities are extensively considered under state and local planning requirements. The beach is loved by Sydneysiders generally and Eastern Suburbs residents in particular. The local council and the NSW Government are far more directly accountable (than the Federal Government) to those who are most passionate about the beach's protection. It is impossible to imagine what development might have been approved under local and state processes within the national heritage area which will now be forbidden. On the other hand it is possible to see the increase in red tape that the national heritage listing (in the absence of an approvals bilateral) will have on the simplest of development activity within the Bondi Beach heritage area.

Of even greater concern is the potential impact that this listing could have on development of private property in the vicinity of Bondi Beach. Though private property is not listed, the EPBC Act requires that development in the vicinity of a listed site, that may have a significant impact on the values of the site, may be defined as a "controlled action". This makes that activity subject to the approval process under Commonwealth legislation. In this situation there is a need for two approvals – one from either the state government or the local council, and the second from the Commonwealth Minister.

The Commonwealth Department of Environment, Water, Heritage and the Arts could find that it is drawn into state planning approval processes for development in the vicinity of Bondi Beach. Not only is this an unnecessary duplication of process, it is also a misalignment of objectives. That is, the local/state planning authorities are in the best position to deal with the holistic assessment of development proposals. Unlike the Commonwealth Department of Environment, Water, Heritage and the Arts, state planning authorities must integrate their decision-making processes. That is, they cannot focus on a single issue. State planning authorities must fully integrate environmental, social and economic impacts when considering a proposal.

Clearly this situation is less than ideal. Surely the Commonwealth does not wish to engage in the day-to-day management of Bondi Beach or become embroiled in local land use and development approval processes.

The existing legislation provides the opportunity to avoid this situation and, as demonstrated in the following example, can enable efficient and transparent assessment and approval of development within or in the vicinity of listed areas.

7.4.2 Sydney Opera House – Case Study

The most appropriate means of ensuring that development assessments are able to proceed efficiently, while managing the tension that exists between environmental protection and the need for development, is the implementation of an "approvals bilateral" as permitted under section 46 of the EPBC Act.

In the case of the Sydney Opera House a management plan was developed in accordance with world heritage and national heritage management principles. The preparation of the plan was rigorous and the Commonwealth Minister is in the position to accredit the plan under the EPBC Act.

Once a plan of management has been approved and the Commonwealth and state ministers sign an "approvals bilateral agreement", no duplicate approval is required from the Commonwealth under the EPBC Act.

The advantage of following this process is that it engages the Commonwealth in the development of an appropriate environmental protection system which is then to be used by the appropriate state minister when making a development determination. The preparation of such a plan binds the State so that approvals of development inconsistent with the plan cannot be granted.

It must be noted that entering into an "approvals bilateral agreement" does not exclude the Commonwealth. States must notify the Commonwealth of all proposed actions that will have or are likely to have significant impacts on the site.

Currently the Opera House "approvals bilateral agreement" is the only such agreement in existence, however **the opportunity does exist for the development of a more generic approvals bilateral for urban development across the board.**

7.5 Reducing duplication between listing regimes

It is obvious that there is an increasing overlap between the State heritage sites/protected areas listed under the state legislation and the national and world heritage sites listed under the EPBC Act.

For example, in NSW national and world heritage sites are also protected under state law through either:

- a listing the site on the NSW State Heritage Register (SHR); or
- the site being protected as a park or reserve under the *National Parks and Wildlife Act 1974*.

Similarly, there are threatened species that are both nationally listed, and listed at a state level. For example, Cumberland Plain Woodland is listed as an endangered ecological community under both the *Threatened Species Conservation Act 1995* (NSW) and the EPBC Act.

This dual listing requires development proponents to go through an extensive process to satisfy state officials, and then usually, an additionally extensive process to satisfy federal officials. There is a tendency for each group of officials who become involved to want to "add something" to the process. An applicant will be forced into a series of compromises in order to meet the expectation of state officials, only to find that federal officials expect a further round of compromises. This kind of layered arrangement penalises applicants who make early and substantial concessions in order to protect the environment or heritage and reward applicants who engage in 'gaming'.

We ask that duplicated listing regimes be abolished. This means that all "lower order" heritage, state reservation or threatened species listings should automatically lapse when an equivalent Commonwealth listing is made.

For example, once land is listed as a world heritage area, any lower order reservation in existence (such as a prior national park reservation) should lapse in favour of the new higher order listing. A subsequent lower level re-listing would be prohibited so long as the higher level listing is in place. This would also mean a state or local council heritage listing would automatically lapse if a site is listed as a national heritage site under the EPBC Act.

For example, in relation to Cumberland Plain Woodland, the existence of the national listing would remove the need for a separate state listing and the state listing would lapse.

Once the current system of multiple, overlapping listings is abolished, the confusing and conflicting mandate for multiple teams of federal and state officials to be involved on the same issue is removed. This does not mean, for example, that state officials may not become involved in protecting a

nationally listed threatened species. However, if they do so, it should only be as the delegates of the Australian Government with the full authority to issue approvals in their own right (without seeking the approvals of the Federal Government). If the Australian Government does not want to delegate approving authority state officials should have no involvement in relation to the issues concerned.

Our preference would be that, along with the abolition of dual state/federal listings, the Commonwealth should delegate full approval authority for urban development to state officials (along with any policy guidance the federal government wants to give) so that land use decisions can be made on an integrated basis (that is, all biodiversity issues, community amenity issues, social and economic issues can be considered together).

7.6 Offsets

The use of offsets helps to overcome the repeated conflict between property development and conservation so there are both:

- improved outcomes for biodiversity overall; and
- the social and economic needs of the community are still addressed.

Offset schemes have been very successful in achieving balanced conservation outcomes in the United States. Land owners and developers can value the conservation attributes of their land. So instead of being seen as a liability, the conservation of a threatened species can now be valued by landowners.

In NSW the biodiversity banking proposal put forward by the Department of Environment and Climate Changes (DECC) is innovative and seeks to provide certainty for industry upfront. One of the hurdles remaining for the successful implementation of the NSW biodiversity banking scheme is the relationship between approvals under the state's *Environmental Planning and Assessment Act* and the EPBC Act. The independent operation of these two acts means that when there are threatened species or endangered communities listed under both acts, dual approval is required. In particular, there is no consideration of offsets under the biodiversity banking scheme at to the point of deciding whether a particular activity is at a "controlled action" or possibly even at the later approval stage.

We understand that the DECC has commenced negotiations with the Commonwealth Department on this matter but little progress has been made.

Similarly, in the growth centres of Western Sydney, new housing developments will not be subject to state environmental laws that protect endangered plants and animals. This is because the NSW government has assessed the environmental value of the areas (in which up to 181,000 homes will be built) at the *regional* planning stage rather than assessing threatened species in relation to individual housing developments. The *regional* assessment led to "biodiversity certification" being granted to the growth centres environmental planning policy. The decision will speed up planning decisions and make homes more affordable.

As part of the "biodiversity certification" process, the government committed to a comprehensive program of offsets - with $530 million to protect 3,800 hectares of native bush in Sydney's west. Even though this money will target the largest, most intact remains of Cumberland Plain Woodland for permanent protection, the whole arrangement is not recognised under the EPBC Act for the purposes of deciding whether or not a development is a "controlled action".

The EPBC Act should automatically recognise state offset and biobanking schemes both when decisions are made as to whether an activity is a "controlled action" *and* at the approval stage. Without such recognition, innovative policies, such as biobanking, are unlikely to succeed.

7.7 Merit appeal rights for applicants

So long as the Commonwealth retains an approvals role, then merit appeals for applicants should be introduced.

Property rights form the basis of our economic system. Investment cannot and will not take place unless businesses and individuals can purchase land with a reasonable degree of certainty about how the land may be developed. Globally, jurisdictions with uncertain property rights suffer reduced levels of investment. In such environments only projects promising the very highest rates of return are sufficiently attractive to overcome the increased regulatory uncertainty.

It is becoming increasingly difficult to secure investment for greenfield development in some areas, in part, because of the wide, unreviewable, discretion exercised by the Federal Minister for the Environment when the EPBC Act applies. This wide discretion risks weakening the link between land ownership and the ability to create value by developing land.

Merit appeals for applicants for urban development approvals are a standard part of state planning systems. They are not standard for heavy industry. The EPBC is clearly designed around the issues of heavy industry rather than urban development, and thus overlooks the need for urban developers to have access to appeals in order to secure capital.

Appeal rights offer some degree of protection for applicants and their financial backers from arbitrary and political decision-making. While it may be argued the incidence of some decision-making is rare, the risk of it must be factored in – and may have a chilling effect on capital raising activities for some projects.

8. Further information

The Urban Taskforce is available to further discuss the issues outlined in this submission.

Please contact:

Aaron Gadiel
Chief Executive Officer
GPO Box 5396
SYDNEY NSW 2001

www.urbantaskforce.com.au

Ph: (02) 9238 3955
E-mail: admin@urbantaskforce.com.au