

PLANNING LAW AND SUSTAINABILITY IN AUSTRALIA: ACHIEVEMENTS AND CHALLENGES

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Keywords: sustainability, ecologically sustainable development, legislation

Abstract

In 1992 the Australian Government published its National Strategy for Ecologically Sustainable Development, a policy document representing Australia's response to the World Commission on Environment and Development 1987 report Our Common Future (the Brundtland Report). Through the auspices of Australia's federal system of government, it was envisaged that the sustainability principles in this national policy document would progressively be implemented, through both policy and law, at the national, state and local levels of government. Beginning with a description of the Australian concept of 'ecologically sustainable development' (ESD), this paper first examines the implementation of ESD through both policy and legislation at the Commonwealth level. The State of New South Wales (NSW) is then selected for more detailed assessment, with, examples of key State government legislation and court decisions considered. Equal emphasis is placed on both the achievements in ESD policy development and implementation through legislation, statutory planning procedures and litigation, as well as the challenges that have confronted the pursuit of ESD in NSW. Noteworthy amongst these challenges has been a failed recent attempt by the NSW Government to introduce new planning legislation which sought to replace ESD with the arguably weaker concept of 'sustainable development' as one of its objectives. Apparent from this episode is strong community and institutional support for robust sustainability provisions within the State's statutory planning system.

1. Introduction

In 1992 the Australian Government published its *National Strategy for Ecologically Sustainable Development* (Commonwealth of Australia, 1992), a policy document representing Australia's response to the Brundtland Report, *Our Common Future* (United Nations World Commission on Environment and Development, 1987). Arguably Australia has pursued a fundamentally different model for the interpretation and implementation of sustainable development which involved a modification of that used in the Brundtland Report. The divergence stems from the adoption of *ecologically* sustainable development, and the changes in conceptual focus which consequently emerged from this model.

In accordance with Australia's federal system of government, it was envisaged that the concept of 'ecologically sustainable development' (ESD), would progressively be implemented, through both policy and law, at the national, state and local levels of government. This paper first examines the implementation of the 'principles and programs' of ESD through both policy and legislation at the national (Commonwealth) level. Second it traces the adoption of ESD at state level, using the State of New South Wales (NSW) as a case study. Third, it considers an attempt to retreat from ESD as part of recent statutory planning system reform in NSW, which culminated in the formulation of a Planning Bill in 2013 to replace existing planning legislation.

Replacing the uniquely Australian statutory and policy formulation of ESD, the Planning Bill 2013 adopted the broader concept of sustainable development. With the entrenched institutionalisation of ESD and its active implementation in NSW forming a contextual backdrop, this paper examines the potential implications of the Planning Bill's proposed conceptual change from ESD to sustainable

development. The paper thus examines how ESD has been implemented and interpreted in NSW, and what changes may occur under a new Planning Act.

2. Conceptual framework, hypothesis and methodology

From a conceptual perspective, this paper examines the statutory expression of sustainable development in the NSW Planning Bill, and argues that it represents a significant departure from the ‘traditional’ the Australian ESD framework for environmental policy. Broadly, this change of focus can be attributed to a general neoliberal reform process confronting planning systems (including NSW). In particular, it is contended that the proposed planning legislation alters – indeed removes – ESD to ensure that any express reference to an integrated approach for the purpose of achieving sustainable development is deleted. As such, this new conceptual framework ignores the necessary integration of economic, environmental and social considerations in decision-making so as to facilitate development that is sustainable.

Pertinently, considerable criticism was directed in stakeholder submissions on the planning reforms toward the significant change in emphasis or approach by the NSW government in its adoption of sustainable development. Specifically, the problem statement examined here is the argument that, as a consequence of this envisaged change, the depth of environmental analysis of the impact of planning proposals and projects in NSW will be diminished and economic considerations enhanced, under the proposed new planning legislation. To this end, the methodology adopted here is to: first examine the Australian concept of ESD; second consider its application and interpretation in NSW through legislation and case law; and then to analyse the proposed change of approach to sustainable development through a consideration of relevant provisions of the Planning Bill 2013 and submissions made by interest groups as part of the planning reform consultation process.

In considering ESD at both national and NSW levels, particular emphasis is placed on the precautionary principle, as arguably this has been perceived as the most problematic aspect of ESD. Concern over the operation of the precautionary principle appears to have been a major ‘cause’ of the move to replace ESD with sustainable development.

3. The Australian concept of sustainability – ecologically sustainable development

Perhaps somewhat harshly, it has been argued that sustainable development contains little merit as a framework for contemporary environmental policy-making, and should be replaced by a more ‘workable paradigm’ (Owens and Cowell, 2011, p.43). In the Australian context, the word ‘ecologically’ has been added as a prefix to ‘sustainable development’ to form the title to the current ESD process. The interpretation of ESD appears broadly synonymous with the Brundtland concept, but emphasises our particular concern with the ecology and the protection of the ecology including the protection of biodiversity in Australia. To elaborate, the Australian Government states that the prefix ‘ecologically’ was added to the normal international usage of sustainable development ‘in recognition of the very great importance of protecting ecosystems in the context of a continent in which many unique ecosystems were under threat’ (Commonwealth of Australia, 2002, p.5).

Significantly therefore, at the domestic level of Australian environmental policy-making, the interpretation of sustainable development has assumed the unique form of ecologically sustainable development. Both government and academics have recognised that the insertion of the adjective ‘ecologically’ into the formula of sustainable development introduced a qualifying term that imports a peculiar emphasis on the integration of the environment into development discourse (see for example, Commonwealth of Australia, 2002; Harding, 2006; Bates, 2010; and Farrier and Stein 2011). Farrier and Stein for example state that ESD gives ‘the concept of sustainable development greater precision and ... make it a more useful tool in legal contexts (2011, p. 8). Further, they content that ESD requires the integration of economic, environmental, social and equitable considerations, over both the short and long term (Farrier and Stein, 2011).

The sustainability process in Australia began in June 1990 with the release of a Commonwealth government Discussion Paper on ESD (Commonwealth of Australia, 1990). Here the term ESD was broadly interpreted as:

Ecologically sustainable development means using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.
(Commonwealth of Australia, 1990, p.3)

In 1992, the Commonwealth government finalised a *National Strategy for Ecologically Sustainable Development* (NSES D) (Commonwealth of Australia, 1992), which was endorsed by the Council of Australian Governments (that is, the Commonwealth, state and territory governments) on 7 December of that year. While the NSES D stated that there was no universally accepted definition of ESD, the strategy had as its goal:

Development that improves the quality of life both now and in the future, in a way that maintains the ecological processes on which life depends.
(Department of the Parliamentary Library, 1994, pp.3-4).

Harding (2006) convincingly argues the status of ESD as a uniquely Australian concept which differs in emphasis from the concept of sustainable development at the international policy level, due to the added importance placed by the former on ecological integrity. Harding writes that ESD,

... is a peculiarly Australian term and arose in the early stages of a government initiated discussion of sustainable development in Australia in 1990. It seems that the environmental groups, concerned that the sustainable development discussion process would be hijacked by business and industry and interpreted as just *economically* sustainable development, successfully fought for the inclusion of ecologically in the 'official' terminology. This is the term that has been used since then in Australia including in legislation and policy.
(Harding, 2002, p.233).

Harding's analysis draws a clear distinction between the perception of economic prioritisation that could be engendered by the concept of sustainable development (i.e. *sustained* development), and the relevance of the deliberate insertion of the adjective 'ecologically' in the Australian formula of sustainable development.

The significance of ESD in Australia is demonstrated by Bates, who states:

ESD has become the most important legislated criteria for environmental management, not just as an object of legislation, but as a mandated consideration for environmental decision-making. Statutory requirements to 'have regard to' ESD when making decisions appear not just in environmental legislation, but perhaps more importantly in legislation conferring discretionary powers on a wide range of government agencies to take or approve activities that might impact adversely on the environment and natural resources.
(Bates, 2011, p.208).

Although legal definitions of the concept of ESD differ between Commonwealth and state legislation, most are fundamentally based on the definition of ESD agreed to by Commonwealth, state and local governments and expressed in the NSES D and the *Inter-Governmental Agreement on the Environment*, signed by Commonwealth, state and territory governments and the Australian Local Government Association in May 1992 (Bates, 2011). In summary, the term ESD embodied in these documents imports the principles of: a) the precautionary principle; b) inter-generational equity; c) conservation of biological diversity and ecological integrity; and d) improved valuation and pricing of environmental resources.

A significant element of the uniquely Australian emphasis on the ecological aspect of sustainable development is the parallel importance of the precautionary principle as a core principle of ESD. Recognition of scientific uncertainty in relation to the environmental impacts of development has represented an important shift in approaches towards environmental management. In particular, this approach holds that a more anticipatory attitude in relation to the environmental harm created by human activities must operate as a necessary pre-requisite for progress towards sustainability.

Controversy and debate has existed in relation to two different perspectives on the application of the precautionary principle. On the one hand an absolutist interpretation and operationalisation of the precautionary principle has sought a ‘zero-risk’ outcome, while on the other perceptions of the variable and open-ended articulations of the principle have resulted in a lack of consistency in its application (Harding and Fisher, 1999).

In the context of the debate surrounding the efficacy of the precautionary principle, several national and state policy and legislative documents make specific reference to the relevance of a ‘risk-weighted’ approach in applying the principle. The insertion of this operative provision in the definition of ESD in s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW), for example, came as a consequence of judicial interpretation of the proper means of applying the precautionary principle. Specifically, in *Greenpeace Australia Ltd v Redbank Power Company Ltd and Singleton Council* (1994) 86 LGERA 146, Chief Justice Pearlman of the Land and Environment Court stated (at p. 154) that ‘the application of the precautionary principle dictates that a cautious approach should be adopted in evaluating the various relevant factors in determining whether or not to grant consent; it does not require that the greenhouse issue should outweigh all other issues.’ The precautionary approach thus requires the gravity of potential environmental harm to be combined with an assessment of the balance provided by other salient social and economic factors when making a decision in relation to a particular proposal or activity. Through application of this approach, fears of an absolutist implementation of the precautionary principle, were somewhat allayed.

Indeed, in assessing the suggestion that the precautionary principle operates as an absolutist dictum, Nollkaemper concludes that the ‘status of the precautionary principle as a principle allows for a balanced approach to risks. It serves the interest of risk-aversion; yet it means that the precautionary principle is not a trump-card that a priori overrides other considerations’ (Nollkaemper, 1996, p.73). Harding has likewise identified that from the Australian perspective, ‘opposition to the principle will grow unless its application ... occurs within the context of application of the full suite of ESD principles’ (Harding, 2006, p. 18). However, when applied to the structures of sustainable development in Australia and NSW in particular, the broad policy expression of the precautionary principle contains an in-built mechanism against the absolutist status of precaution through explicitly requiring ‘an assessment of the risk-weighted consequences of various options’ (Harding, 2006, p.6). To this extent, Harding has correctly identified that absolutist interpretations represent ‘an extreme interpretation of the precautionary principle’ (2006, p.6) and that a ‘risk-weighted’ interpretation has been statutorily adopted in Australia.

Thus it is suggested that Australia has pursued a fundamentally different model for the interpretation of sustainable development from that which is utilised in the Brundtland Report. This divergence stems from the adoption of the concept of ESD, and the changes in conceptual focus which consequently emerge from this model. In particular, attention is drawn to the relevance of the precautionary principle as a leading principle of the Australian model of ESD, and its proper application through a risk-weighted approach in environmental decision-making.

4. ESD in New South Wales

Two Australian states that adopted ESD as part of their planning laws have recently attempted to retreat from this position. The states of Queensland and New South Wales have, as part of a neoliberal statutory planning reform agenda, sought to displace ESD as an object and purpose of their planning acts, by the broader – and arguably weaker – concept of ‘sustainable development’.

Queensland's current planning law, the *Sustainable Planning Act 2009* (Qld), incorporates ESD as the specific purpose of the Act by seeking to achieve 'ecological sustainability', including the application of the precautionary principle and provision for intergenerational equity. However, draft Planning Bills currently being considered in Queensland propose to introduce a new Planning and Development Act which removes entirely the principles of ESD (EDO Qld, 2014), to be replaced with the object of facilitating 'prosperity, including through ecologically sustainable development that balances economic growth, environmental protection and community wellbeing'. Although there was a change in State government in Queensland in January 2015, the new government remains committed to continuing this planning reform process in that state (Department of Infrastructure, Local Government and Planning, 2015).

Nonetheless, NSW has been selected for closer scrutiny as it has incorporated ESD in a range of environmental laws, including the main land use planning law, the *Environmental Planning and Assessment Act 1979*, as well as having, in comparison to other planning jurisdictions in Australia, a body of established case law in this field, due in part to the presence of a specialist tribunal, the NSW Land and Environment Court. Also, as Bates (2010) point out, NSW has quite consciously adhered to the NSESD definition of ESD.

4.1 ESD in legislation

The first statutory manifestation of ESD policy in NSW occurred in 1991 when ESD, and its attendant principles, were incorporated into s 6(2) of the *Protection of the Environment Administration Act 1991* ('POEA Act'). The 'principles and programs' of ESD contained in s 6(2) of the POEA Act are:

- (a) The precautionary principle – namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:
 - (i) Careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
 - (ii) An assessment of the risk-weighted consequences of various options,
- (b) Inter-generational equity – namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,
- (c) Conservation of biological diversity and ecological integrity – namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,
- (d) Improved valuation, pricing and incentive mechanisms – namely, that environmental factors should be included in the valuation of assets and services, such as:
 - (i) polluter pays – that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,
 - (ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,
 - (iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.

Environmental protection has figured as a key object of the *Environmental Planning and Assessment Act 1979* (EP&A Act) having an expression in three of the ten objects of the Act (s 5(a)(i), (vi) and (vii)). ESD inserted as an object of the EP&A Act in 1997. The definition of ESD adopted by the Act

is the same as that found in s 6 of the POEA Act, which in turn accords with national policy framework of ESD. The principles and programs of ESD found in the NSESD have been incorporated into the objects of several other pieces of NSW legislation, including the *Mining Act 1992*, *Coastal Protection Act 1979*, *Local Government Act 1993*, *Water Management Act 2000* and *Native Vegetation Act 2003*, and is adopted as the standard terminology used in over 60 NSW statutes. Notably, the *Environmental Planning and Assessment Regulation 2000*, requires that these principles be incorporated into environmental impact assessment under the EP&A Act.

As a signatory to the *Inter-Governmental Agreement on the Environment* in May 1992, the Australian Local Government Association committed itself to the promotion of the agenda of ESD. Further, s 8 of the *Local Government Act 1993* (NSW) explicitly declares ESD as a constituent element of the Charter for Local Government, which includes the following ‘... to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development.’

4.2 ESD in case law

The statutory requirement of ESD has further been augmented by a significant body of case law developed in the NSW Land and Environment Court, which has assisted practitioners in the application of ESD to planning and development matters in NSW. In its jurisprudence on questions of law concerning the application of ESD principles to the development assessment process, the Court has recognised that, whilst environmental degradation may be outweighed by the overall benefits of a proposed development project, it is nonetheless crucial that decision-makers take care in considering the existence of appropriate and adequate measures to control and mitigate likely environmental harm (*Leatch v National Parks and Wildlife Service and Shoalhaven City Council* (1993) 81 LGRA 270 at 282).

With regards to the interpretation of ESD and the nature of its proper application in the context of the development assessment process provided for in the EP&A Act (specifically Part 4 – ‘Development Assessment’), the Court has adopted an approach safeguarding a strong form of sustainability. Despite the omission of ‘ESD’ from the mandatory requirements that a consent authority must take into consideration in determining a development application under s 79C of the EP&A Act, the Court has consistently read the requirement of ESD into the ‘public interest’ factor of that section.¹ As a consequence of this interpretation of s 79C, the Court has acknowledged the NSW Parliament’s intention of introducing ESD as an additional object of the Act, and has subsequently explicitly elevated ESD to the status of a legal requirement in the development assessment process.

In the context of interpreting the principle of ESD which endorses conservation of biological diversity and ecological integrity, several judgments of the Land and Environment Court have recognised the check that ESD places on the ostensible ‘certainty’ of zoning. In particular, in *BGP Properties Pty Ltd v Lake Macquarie City Council* [2004] NSWLEC 399, McClellan CJ took cognisance of the legal relevance of ESD in the EP&A Act to find that a decision-maker should refuse development consent where the proposed project will cause environmental harm, irrespective of the land in question being zoned for development purposes. Thus the Court held that ESD considerations may override the zoning provisions of planning instruments: that is, ESD considerations may render a site undevelopable, displacing the presumption or expectation of gaining approval for a ‘suitably’ designed proposal, despite it being zoned for development. Implicit also in the judgment was the proposition that development consent, and not zoning, operates as the source of the conferral of the right to develop. In *BGP Properties* ESD was recognised as a relevant legal condition that burdens other,

¹ See for example, *Carstens v Pittwater Council* [1999] NSWLEC 249 at [74]; *BGP Properties Pty Ltd v Lake Macquarie Council* [2004] NSWLEC 399 at [113]; *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133 at [123]-[124]; *Minister for Planning v Walker* [2008] NSWCA 224 at [43]; *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426; *Gales Holdings Pty Ltd v Tweed Shire Council* [2006] NSWLEC 85.

legally-created zoning criterion, which would have otherwise facilitated unsustainable and environmentally harmful development. Further, the authoritative nature of this statement as a settled point of law is evident in the status of *BGP Properties* as a precedent that has been applied and followed in numerous succeeding NSW cases.²

The case of *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133, a merits appeal against the respondent local council's decision to refuse an application made by Telstra for the installation of mobile phone towers, involved a comprehensive engagement with ESD principles by Chief Justice Preston. The precautionary principle provided the context of the major issue in the litigation: namely, whether there was a need to apply the precautionary principle in the development assessment process, so as to address the potential public health impacts caused by radiofrequency electromagnetic energy (RF EME) emissions from the proposed facility. A court-appointed expert reiterated the consensus scientific view that the risks caused by RF EME from the proposed towers 'could not conceivably cause any adverse biological or health effect' (at 78-89). The Court accepted the expert's opinion that 'a high standard of environmental and health protection would be maintained if this station is allowed to be constructed as specified in the proposal from Telstra' (at 89). Furthermore, it was estimated that the emissions from the proposed towers would be less than one fortieth of those permitted under the relevant Australian Standard.

In interpreting the precautionary principle, Preston CJ identified its operation as but one component of the package of principles of ESD. Thus, rather than viewing the precautionary principle in isolation, it was reaffirmed that precautionary measures must not only be appropriate having regard to the precautionary principle itself, but also in respect to the other principles of ESD. On the facts of the case before him, Preston CJ held that there was no basis to invoke the precautionary principle, given that the proposal for the mobile phone towers already incorporated measures to ensure the compliance of the level of RF EME emissions with the relevant (precautionary) Australian Standard. As a consequence, 'any harm to the health and safety of people or the environment caused by exposure to such extremely low levels was negligible' (at 184). Importantly, the judgment clarified (at 186) that:

This conclusion did not mean that there had been an avoidance of a precautionary approach. On the contrary, the conclusion was a direct consequence of the fact that a precautionary approach had already been adopted in the standard setting process, the terms of the relevant Australian standard, the design and location of the proposed base station, the equipment to be provided, the operation of the equipment, the application of the Australian Standard to the RF EME generated from the base station, and the likelihood of actual RF EME being significantly less than predicted.

The authority of *Telstra* in relation to the point of law that deals with the interpretation and application of the precautionary principle has remained undisturbed. Indeed, the absence of a judicial review case in the years since *Telstra* has been supported by the parallel development whereby *Telstra* has been periodically applied in merits review cases heard by commissioners of the Land and Environment Court. This consistent interpretive approach by the Court has made a clear contribution to understanding the weight to be given to the precautionary principle in such areas of practice as development assessment. Also revealed is the preference of the Court for adopting a standard of sustainability that is predicated upon appropriate invocation of precaution.

²See for example, *Chappelow v Sutherland Shire Council* [2005] NSWLEC 56; *BT Goldsmith Planning Services Pty Ltd v Blacktown City Council* [2005] NSWLEC 210; *Joye v Valuer-General* [2006] NSWLEC 341; *Wei v Holroyd City Council* [2007] NSWLEC 163; *Martin & Sporke Pty Ltd v Wingecarribee Shire Council* [2007] NSWLEC 598; *Telstra Corp Ltd v Blacktown City Council* [2008] NSWLEC 1261; *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190; *Wygiren Pty Ltd v Kiama Municipal Council* [2008] NSWLEC 1233; *Motorplex v Port Stephens Council (No 3)* [2008] NSWLEC 1280; *Drazdon Pty Ltd v Ku-ring-gai Council* [2009] NSWLEC 1147; *Qur'anic Society 'Dar Tahfez El-Quran' Inc v Camden Council* [2009] NSWLEC 1171; *Homemaker Hub Pty Ltd v Strathfield Council* [2009] NSWLEC 1265; *Southern Cross Community Housing Ltd v Shoalhaven City Council* [2010] NSWLEC 1306; *Urban Link Pty Ltd v Lane Cove Council* [2011] NSWLEC 1279; *Landmark Group Pty Ltd v Lane Cove Council* [2011] NSWLEC 1303.

The matter of *Walker v Minister for Planning* [2007] NSWLEC 741, concerned a concept plan approval by the respondent under (the now repealed) Part 3A of the EP&A Act, for a proposed residential subdivision and retirement development on a flood constrained coastal plain near Wollongong, south of Sydney. In a lengthy judgment which navigated the policy and legislative history and context of ESD, as well as the body of jurisprudence that has developed around it, Justice Biscoe of the Land and Environment Court found in favour of the applicant, invalidating the approval of the concept plan on the ground of the respondent's failure to take into account principles of ESD as a mandatory relevant consideration. ESD considerations were held to be relevant to the concept plan assessment process as a consequence of the increased flood risk which was identified as a major constraint to development, and the added fact that this impact was enlarged due to the compounding effect of climate change.

A notable feature of the judgment in *Walker* by Biscoe J was his Honour's comprehensive analysis of the international, national and NSW policy frameworks for ESD, as well as a survey of the Court's body of case law concerning ESD, so as to reinforce the relevance of the extensive incorporation of the principles of ESD in both Commonwealth and NSW environmental legislation. Biscoe J maintained that a crucial consequence of the widespread adoption of ESD in law and policy was its intended operation as a requirement with sufficient legal weight to ensure that it was taken seriously by decision-makers when executing environmental management functions such as determining development proposals. The judgment by Biscoe J was subsequently appealed by the NSW Minister for Planning and, in a decision which at face value might appear to undermine the case of 'strong' sustainability, was overturned by the NSW Court of Appeal (*Minister for Planning v Walker* [2008] NSWCA 224). The NSW Court of Appeal held that as a matter of statutory construction of Part 3A of the EP&A Act, it was not mandatory to have regard to one or more of the principles of ESD due to the extremely broad discretion available to the Minister under that part of the Act. The Court of Appeal emphasised however, that it *was* mandatory to have regard to ESD under other parts of the Act. Significantly, the deeply unpopular Part 3A of the EP&A Act was repealed in 2011, leaving ESD as a mandatory relevant consideration in the current project assessment provisions in the EP&A Act.

The more recent judgment of the Land and Environment Court in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* [2013] NSWLEC 48 has reaffirmed the application of ESD principles in the NSW planning system. Here the Court upheld a third party appeal for merit review of a decision in 2010 by the Minister for Planning to approve an extension of an open cut mine under Part 3A of the EP&A Act. While significant for several reasons (for example it provided an exhaustive review and assessment of the merit issues of the case), the decision was particularly illuminating because reference was made to the relevant principles of ESD throughout the judgment to assist the Court in its merits review task. The judgment can be distinguished from that by the Court of Appeal in *Walker* because, although both related to development approvals under Part 3A of the Act, *Walker* considered whether ESD was a mandatory consideration as a discrete planning issue, whereas in *Bulga* the Land and Environment Court considered a variety of relevant planning impacts through the context of ESD. Significantly, the Land and Environment Court's judgment in *Bulga* was subsequently upheld on appeal by the NSW Court of Appeal (*Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105).

In *Bulga*, Warkworth's project application was refused by the Land and Environment Court due to, *inter alia*, its likely significant adverse impacts on biological diversity, including on four types of endangered ecological communities listed under the *Threatened Species Conservation Act 1995*. Specifically, the Court held that the project would have unacceptable impacts on biological diversity which, despite proposed biodiversity offsets and other compensatory measures, were not able to be adequately avoided, mitigated or compensated. In the course of considering this case, the Chief Justice's deliberations were infused with acknowledgment of ESD principles. It is sobering to note that, with the abandonment of ESD as proposed by the Planning Bill 2013, it is unlikely that the grounds and reasons relied on in *Bulga* would be available in future litigation in the Court.

5. The move to sustainable development in NSW

Broadly, planning systems (including in Australia) have been impacted upon by governments' neo-liberal requirements as to the fast-tracking of the planning process, the privatization of many public industries and services, and the reduction in public spending. The neo-liberal paradigm has been harnessed to explain much of the rationale of planning system reform in recent years (Blowers, 2000; Gleeson and Low, 2000a; 2000b). In NSW planning reform had become a major policy concern and, following its electoral success in March 2011, the incoming State government announced a review of the existing EP&A Act with the intention of replacing it with a new Planning Act.

A period of extensive consultation commenced in July 2011 with the establishment of an independent panel to review the planning system which published two issues papers in December 2011 and May 2012 (NSW Government 2011; 2012a). This was followed by the release of a Green Paper (NSW Government 2012b), and finally a White Paper and Exposure Draft Planning Bill 2013 (NSW Government 2013a). While the report of the independent panel recommended the retention of ESD as an object of a new Planning Act, both the 2013 White Paper *A New Planning System for NSW*, and the subsequent Planning Bill 2013, omitted any reference to ESD. In its place, the term 'sustainable development' was adopted. While the NSW government justified this change on the basis of the adoption of the term utilised in the Brundtland Report, this omission of ESD was crucial as the highly significant principles and programs of ESD found in the EP&A Act would be displaced.

To examine some of the substantive implications of the operationalisation of sustainable development in the Planning Bill, this section considers its legislative definitions and objects. It is submitted that sustainable development contains a clear comprehension which reflects the NSW government's preference for economic growth as the overriding philosophical core of the regulatory planning system created by the Planning Bill. Specifically, this argument maintains that the adoption of sustainable development is not merely a minor issue of semantics, but rather a calculated removal of the integrated approach to decision-making provided through the framework of ESD, which includes the joint consideration of economic, social, equitable and environmental factors.

In analysing the relevance of the proposed change from ESD to sustainable development, it is important to acknowledge the deliberate position taken by the NSW government in the debate concerning the relative weight to be assigned to economic, social and environmental factors in planning decision-making. When read in concert, the nine objectives of the Planning Bill reinforce a strong growth focus. For example, the eighth objective promotes 'efficient and timely development assessment proportionate to the likely impacts of the proposed development.' Some submissions in relation to the Exposure Planning Bill identified a fundamental philosophical shift in the objects of the current and proposed Acts; namely, from one which focused on the outcomes of planning decision-making to another which 'is directed more at the process of plan-making and development assessment' (Local Government NSW, 2013, p.14). As a consequence of this interpretation, the Property Council of Australia has succinctly surmised in its submissions that the Planning Bill would be the 'primary land use and economic growth legislation for NSW' (Property Council of Australia, 2013). One may accordingly observe that the by-product of the process-oriented focus of the Planning Bill was a clear encouragement of expediency in the development assessment process – a focus which significantly alters the outcome-driven emphasis of ESD, and lends support to an interpretation of growth on the basis of sustained development.

Of the nine equally-weighted objects of the Planning Bill, the first-stated object is that of 'economic growth and environmental and social well-being through sustainable development.' The Planning Bill purports that 'sustainable development is achieved by the integration of economic, environmental and social considerations, having regard to present and future needs, in decision-making about planning and development.' The proposed change to the object of ESD, and its replacement with the new object of sustainable development creates an immediate, fundamental conceptual and definitional divergence. Of great significance for the removal of ESD is the nullification of the principles which

attached to its statutory definition. In particular, the definition of sustainable development is silent on three of the principles and programs of ESD – the precautionary principle; conservation of biological diversity and ecological integrity; and improved valuation, pricing, and incentive mechanisms, including the polluter pays principle. Furthermore, the definition only contains an abridged version of the more detailed principle of inter-generational equity. The result of removing such principles of ESD is the potential for reduced depth of environmental analysis undertaken in the development assessment process.

In the face of this omission of ESD, and legislating to replace it with sustainable development involving a choice between economic growth and environment-social values, it would appear that NSW courts may be jurisdictionally impotent to revive an application of ESD in the operative sections of the Planning Bill. In the context of statutory interpretation, the objects of any regulatory system are the clearest litmus test for the intended manner of its operation (Pearce and Geddes, 2011), and the philosophical foundation of an economic imperative in the Planning Bill's objectives accordingly creates a clear directive for the courts in the determination of conflicting values.

A misconception of ESD as a policy that unduly prioritises environmental factors possibly accounts for the NSW government's decision to abandon ESD in favour of sustainable development. Indeed, this decision is particularly significant when one considers that the retention of ESD was an explicit recommendation made by the Independent Planning Review (NSW Government, 2012a). Further, advocates of the retention of ESD would agree with the broader recommendation of the Independent Planning Review that ESD should be included in the planning reforms as the overarching object.

With regards to the argument of policy misconception, the following observation by the Nature Conservation Council of NSW and the Total Environment Centre clarifies the relevant legal application of ESD:

It is important to recognise that ecologically sustainable development does not seek to raise environmental matters above other matters. Ecologically sustainable development seeks to integrate environmental, economic and social considerations in decision making.

Properly applied, ESD recognises that ecological integrity and environmental sustainability are fundamental to social and economic wellbeing, particularly when considering the needs of both present and future generations. Despite the challenges presented by the concept of ESD, experts have recognised that there is no other credible candidate for an integrative policy framework.

(Nature Conservation Council of NSW, 2013, p.12).

Recognising the consequences of removing ESD principles and the attendant economic, environmental and social factors to be considered in their application, Local Government NSW, in a submission on behalf of NSW local councils, noted the earlier recommendations to retain ESD. In particular, the submission emphasised the concern of councils 'that the removal of these principles may limit their ability to protect important natural assets which underpin future economic and social viability' (Local Government NSW, 2013, p.14).

The Law Society of NSW supported this argument by expressing concern that 'in the absence of a focus on ecologically sustainable development in the objects, this is likely to have the consequence that inter-generational equity, the precautionary principle and other environmental benefits will be outweighed by perceived public benefit in economic and social terms' (Law Society of NSW, 2013, p.9).

6. Conclusions

This paper contends that the NSW government's adoption of sustainable development on the apparent basis of reconciling NSW planning laws with international environmental standards involves the

misconception that sustainable development can only operate in practise through the prioritisation of either economic or environmental concerns. As a consequence of this approach, the legal safeguards that exist when an integrated approach to decision-making is adopted through the ‘triple bottom line’ focus of ESD on economic, social and environmental factors, are removed.

The argument for the retention of ESD as an object of planning laws has been presented through: its consistent application in national policy documents and inter-governmental agreements; its operationalisation through an exhaustive definition in the POEA Act which captures the national policy framework for ESD and which was also incorporated in the EP&A Act; its adoption as the standard terminology used in over 60 NSW statutes, including the *Mining Act*, *Coastal Protection Act*, *Local Government Act*, *Water Management Act*, and *Native Vegetation Act*; and its well-established basis in planning law jurisprudence, with a body of case law concerning its interpretation and application.

The paper claims that sustainable development represents a somewhat different paradigm which reflects the NSW government’s preference for facilitating economic growth as the overriding purpose of a reformed planning system. Specifically, the adoption of sustainable development is not merely a minor issue of semantics. Rather, it suggests that the abandoning of ESD is symptomatic of the NSW government’s calculated prioritisation of economic growth values in planning decision-making processes. This contention is supported by an examination of the definition and operationalisation of sustainable development in the Planning Bill, and subsequent assessment of the limited extent to which this concept is competent in achieving the integrated approach to decision-making, as provided through the framework of ESD.

In particular, it is suggested that the envisaged concept of sustainable development fails to achieve the integrated approach of ESD, which includes the joint consideration of the three ‘bottom lines’ economic, social and environmental factors. Alternatively, insofar as the Planning Bill links the future economic growth of NSW with an active development industry, it erroneously represents the decision-making framework of planning law as requiring a ‘false choice’ between economic growth on the one hand, and social, equity and environmental values on the other. A crucial corollary of this growth focus of the Planning Bill is the simultaneous erosion of the imperative for environmental protection. This has the consequence of signalling the NSW government’s readiness to promote a weak form of sustainability through the reduction of environmental safeguards which place a check on individuals’ expectations to development.

Analysis in this paper of the consequences of the definitional divergences which arise from the replacement of ESD with the broader concept of sustainable development, suggests the ascendancy of a pro-developer cause at the expense of guarantees for environmental protection in land use planning and management. Through removing the well-established principles of ESD from key operation areas of the proposed planning system – namely, the legislative objectives, but also strategic planning and development assessment – the NSW government has endorsed a statutory planning system that seeks to produce expedited and short term economic gains at the expense of sustainable outcomes which have influenced environmental management in Australia for over 25 years.

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