COMMUNITY AND INTEREST GROUPS WORKING PARTY

REPORT TO PRRG ON FURTHER IDEAS IN RELATION TO:

COMMUNITY ACCESS TO INFORMATION

AND

THE COSTS DISINCENTIVE FOR COMMUNITY MEMBERS TO TAKE ENFORCEMENT ACTION AND ARGUE APPEALS

APRIL 2014

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INTENT

- *Enhance community confidence in the planning system, an essential component in an effective and efficient system, through having: certainty in the system (integration), appropriate community participation, transparent and accountable decision-making and due regard to environmental and social impacts.*
- *All stakeholders in the planning process - government, industry, development proponents – need to acknowledge that the mushroom approach to community involvement is ineffective, inefficient and impossible in the 21st century. An informed community is a part of the foundations of a forward looking planning system.*

COMMUNITY ACCESS TO INFORMATION

The Working Party supports the following ideas:
75. Introduce new ways of communicating development proposals, such as fixing notices to properties or using online registers – legislation
Why?

a) Improved communication as part of the public participation process will enhance community confidence in the system by making the public participation process more understandable for community members.

b) Plain English simple communication, with a minimum of technical terminology and legalese, in all aspects of the public participation process (from public notices through to appeal notices) is an essential and easy step in building community confidence in the planning system.

c) Notices need to be clearer so that the lay person can clearly understand what the notice is referring to and how they can have a say.

d) A requirement that plain and simple English be used in the plans and the process documents will greatly contribute to meaningful community participation and ownership of the plans and processes.

e) A range of 21st Century notification methods should be used including social networking sites (such as Facebook and Twitter), blogs, video sharing sites, hosted services, and web applications.

f) However, adoption of additional and more modern notification methods must not result in a reduction of public notification coverage across all age and socio economic groups. The outcome should be greater community notification.

78. Representative bodies should be given a role in the notification and consultation process – legislation

Why?

a) An increased role for specialist and community based representative bodies in the notification and consultation process would enable more informed, effective and efficient community involvement, which in turn would make the planning system more efficient.

b) A flow on effect would be that the planning authorities, the courts and development proponents would be able to seek community comment and address community concerns more effectively and efficiently. For example, organisations such as the National Trust, the Conservation Council of SA, the Environmental Defenders Office and the Aboriginal Legal Rights Service could play a representative role – if properly funded.

The Working Party makes the following additional recommendations:

Working Party Recommendation 1: *All information on planning matters should be made publically available unless there is a compelling public policy reason for it not to be released.*

Working Party Recommendation 2: *The public must be adequately notified. The best-practice solution is an online public register of planning matters that is kept up to date.*

Working Party Recommendation 3: *In addition to notification about ordinary and 'major' planning decisions, there needs to be a simple mechanism introduced to allow the community to be kept easily informed of all public consultations and inquiries currently on foot.*

Working Party Recommendation 4: *Across departments and agencies with overlapping responsibilities, publically available information should be centralised and then linked from each organisation's website to ensure consistency of information and a complete picture.*

Development Public Notification

- For 'public notices' to actually be public notices, they must be reasonably brought *to the notice of the public.*

- As an example of the poor state of current public notification, the 'major developments' section of the *Development Act 1993* requires the Minister only to provide "notice in the Gazette" of a major development declaration.

- The major problems with this approach are that: (1) almost nobody casually reads the Government Gazette; and (2) both the Gazette and any newspaper advertisements are rarely *persistent* i.e. they usually appear for one day only.

- This approach is outmoded because government departments and agencies have long had the ability to publish persistent notices for virtually no cost - on their internet web-pages. Yet, as the *Development Act* doesn't require this, it has generally been done in an ad-hoc and highly deficient manner.

- For example: (i) the two most recently announced major developments are yet to be listed on the Government's Major Developments webpage after more than a month since being gazetted; and (ii) the Whyalla Rare Earth's Complex (which also didn't appear until months after declaration) is still on the list despite being abandoned by the proponents more than a year ago.

- When there is internet publication, it raises a significant problem of its own - there are such a myriad of departmental and agency websites that internet notices can easily become buried.

- Newspapers and the Gazette may have been considered sufficient public communication in the past, but in the 21st century, best practice now requires a persistent and centralised hub of up-to-date information on all public notices via an online public register.

Public Consultations and Inquiries

- Something simply cannot be termed a 'public consultation' if the public has not been made widely aware of its existence. Consultations where only a select number of key stakeholders are informed of their right to make submissions could be more correctly termed 'private consultations'.

- The current system assumes that community members already know what issues are currently open for public consultation, and that they are therefore only looking for the relevant webpage to find out how they can have their say.

- Yet even in that regard the current system remains deficient. At times, a Google search for "[an issue]" and "SA" will yield a simple path, yet at other times searches are just as easily frustrated. Parliamentary inquiries, for example, are notoriously difficult to track down even when the searcher is aware that an Inquiry is up and running.

- Alternatively, the current system assumes that community members are regularly in the habit of trawling through a multitude of government department and agency websites in the hope of discovering whether there are any current inquiries or consultations of interest.

- As a basic test, if a simple Google search for "SA" and "public consultation" does not yield a first or second page result for any issue currently on public consultation, then the body administering that consultation has failed to publish widely enough.

- The existing system is far from exhaustive. While consultation on matters initiated by a government department or body is often flagged by that body, other consultations relevant to that body (but not initiated by it) are rarely flagged at all e.g. parliamentary inquiries.

Access to more general information

- Community members are usually unaware of the demarcation issues that may exist between various departments and bodies with similar interests. For example, consider the recent instances of groundwater contamination at various sites around Adelaide. A community member might reasonably expect to find information on such issues at any or all of the following:

    - Department of Environment and Natural Resources
    - Department of Water
    - Environment Protection Authority
    - Department of Health
    - Department of Planning and Local Government
    - www.sa.gov.au

Internet searches of these organisations reveal disjointed or absent information that could be simply centralised and then linked from each organisation's website to ensure consistency of information and a complete picture.

THE COSTS DISINCENTIVE FOR COMMUNITY MEMBERS TO TAKE ENFORCEMENT ACTION AND ARGUE APPEALS IN THE PUBLIC INTEREST

Section 85 Development Act 1993 – Third Party Enforcement Proceedings

> s. 85(1) *Any person* may apply to the Court for an order to remedy or restrain a breach of this Act or a repealed Act (whether or not any right of that person has been or may be infringed by or as a consequence of that breach).
>
> s. 85(4) An application may be made without notice to any person and, if the Court is satisfied on the application that the respondent has *a case to answer*, it may grant permission to the applicant to serve a summons requiring the respondent to appear before the Court to show cause why an order should not be made under this section.
>
> s.85(15) The Court may order an applicant in proceedings under this section—
>
> (a) to provide *security for the payment of costs* that may be awarded against the applicant if the application is subsequently dismissed;
>
> (b) to give *an undertaking as to the payment* of any amount that may be awarded against the applicant under subsection (16).
>
> s.85(17a) The Court may make such *orders in relation to costs* of proceedings under this section as it thinks fit.

The parliamentary intention of section 85 is to enable any person (because their private interests are affected or because the public interest is affected) to bring enforcement proceedings. In theory, section 85 enables the community to seek to remedy, not just breaches by proponents, but also breaches by planning authorities.

Section 85 is intended to assist in giving effect to the object of the *Development Act* which is to "provide for proper, orderly and efficient planning and development in the State" and, for that purpose to (inter alia) "establish and enforce cost-effective technical requirements, compatible with the public interest, to which building development must conform;" and "provide for appropriate public participation in the planning process and the assessment of development proposals."

However, the practical effect of the discretionary costs security, costs undertakings and costs orders powers has been to almost totally dissuade enforcement proceedings being undertaken by third parties to protect the public interest.

In essence, the financial risk is too great for third parties acting in the public interest. Certainly, the ERD Court has exercised its costs related discretion in a number of "public interest" cases to not impose a financial burden upon public interest third parties.

However, the Court's discretionary approach does not prevent the respondents in enforcement proceedings from using the express or implied threat of adverse costs orders to (at best) dissuade and (at worst) intimidate public interest third parties.

> **Working Party Recommendation:** *Amend section 85 to require the Court, at the same time as determining if it is satisfied that respondent has a case to answer (s.85(4)), to determine if it is satisfied that the applicant is acting in the "public interest".*
>
> *If the Court is satisfied that the applicant is acting in the "public interest", the applicant should, under express amendments to s. 85:*
> - *be exempt from s85(15) orders;*
> - *be exempt from s.85(17a) adverse costs; and*
> - *remain entitled to seek s.85(17a) costs orders.*

The "case to answer" threshold test, the "public interest" threshold test and the practical complexities, time commitment and associated costs for "public interest" applicants will dissuade and filter out disingenuous and non-meritorious "public interest" applications.

As a consequence, the much overused "opening of the litigation flood gates" argument, that is used to oppose such "public interest" reforms, continues to lack any practical or academic merit.

Implementation of the Recommendation will reinforce the parliamentary intent behind section 85 in regard to public participation and will increase community confidence in, and support for, the planning system.

Third Party Public Interest Appeals

The Full Court of the SA Supreme Court in *Crown Marina Pty Ltd V City of Port Adelaide Enfield & Anor* 2010 SASC 121, in exercising the costs discretion, determined that appellants who are successful in the ERD Court but then unsuccessful in the Supreme Court are potentially liable for the costs of the whole action, including the other parties ERD Court costs – i.e. costs of the appeal should follow the event.

The Supreme Court emphasised that:

> *"It is not to the point that the ERDC is a no costs jurisdiction in respect of objector appeals. When the matter reaches this Court, where there is a discretion, that will be exercised in accordance with well-recognised principles."* (para 13)

The Supreme Court acknowledged that, at the discretion of the Court, the usual application of the costs rule could be displaced in cases where it was found that the appellant had no personal interest in the outcome but was pursuing public interest litigation.

Pursuant to section 38 of the *Development Act 1993*, in respect of Category 3 development only, any person who makes a representation (whether because their

private interests are affected or because the public interest is affected) has a right of appeal.

The ERD Court has limited discretionary costs security, costs undertakings and (misconduct) costs orders powers under sections 29 and 39 of the *ERD Court Act 1993*.

The parliamentary intention behind Category 3 appeals is to enable any person (because their private interests are affected or because the public interest is affected) to appeal against a decision to grant a development authorisation. In theory, section 38 enables the community to challenge the merits of a planning decision and the procedural steps of the planning authority under the section 38 process.

Category 3 representation and appeal rights are intended to assist in giving effect to the object of the *Development Act* which is to "provide for proper, orderly and efficient planning and development in the State" and, for that purpose to (inter alia) "establish and enforce cost-effective technical requirements, compatible with the public interest, to which building development must conform;" and "provide for appropriate public participation in the planning process and the assessment of development proposals."

However, the practical effect of the Supreme Court's decision in *Crown Marina Pty Ltd* is to strongly dissuade appellants, who are acting in the public interest, to pursue their appeal rights in the ERD Court. The financial risk is too great. This is particularly so when proponents, with deep pockets, are able to appeal an adverse ERD Court decision to the Supreme Court, and if successful, seek their Supreme Court and ERD Court costs (even when, as in *Crown Marina*, the ERD Court third party appellant did not participate in the Supreme Court appeal).

The public interest third party appellant can, on the costs issue in the Supreme Court, argue that, pursuant to the principles set out by the High Court in *Oshlack v Richmond River Council (1998) 193 CLR 72*, the Court should exercise its discretion not to award costs. However, it takes a brave litigant to take such a financial risk particularly in the knowledge that the proponent may further appeal to the High Court on the costs issue.

Working Party Recommendation:

(a) To provide certainty to public interest third party appellants in regard to costs orders, the common law discretion in regards to "costs of the appeal following the event" should be removed for s.38 appeal proceedings brought in the "public interest".

(b) Amend section 38 to the effect that in all appeal proceedings brought under section 38, that are determined by the ERD Court to have been brought in the "public interest", no costs orders are to be made (other than under sections 29 and 39 of the *ERD Court Act 1993*) in the ERD Court or any subsequent appeal proceedings.

In the 20 years operation of section 38, the practical complexities, time commitment and associated costs (not including adverse costs orders) for "public interest" appellants and the potential exercise of the costs powers under sections 29 and 39 of the ERDC Act have dissuaded non-meritorious "public interest" appeals.

As a consequence, the much overused “opening of the litigation flood gates” argument, that is used to oppose such “public interest” reforms, continues to lack any practical or academic merit.

Such an amendment will reinforce the parliamentary intent behind Category 3 appeal rights in regard to public participation and increase community confidence in, and support for, the planning system.