CORRUPTION AND THE NSW PLANNING REFORMS

THE FACTS

June 2013

OVERVIEW

In April 2013, the NSW Government released a White Paper, draft Exposure Planning Bill and Planning Administration Bill (the Bills) proposing a new planning system for NSW.

In February 2012, the NSW Independent Commission Against Corruption (ICAC) released a report "*Anti Corruption Safeguards and the NSW Planning System*" (the Report) that identified six corruption prevention safeguards that would reduce the frequency of corruption if integrated into the NSW planning system. These safeguards, together with comments on where the Bills fall short, are set out below.

1. Providing Certainty

The principle: ***The existence of a wide discretion to approve projects, which are contrary to local plans and do not necessarily conform to state strategic plans, creates a corruption risk and community perception of lack of appropriate boundaries.***

In its Report, ICAC specifically mentioned the width of discretion in (the now repealed) Part 3A and SEPP1 objections as the most obvious examples of wide discretion to decision makers in the planning system posing corruption risks.

The Bills give the Minister and Director General of Planning extensive discretion in relation to the making, amendment and repeal of strategic planning instruments, the issue of strategic compatibility certificates and the declaration of State Significant Development.

Added to this, proposals to create a new "*Enterprise*" zone that will have very limited prohibitions and controls, and to merge existing low and medium density zones into one broad Residential zone, will introduce much more flexibility into the planning system, providing developers with potential windfall profits.

This is particularly concerning in circumstances where clause 10.12 of the Planning Bill significantly reduces the ability of any person to take action in the Land and Environment Court in order to restrain a breach or anticipated breach of the planning laws.

The Bills provide the Minister and the Director General of Planning with extensive discretion to approve projects that are contrary to local plans and allow the introduction of significantly more flexibility into the system.

2. Balancing Competing Public Interests

The principle: ***If it is the intent of the planning system to prefer a particular public interest over another, this should be clearly articulated in the legislation to avoid perceptions of undue favouritism.***

The Planning Bill contains nine objectives in clause 1.3. These are in no particular order and are consequently capable of causing confusion in decision makers and allowing corruption to be cloaked.

The absence of an overarching objective goes directly against Recommendations 6 and 7 of the NSW Planning System Review by Messrs Tim Moore and Ron Dyer.

3. Ensuring Transparency

The principle: ***Transparency is an important tool in combating corruption and providing public accountability for planning decisions.***

The extensive discretion provided to the Minister and the Director General of Planning is likely to lead to less transparency, as is the extension of powers to planning bodies.

The Bills provide for the continuation of the Planning Assessment Commission (PAC), Regional Planning Panels (currently known as Joint Regional Planning Panels), new Sub-Regional Planning Boards and ad-hoc committees and panels.

PAC members, Regional Planning Panel members and Sub-Regional Planning Panel members are appointed by the Minister for a period not exceeding three years (four for Sub-Regional members) and are part-time (although the Minister may appoint PAC members full time). This raises opportunities for patronage that could very well open the door for corrupt behaviour.

In addition, there is no restriction on the panel members engaging in other work, including carrying out work for developers.

Because the members of these planning bodies hold their positions at the will of the Minister and do not have tenure (unlike for example, a Judge), there will be at least the perception that these appointees will be doing the bidding of the Minister (notwithstanding the fact that the Bills provide that the appointees are not subject to the "*direction*" of the Minister).

A further concern is that the members will be able to continue to work in the private sector and in particular, to work for the very developers who will be the subject of the decisions they will be making. Even if the members excuse themselves from dealing with matters relating to existing clients, (or those of the firms they are employed by) there may nevertheless be a perception of a pro-developer bias in respect of the Ministerial appointees.

The proposal to deny the community the right to comment on up to 80% of developments is also likely to reduce transparency.

The Bills will reduce transparency.

4. Reducing Complexity

The principle: ***A straightforward regulatory structure assists in the detection of corrupt conduct and acts as a disincentive for individuals to undermine the system.***

The system remains complex. There are four levels of plans, four "*streams*" of development assessment, "*EIS Assessed"* Development, State Significant Development, State Significant Infrastructure and Public Priority Infrastructure. In addition, there are a variety of bodies responsible for determining applications – the Minister, the Director General, the PAC, Regional Panels, Councils and Private Certifiers.

The Bills do not reduce complexity.

5. Meaningful Community Participation and Consultation

The principle: ***Meaningful community participation in planning decisions [relating to planning instruments and development proposals] is essential to ensuring public confidence in the integrity of the system.***

Whilst the Bills provide for a "*Community Participation Charter*" in respect of the development of strategic instruments, including local plans, this Charter is not mandatory or enforceable, and does not apply to development applications. Further the Minister has extensive powers to amend all strategic plans with or without community consultation, and the Director General has the power to issue strategic compatibility certificates to allow prohibited developments without public consultation.

The Bills do not ensure meaningful community participation.

6. Expanding the Scope of Third Party Merit Appeals

The principle: ***There is currently a disparity between objector and applicant rights on the issue of merit appeals. Merit appeals provide a safeguard against biased decision making by consent authorities and enhance the accountability of these authorities. The extension of third party merit appeals acts as a disincentive for corrupt decision making by consent authorities.***

The Bills provide that in almost all cases developers (proponents) have the right to appeal to the Land and Environment Court on the merits in relation to a decision about a development application. Proponents also have a right to seek a review of a Council decision not to proceed with a spot rezoning proposal.

However, third party appeal rights on the merits (third party appeal rights) are only available to objectors in relation to "*EIS Assessed*" development applications.

The Bills have not specified what categories of development will be "*EIS Assessed"* (which is itself a concern), but assuming that this follows the categories of "*Designated Development*" under the current *Environmental Planning and Assessment Act*, this class of development is quite limited.

In addition, the Bills remove the current rights of a third party objector to take action if they believe a breach of the Act or general law has occurred (judicial review) in relation to the making of strategic planning instruments and State Significant Development.

In contrast to the ICAC observations that increased review opportunities improve decision making, the Bills reduce the oversight of decisions provided by the right of legal challenges.

CONCLUSION

The Bills do not compare well with the six corruption prevention safeguards identified by ICAC. It is the view of the *Better Planning Network* that, if adopted, the Bills would lead to an increased risk of corruption in NSW.

RECOMMENDATIONS

1. The discretionary decisions of the Minister relating to the making, amendment and repeal of strategic plans be subject to mandated, robust and objective criteria.
2. The "*Community Participation Charter*" be made mandatory and enforceable, and the Minister and all consent authorities be bound by community participation plans.
3. The community's right to comment on all development applications that are not currently classified as exempt be retained.
4. Clause 10.12 of the Planning Bill (which limits the right of judicial review) be deleted.
5. Third party objectors have a right to appeal on merit to the Land and Environment Court in relation to all development applications and decisions to rezone land.
6. Strategic Compatibility Certificates be removed from the Planning Bill.
7. Members of the PAC and Regional Planning bodies be full time appointments and their members be precluded from acting for developers (or being in a company or firm that so acts) during the period of their appointment.
8. That ICAC carry out an audit of the Bills and that further progress of the Bills be suspended until issues raised by the ICAC in their audit are fully addressed and the risk of corruption removed.