NSW Proposes Extensive Reforms To Land Use Regulation and The Approval Process

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The NSW Government recently announced proposals for reforming the regulation and management of land use, planning and natural resource approval systems. The proposals are outlined in a Green Paper entitled "Towards an Integrated Land Use Planning and Natural Resource Approval Policy". They represent one of the most extensive and significant reviews of these approval systems ever undertaken in this State and should lead to the Department of Urban Affairs and Planning tabling a draft Exposure Bill in Parliament in early 1997.

The Green Paper's intention is to create simpler, more cost-effective ways of regulating environmental and planning problems.

Major Problems

The proposed reforms are intended to address various problems stemming from the lack of co-ordination - and the multiplicity of control points - in the NSW planning, land use and natural resource management approvals system.

The following particular problems are identified in the Green Paper:

- uncertainty and confusion about rights and responsibilities, largely stemming from the multiplicity of statutes, regulations and planning instruments (there are approximately 104 statutes, at least 45 sets of regulations, and a large number of environmental planning instruments created under the *Environmental Planning and Assessment Act* 1979 (the *EP&A Act)*;
- multiple systems of control;
- the multiplicity of approval requirements; and
- a lack of co-ordination between different regulatory agencies, inflexible standards and procedural requirements.

The Green Paper starts from the premise that there are no fundamental flaws in the *EP&A Act* and that the policy framework which it provides is basically sound. It is the effects resulting from the interaction between the *Act* and other statutes which are said to create particular problems including:

(a) the parallel operation of the *Act* alongside specific environmental and natural resource legislation which results in several agencies regulating and issuing approvals on the basis of differing heads of consideration, operating requirements and standards;
(b) the multiplication of approval processes at local level; and
(c) operating approvals apply for relatively short periods (typically 12 months).

Proposals For Reform

A range of reform proposals is already underway or projected including:

- stage II of the review of pollution control legislation, which will consolidate the *Clean Air Act, Clean Waters Act, Noise Control Act, Pollution Control Act* and related legislation;
- forestry regulation will be streamlined as part of the corporatisation of select State Forests operations;
- "umbrella" water legislation will be developed;
- building and planning approvals legislation will be consolidated; and
- the Minister for Land and Water Conservation will consider the development of a natural resources management Act which would combine a number of land and water statutes.

Some of these reforms will require legislative amendment. Others may be implemented administratively.

Amalgamation

Some activities and land uses require approval under the *EP&A Act* and operational licences or further approvals such as pollution licences. This means that proponents are often required to proceed sequentially from one approval/licence process to the next. The potential to amalgamate development consent and operational licensing is being considered in the current review of the State's pollution control laws (the Environment Protection Authority Stage II Review).

"One Stop Shopping"

The Green Paper raises the possibility that an "*integrated approvals agreement*" could consolidate into one integrated document - at the development application (DA) stage - all the conditions and requirements sought from developers by each regulatory agency.

Currently, the consent authority (usually the local council) sends the DA to all State agencies which have the power to impose conditions on, or reject, development applications by virtue of their own legislation or under environmental planning instruments created under the *EP&A Act*. Sometimes these conditions either conflict with or duplicate each other.

The combination of conditions into a customised and integrated approvals agreement would require conflicting or duplicated conditions or requirements to be rationalised or simplified.

Integrated approvals agreements would require agencies to "*sign off*" on one set of conditions which would meet all their statutory requirements.

If there is a legal requirement to issue separate documentation (for example, a pollution licence), this could be appended to the integrated approvals agreement. Each agency would remain accountable for the conditions on which it is "*signing off*". The determining authority nominated under the *EP&A Act* would not change and existing appeal rights in relation to each approval (where they exist) would not be altered.

Implementation Issues

The Green Paper recognises that integrated approvals agreements could be difficult to implement in practice. It suggests that one way to approach potential problems is to divide developments into three categories:

1. developments that are simply too small to warrant the concentrated effort required for integrated approvals agreements;
2. small to medium, or complex documents that should be dealt with through an integrated approvals agreement; and
3. projects of State significance which should be "*uplifted*" to a different plane of determination involving the Minister for Urban Affairs and Planning.

The proposal is for the threshold between categories 1 and 2 to be decided at local level by the determining authority, with appeal against a refusal to grant an integrated approval to the Director of Urban Affairs and Planning.

Projects of State Significance

The Green Paper suggests that the Government could use a State Environmental Planning Policy (SEPP) to allow the development of integrated approvals agreements for projects of State significance. Such a SEPP would nominate the Minister for Urban Affairs and Planning as the consent authority. The Minister would provide a forum through which DA-related approvals could be fast-tracked at a senior level within the State Government.

Projects which have major economic benefits often also have significant environmental impacts. The Green Paper suggests that commissions of inquiry, which currently may be established by the Minister under the *EP&A Act,* offer a good model for focused community consultation and the sifting of evidence on economic, environmental and social impacts.

The commission of inquiry concept could be linked with the integrated approvals agreements so that all approvals, licences and permits relating to one project could be considered by the commission.

The recommendation of a commission in this circumstance may need to be considered by Cabinet, given that the approvals in question could go well beyond the responsibility of the Minister for Urban Affairs and Planning.

However, there would need to be a "*lead minister*" who could manage the decision-making process and be responsible for an outcome within a reasonable time-frame. The Green Paper suggests that the Minister for Urban Affairs and Planning is probably the most appropriate minister to perform this role. It also suggests that it may be appropriate to move away from arbitrary limits for determining major projects by allowing the Government to nominate significant developments by regulation or legislation.

Small-to-Medium Developments - Development Managers

Systematic and State-wide implementation of integrated approvals agreements for small-to-medium size developments and other regulatory management reforms may need effective development managers or "*brokers*".

The Green Paper suggests that these could be local council officers who have specific duties in the management of the system. These duties could be identified by statute or through education and best practice management programs with local councils.

Development managers could be given the task of:

- convening the integrated approvals committee co-ordinating consideration of the development application by relevant regulating agencies;
- steering the parties towards resolution of inconsistencies, overlaps and simplification of conditions;
- mediating between the proponent and regulating agencies if the proponent considers conditions to be unreasonable or if the requirements of different agencies have not been properly co-ordinated.

Essentially, the development manager would liaise, co-ordinate and mediate but would not usurp the role of any other regulating agency.

Role for the Director-General

There may be times when disagreements between

regulating agencies need to be resolved. The Green Paper proposes that such conflicts would be resolved by the Director-General of Urban Affairs and Planning (or his/her local delegate) stepping in and deciding the issue. The Director-General could be called in either by the development manager or the proponent.

These proposals raise some significant issues including:

- What developments should get the benefit of an integrated approvals agreement?
- Are local council officers those most appropriate to play the role of development managers for small-to-medium developments?
- Should development applicants have the right to mediation of disputes by the development manager, or should this simply be the decision of the manager? If proponents have this right, should it be a right to challenge the nature of the conditions set (that is, whether or not they are too onerous) or should it be limited to issues concerning inter-agency co-ordination?

Referrals and Concurrences

In addition to methods for integrating all the approvals required in the land-use determination, the Green Paper also considers ways to rationalise the number of approval processes, specifically referrals and concurrences.

Concurrences are requirements under the *EP&A Act* - and other natural resource management and land use legislation - whereby the approval of a development application is contingent upon the concurrent approval of a Minister, public authority or even another local council. Concurrences are found in instruments created under the *EP&A Act* (SEPPS, REPs and LEPs), development control plans and other instruments which pre-date the *EP&A Act* but which were saved by it. Concurrences are also created under other legislation which deals with specific issues and the powers of State regulating agencies such as the *Threatened Species Conservation Act.*

Referral of development applications to State Government agencies for advice is not binding on the consent authority, although it must be taken into account. Most councils hesitate to act against the advice offered, or in its absence if it is late, due to fears about their legal liability.

The Premier has instructed all State agencies to embark on a major review of referral and concurrence requirements. Agencies wishing to retain these requirements must justify them to the Premier. All referrals and concurrences that cannot be justified will be removed. The sunset date is March 1998.

Strategic Planning and Delegation

Currently, many agencies determine categories of environmental risk, hazard or problems and then require that any development that may fall into one of these categories must be checked by them. They impose this requirement by including a concurrence/referral in an environmental planning instrument (SEPP, REP or LEP) or by general concurrence powers provided in their own legislation.

The Green Paper suggests that an alternative to this might be to encourage State agencies to clarify their position up front by requiring that they establish a framework of rules, performance standards or goals that can be incorporated in appropriate environmental planning instruments. These rules or goals would need to be stated with sufficient clarity so that local councils could confidently consider most DAs without sending them to State agencies. In effect, local councils would be delegated the State agency's concurrence powers. Only exceptional cases would then need to be referred to State agencies.

Performance Standards

The Green Paper raises the possibility of regulation through performance standards.

The advantage of performance-based regulation is that it specifies compliance in terms of regulatory outcomes rather than a process by which compliance should be achieved. It is the regulation of ends, rather than means, and it allows the proponent to find solutions that reach those ends.

In the case of such performance-based regulation, there may be a need for regulatory authorities to certify the compliance strategy.

Performance-based regulation has many advantages for business. In directing the regulatory focus towards outcomes rather than processes, such regulation provides strong incentives for technological change.

Lead Agencies

Government regulators are already trying to improve co-ordination in areas that are easier to define and manage as single issues such as mining approvals.

The Mining and Extractive Industries Working Party is developing a number of strategies to reform the approvals policy in regard to this type of development. However, there is no intention to reduce the overall level of regulation. It is proposed to use the concept of a lead agency, which has economic development as a core part of its business, to instigate a co-operative approach between regulatory agencies to harmonise the approvals system.

Implications

If the proposed reforms are successful in streamlining the multiplicity of land use, planning and natural resource approval requirements, they will contribute significantly to a more efficient and cost-effective approvals system which will reduce duplication and provide greater certainty for developers and regulatory agencies.

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