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Abstract
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Keywords
australia, wales, south, lessons, assessment, environmental, strategic, practice, scottish

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Strategic environmental assessment: lessons for New South Wales, Australia, from Scottish practice

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Disparate approaches to strategic environmental assessment (SEA) in New South Wales (NSW), Australia and Scotland are compared. The first is fragmented and unfamiliar while the other is well established. A detailed analysis of the use of SEA in each jurisdiction follows a contextual evaluation of its purpose. Whereas the Scottish system is supported by recent regulation and policy, both NSW and the overriding Commonwealth Government follow haphazard actions with few if any settled methodologies. In order to improve its environmental assessment credentials and promote more sustainable development outcomes, NSW might consider the need for SEA more seriously. Investigation of other systems, such as that in Scotland, may assist.

Keywords: strategic environmental assessment (SEA); NSW SEA; Commonwealth of Australia SEA; Scotland SEA

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1. Introduction: using environmental assessment to improve public sector decision-making in Scotland and New South Wales

Since 2004, Member States have been required to apply the European Union (EU) Strategic Environmental Assessment (SEA) Directive to new public sector statutory plans and programmes that 'set the framework for future development of projects' (CEC 2001, Art. 3.4). This represented a logical extension of the initial EU Directive on environmental impact assessment (EIA), which applied to major development projects (CEC 1985). The European Commission's Fifth Environmental Action Programme, entitled *Towards Sustainability*, set out the case for bringing the initial planning process as well as subsequent projects within the scope of environmental assessment (EA), stating that 'the integration of environmental assessment within the macro-planning process' would facilitate environmental protection and effective resource management across Member States and remove distortions to intra-EU competition for new development projects (CEC 1993, preamble).

The 2001 EU SEA Directive focused solely on public plans and programmes statutorily required for the development process, but excluded policies. However, provided they met these requirements, the individual jurisdictions of EU Member States remained free to extend SEA to all aspects of public sector policy formulation. The Environmental Assessment (Scotland) Act 2005 (EAS Act) reflected a desire on the part of the Scottish Government to become a 'world leader' in SEA (Jackson and Illsley 2006). It currently represents the most comprehensive application of this technique to public sector policies, plans and programmes (PPPs), not just within the EU but across all the members of the Organisation for Economic Co-operation and Development.

Our paper uses the Scottish SEA legislation as a template for analysing comparable techniques to be found in the statutory planning system for the state of New South Wales (NSW), Australia's most populous state. In Australia, the 1901 Constitution distributed legislative power between the Commonwealth and the six State Parliaments, leaving land use statutory planning law as a residue power in the hands of the states. The Scottish Government is a devolved part of the UK, with responsibility *inter alia* for land use planning and development policies. The paper starts by exploring the fundamental purposes of SEA so as to identify common themes. We then evaluate SEA practice in Scotland and NSW, analysing several key issues affecting its use in both jurisdictions. Our findings highlight differences attributable not just to institutional factors but also to alternative interpretations of the role of EA in realizing the goals of sustainable development (SD), allowing us to offer some lessons for practice in NSW.

2. The concept of SEA

The concept of SEA is unambiguous. The emphasis in the literature is on the need to 'front-load' EA into policy-formulation to ensure that strategic decision-making is fully evaluated for its environmental implications (Glasson 1995). Thérivel *et al.* (1992, pp. 19–20) refer to

> the formalised systematic and comprehensive process of evaluating the environmental effects of a policy, plan or programme and its alternatives, including the preparation of a written report on the findings of that evaluation, and using the findings in publicly accountable decision making.

By identifying and promoting more sustainable development options, this facilitates ensuing development projects

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that conform to these strategies. The successful result will be *application* of SEA.

The logic of this approach demands a pro- rather than re-active form of EA: a technique used to assess the parameters of the development process before individual projects are considered, rather than one simply reacting to development proposals as they appear. Its effective use by public sector decision-makers offers proponents of future developments a clear indication of the context in which subsequent major infrastructure projects will be subject to specific EIA processes. This should help shape not just major projects subject to their own EIA, but also those proposals sufficiently small to avoid EIA but capable in aggregate of producing significant cumulative environmental effects (Boothroyd 1995). As Australian commentators have observed, SEA addresses the problem that 'EIA does not begin early enough in the planning process' (McCarthy 1996, p. 125).

Beyond this point, opinions diverge on what should constitute the SEA process and its application. The literature highlights four aspects of the technique: its methodological focus; the use of a flexible tiered approach; its environmental role; and its contribution towards SD. Commentators are divided on whether the methodology should cover all public sector PPPs or focus primarily on those that public bodies have a statutory obligation to prepare for the development process. Implementation of the EU SEA Directive by the jurisdictions of Member States demonstrates a variety of focused and comprehensive approaches (Jackson and Illsley 2007). This reflects an underlying uncertainty as to the central purpose of SEA: whether it is simply an instrument for ensuring what Owens and Cowell (2002) termed the operationalization of agreed government policies and practice; or alternatively whether it should be seen as a means of exposing public sector policy formulation in respect of the environment to full public scrutiny (Connelly and Richardson 2005).

This lack of consensus reflects ongoing debate about the role of appraisers in government decision-making and the extent to which they serve as objective arbiters of options or apply pre-conceived value judgments to their task (Bina 2007). As a result SEA continues to be defined via various methodological taxonomies rather than by its ultimate function in public sector decision-making. Outside the EU, such uncertainty of purpose allows SEA to remains an extremely flexible mechanism. At one extreme it may extend to assessing Cabinet submissions on policy and/or legislation (Marsden 1997) and even documents relating to ratification of international treaties and fiscal priorities (Buckley 1997). At the other, it can lead to guided appraisal of significant development proposals at the local and regional levels (Clark 2000).

By contrast there is broad consensus on the application of SEA through a tiered layering of PPPs (see, for instance, Thérivel 2004, Noble 2005). This ensures that findings and options chosen at higher levels of public sector decision-making are transmitted downwards in a consistent manner into appropriate decision-making at lower levels. Obviously, the nature of tiering will differ both between and within jurisdictions.

SEA has a long pedigree as an environmental tool (McCarthy 1996). Although its incorporation within legal frameworks remains relatively new (Thérivel 2004), Lee (1982) enthusiastically anticipated the development of SEA out of EIA, tracing the common antecedents of each to the 1969 US National Environmental Policy Act. The European Commission began examining the feasibility of assessing the environmental implications of PPPs in the mid-1970s (Jones *et al.* 2005), while the UK government first issued guidance on the use of environmental appraisal in development plans in response to the development of its North Sea hydrocarbon resources (Clark *et al.* 1976). In Australia, the first Commonwealth Minister with a specialist environmental portfolio announced that the then fresh EIA requirement would be incorporated 'into the normal process of government-decision-making' (House of Representatives, 26 November 1974, 4082, Court *et al.* 1996). This involved national rather than state legislation, and since the bulk of planning and environmental law is to be found in the latter, it is no surprise that the idea failed.

The final aspect of SEA relevant to our comparison is its role in delivering the goals of SD. The European Commission made the compulsory adoption of SEA for the development processes of Member States a specific SD objective in its Fifth Environmental Action Plan (CEC 1993). Thérivel (2004, p. 8) contends that SEA 'should focus on key environmental/sustainability constraints'. Australian commentators have viewed SEA as a preventative mechanism designed to avoid or at least ameliorate ecologically damaging developments, coining the term 'ecologically sustainable development' (ESD). Harding (1998, p. 21) refers to SEA in the context of providing Australian planners with the capacity to place 'more emphasis on ecological concerns'. It is notable that 'sustainability' across Australia, unlike other jurisdictions, specifically refers to the ecological environment.

3. The application of SEA in NSW and Scottish jurisdictions

3.1. Common roots

Before the emergence of SD as a key concept, planning practice in Australia and the UK focused primarily on the resolution of land use conflicts. Despite new legislation with innovative provisions relating, inter alia, to public consultation and EIA, zoning remains the centrepiece of land use planning systems in NSW and the rest of Australia (Fogg 1985; Freestone 1988). By contrast, following the 1947 UK Town and Country Planning Act, which nationalized development rights and established planning authorities across the country to administer development control through statutory development plans, all its planning jurisdictions have abandoned rigid zoning regimes and focused instead on indicative development plans (Owens and Cowell 2002).

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More recently, both NSW and Scotland have had to adapt their planning regimes to accommodate the demands of SD. In NSW, EIA has been a core aspect of the Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act) since its introduction, and represented a major advance in local planning law at the time. All proposals now require a requisite level of EIA, with those placed under a special statutory list needing to be accompanied by a detailed environmental impact statement (EIS). Although the plans and studies supporting the permissibility of such a proposal have been viewed as an embryonic form of SEA, allowing the particulars to be given more detailed consideration at a later stage (Elliott and Thomas 2009, p. 70), this interpretation runs counter to the fundamental SEA front-loading principle, which requires prior assessment of the PPPs determining the exercise of planning policies. Amendment of the Act in the late 1990s to include ESD amongst its primary objects reflected a tentative acknowledgement of this point.

The initial EU EIA Directive was implemented in Scotland in 1987, followed by an update in 1999 (SG 2007) following the second EIA Directive (CEC 1997). These regulations oblige Scottish planning authorities (SPAs) to screen all planning applications to determine which require an EIA. Screening decisions are based on two schedules, the first listing activities for which an EIA is mandatory, and the second listing activities that should trigger an EIA if thresholds are exceeded. Between 1 and 2% of Scottish planning applications are obliged to undertake an EIA and present the resulting EIS along with their application.

The Scottish Government followed implementation of the EU SEA Directive in 2004 with its own EAS Act in 2005. Any new Scottish public sector PPP (subject to a small number of exemptions for financial and military PPPs) must now be screened to determine whether it poses significant environmental effects and so requires an SEA. To facilitate screening, an SEA Gateway has been created within the Scottish Government, bringing together the three Scottish statutory environmental consultees (the Scottish Environment Agency, Scottish Natural Heritage and Historic Scotland) to offer the initiating responsible authority an opinion on whether an SEA is required. Implementation of the EAS Act has tripled the number of Scottish public sector PPPs subject to SEA. In land use planning, the sector attracting most SEAs, these now extend not just to statutory development plans, which would have been caught under the EU SEA Directive, but also to supplementary planning guidance and masterplans, which as voluntary PPPs would have been exempt under the Directive (Jackson and Illsley 2008).

In addition to these statutory requirements for EA at both PPP and project level, SPAs are also now obliged to comply with the Planning etc (Scotland) Act 2006, which sets a statutory duty on development plans to contribute to sustainable development. Formal guidance to this end is provided in a new consolidated Scottish Planning Policy document (SG 2010a, paras 34–40). By contrast, Australian policy-makers have yet to determine whether PPPs should seek to advance SD or merely take the concept into account. The Australian legislation largely adopts the latter approach rather than ensconcing ESD as a paradigm. Reliance on individual judicial decisions to embrace ESD, as described by Bates (2010),[1] indicates a disintegrated approach. A preferable system might involve statutory weighting of particular environmental issues when projects are assessed, which would need support from the law-makers, the executive and the electorate.

One further point should be emphasized before embarking on a detailed comparison of the SEA processes in each jurisdiction. The EU SEA Directive seeks to comply with the Aarhus Convention on Environmental Justice (the Scottish transposition is SSI 2004), in ensuring procedural transparency for the processes involved, a requirement that also extends to the EAS Act. This obliges the responsible authority drafting a new PPP to publish a consultative version of the PPP and the resulting environmental report, and to invite comments on each, both from the statutory environmental consultees and from any other source, all of which are fully accessible through the portals of the SEA Gateway. No PPP subject to SEA can be legally put into effect until these comments have been collated by the responsible authority, which must then issue an implementation statement indicating how they have been taken on board, and what elements of the PPP have been modified in consequence.

Although such transparency is integral to the concept of SEA, adherence to such practice outside the EU is variable. In many jurisdictions it is rarely obligatory because 'SEA has developed mostly in the absence of legal provisions requiring SEA in land use planning or other strategic activities' (Jones *et al.* 2005, p. 31). There is academic support in Australia not only for compulsory statutory SEA (Marsden 1997), but also for community participation in the SEA process, but this has yet to be translated into practice.

3.2. SEA practice in NSW

3.2.1. SEA at the Commonwealth level

Express legislative references to SEA in Australia are rare (Marsden and Ashe 2006), with opportunities served on a minimal platter. At the Commonwealth level, the promises in 1974 failed owing to the limited scope of the legislation.[2] The next major step was a series of working documents on ESD that led to:

- a final report with reference to extending EIA to PPPs (Ecologically Sustainable Development Working Groups 1991);
- a relatively weak National Strategy for Ecologically Sustainable Development stating meekly that its implementation is 'subject to budgetary priorities and constraints in individual jurisdictions' (Commonwealth of Australia 1992, p. 14).

Another milestone occurred in May 1992 when the Australian Commonwealth and all States and Territories, in addition to the Australian Local Government Association, signed the Intergovernmental Agreement on the

Environment (IGAE). The IGAE attempted to spell out the environmental policy and management responsibilities of each sphere of government. In item 3, the signatories agreed that environmental considerations would be integrated into Government decision-making processes at all levels by 'ensuring that environmental issues associated with a proposed project, program or policy will be taken into consideration in the decision making process' (Intergovernmental Agreement on the Environment 1992). Clearly, the IGAE enveloped the principle of SEA.

Prime Minister Hawke had sought a more cooperative arrangement between each sphere of government to avoid costly and controversial inter-jurisdictional environmental battles. The key case was the Commonwealth's success in 1983 in defeating Tasmania's obstinacy in initiating a dam for hydro-electric purposes in a World Heritage area.[3] Given the lack of any framework for SEA, the subsequent IGAE clearly fulfilled a need for policy, law and potential SEA practice, becoming one of Prime Minister Keating's first significant policy statements. Although its implementation has suffered from inactivity (Court *et al.* 1996, p. 55), it was the forerunner to the national *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) (Lyster *et al.* 2009), which addresses ESD in its express objectives.[4]

The EPBC Act extended its boundaries far beyond its predecessor, including private land. The Minister can decide, *inter alia*, whether a 'controlled action' is captured by the Act, i.e. whether it will have a significant impact on a matter of national environmental significance (Johnson 2006), such as a World Heritage area or a listed threatened ecological community. These relate to international conventions entered into by Australia. Commentators have derided the restricted reach of national environmental significance under the EPBC Act since the beginning (Hughes 1999, Padgett and Kriwoken 2001). Moreover, the focus of the statute is on reactive EIA, with the need for an EIS or alternative form of assessment at the Minister's behest. There is no express mention of SEA at all. The closest provision at section 146 reads:

> The Minister may agree in writing with a person responsible for the adoption or implementation of a policy, plan or program that an assessment be made of the relevant impacts of actions under the policy, plan or program that are controlled actions.

Although the language is SEA-based, any utilization of SEA is purely optional. Nevertheless, recognition that actions under PPPs can be 'controlled actions' indicates significant potential. As Marsden (2002) points out, the closest provisions are limited to fisheries administered by the Commonwealth. Accordingly, SEA has almost been bypassed. The Commonwealth follows the usual Australian approach with its emphasis on EIA. Rather than progressing along more holistic lines, EIA continues to be characterized by a heavy emphasis on detailed assessment of specific projects. When compared with Scotland, SEA throughout Australia is scattered, inconsistent and often absent.

The Commonwealth approach exemplifies the 'increasing confusion amongst practitioners, policy-makers and scholars alike as to the particular role of SEA' (Wallington *et al.* 2007, p. 569). Recent Australian government examples of the unrealized potential for policy-based SEA include Our Cities: *The Challenge of Change and Our Cities: Building a Productive*, Sustainable and Liveable Future. The provision of financial grants to other spheres to build up SEA approaches could be developed subject to acceptable conditions, such as increased accountability. However, notwithstanding both the EPBC Act and its policy potential, at the Commonwealth level SEA remains as a weak concept. This also relates to the six Australian States, notwithstanding substantial legislative opportunity.

3.2.2. *SEA within the state of NSW*

Following the EP&A Act, the combination of land use control and EIA was viewed as a major step forward (NSW Legislative Council, 21 November 1979, p. 3351). Yet there was no express or implied reference to SEA. This has not changed. In NSW, potential for SEA exists within the scope of environmental assessment as part of strategic planning processes. For instance, it might be viewed as a policy tool to facilitate strategic planning. In the overall statutory context, the most significant opportunity for SEA lies within the EP&A Act (Stone 1998).

Part 3 EP&A Act enables production of two types of statutory plans known collectively as environmental planning instruments (EPIs):

- state environmental planning policies (SEPPs);
- local environmental plans (LEPs).[5]

While EPIs were expected to be the product of strategic planning, they take the form, character and function of statutory instruments operating at the core of development control (Williams 2007). Originally, the EP&A Act made provision for 'environmental studies' prior to the making of LEPs, including public exhibition and community input. These studies provided SEA promise, particularly when the studies preceded the EPIs, thereby enabling preliminary public involvement. Subsequently, in the name of efficiency, studies and draft LEPs were placed on exhibition together, undermining the capacity to front-load SEA and identify preferred options prior to drafting detailed plans.

While the EP&A Act provided no details on form and contents of environmental studies, such documents usually included an outline of different planning scenarios and an exploration of preferred options. This went some way to accommodate front-loading of SEA. The former requirement for a study could be waived at the discretion of the Director-General of the NSW Department of Planning (DoP). A common example was when a draft LEP aimed to amend the principal plan by 'spot-rezoning'. Accordingly, the notion raised by Marsden and Ashe (2006, p. 206) that the EP&A Act 'require[d] the preparation of environmental studies' is erroneous. Of more relevance,

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however, is that environmental studies, a potential umbrella to embrace SEA, are no longer required. This opportunity for SEA has therefore been extinguished.

During the gradual moves towards the EP&A Act, strong regional planning had been regarded as the blueprint for strategic planning. The innovative 'White Paper' stated that '[r]egional environmental plans would comprise environmental planning policy directions, policy advice and regional or sub-regional structure plans' (Planning and Environment Commission (NSW) 1975, p. 61). Although other types of policies and plans were forecast, some promise of regional SEA was then apparent.

The NSW planning regime has undergone further change. The 'handing down' of a mandatory standard instrument for LEPs in May 2006 designed by the DoP, known commonly as the 'LEP template', requires each of the 152 councils across NSW to prepare a new principal LEP in conformity with the established 'template'.[6] Unless one views the template design as a state-wide form of SEA, the perceived SEA-based benefit is nebulous. For local government, the standard provisions offer a degree of tension between municipal creativity and a strict model handed down by central government. In terms of higher level SEA, the template might be regarded as a 'statutorized' policy that guarantees consistency of process.

New policy initiatives from the State Government offer a more deliberate emphasis on regional planning, echoing the pre-1980 optimism in a different fashion. The approach is intended to address issues that transcend council boundaries without relying on statutory instruments (Department of Planning 2006), which helps to explain why Regional Environmental Plans[7] and environmental studies were swept away. The new mechanism is the non-statutory 'regional strategy', which has no express recognition under the EP&A Act.

Reliance on a nascent form of SEA is evident through current metropolitan and regional planning initiatives, although the term is rarely applied. This is exemplified by mechanisms that inform and guide various non-statutory spatial plans. A metropolitan strategy for Sydney – i.e. *Metropolitan Plan for Sydney 2036* (Department of Planning 2010) – will be implemented through detailed sub-regional strategies, which in turn provide the framework for LEPs prepared in accordance with the standard template.

In addition, planning for two new Growth Centres identified for Western Sydney by the metropolitan strategy is being facilitated more generally by the DoP. This strategic planning process ostensibly includes environmental assessment of all aspects of the Growth Centres programme. Biodiversity values and impacts, for example, are to be evaluated through a 'Conservation Plan' that examines various options for biodiversity conservation, not just in the Growth Centres but within the wider Sydney Basin (Growth Centres Commission 2007). This offers a framework for the application of SEA processes.

More detailed strategic planning is also occurring in other parts of NSW by means of the 'regional strategies' referred to earlier. Designed to identify strategic priorities that will direct future land use planning in selected regions, the strategies will also guide and direct local planning. Implementation of the regional strategies is mandated by a specific ministerial direction under the EP&A Act which 'directs councils when preparing a draft LEP to ensure they are consistent with the relevant regional strategy' (Department of Planning 2007, p. 1).[8] An example includes the Sydney–Canberra Corridor Regional Strategy. Whilst this measure represents yet another example of a shift towards strategic-based planning, it will still be difficult to move away from the entrenched focus on individual proposals as they arise. Zoning remains as the planners' centrepiece in NSW.

While the Ministerial directions have the benefit of statutory recognition, they do not carry the full force of the law. Nevertheless, the Minister may use discretion in the unlikely event to approve an LEP that is inconsistent with the relevant regional strategy. Otherwise, all draft LEPs must be consistent with any such strategy. Any departure must be minor and reflect the policies etc. of the regional strategy. These strategies provide a non-statutory form of pre-plan studies that arguably represent the closest mechanism to SEA in NSW regional planning.

Finally, special reference should be made to Part 3A EP&A Act, introduced in 2005,[9] which significantly expanded the power of the NSW Minister for Planning. This relates to determination of major projects such as coal mines and large tourist projects identified by an SEPP or gazettal of a ministerial order. The range of projects is staggering (Lyster *et al.* 2009). Crucially, there is no need for any specific plan. LEPs do not apply to Part 3A projects. Indeed, if the proposal is listed as 'critical infrastructure', such as the controversial desalinization plant at Kurnell in southern Sydney nearby the historic Captain Cook's landing place, SEPPs may be irrelevant.

In summary, the potential for SEA is nominal, with a plain focus on EIA. One counter-argument relates to the 'concept plan' that Marsden and Ashe (2006, p. 207) describe as 'a form of SEA'. However, this kind of plan need only be carried out on the proponent's volition or the Minister's request. This erodes the potential strength of SEA under Part 3A. Instead it arguably reflects the growing developmentalist nature of the planning system. Overall, SEA in NSW is in a quagmire. Belief in the merits of applying SEA processes to determine the environmental effects of public sector PPPs on a comprehensive basis is absent. The key problem is the disconnectedness between the NSW statutory planning system and SEA following from recent legislative change and a general lack of interest. This relates to all four elements listed earlier under Section 2: a methodological focus, a tiered approach, an environmental emphasis and embracement of sustainability. Mere policy rhetoric is insufficient.

3.3. *SEA practice in Scotland*

The existence of legislation, the EAS Act, making SEA a statutory requirement for virtually all aspects of Scottish

policy formulation, marks the most fundamental difference in approach to the NSW EA regime. This covers not just statutory development plans but also all the voluntary as well as statutory PPPs of other public sector bodies, including for this purposes the privatized utility companies that count as suppliers of public services under the EU SEA Directive. A recent Planning Advice Note (PAN) sets out the procedures required of SPAs in applying SEA to the development process. SEA is seen as 'an important and statutory step that must be built into the plan preparation process', adding value to development planning by 'facilitating fuller consideration of the environmental effects of policies and proposals' (SG 2010b, para 1.2).

The PAN states that the 'central aim' of SEA is 'to help ensure that the environment is given the same level of consideration as social and economic factors within the plan' (SG 2010b, para 2.2). Four aspects of SEA are listed as providing the means of achieving this:

- integration of environmental information into the plan preparation and adoption process;
- early dialogue with consultees, particularly those with environmental expertise, but also the wider public;
- full and objective consideration of alternatives to ensure that the best environmental options are identified and taken on board as far as possible;
- transparency of decision-making, through the publication of the post-adoption statement. (SG 2010b, para 2.2)

A good illustration of this process is provided by the application of SEA to the second Scottish National Planning Framework (2NPF), which provides the pinnacle of a hierarchy of statutory land use plans within the Scottish planning regime. The initial briefing note set out how SEA would assist in the drafting of the 2NPF, stressing the front-loading aspects of the methodology as central to its purpose:

> SEA is not just a test of how 'environmentally friendly' the NPF is, after its content has already been decided. Importantly, environmental impacts are being identified (and where possible avoided) as the NPF is being written, so that the SEA really influences its content. SEA is required to assess the range of environmental impacts of the proposed NPF, and to compare this with a range of 'reasonable alternatives'. This allows us to explore a wide range of ideas and opportunities, before deciding on the best solution and, if possible, including it in the NPF . . . In essence, therefore, the SEA process raises the profile of environmental issues, and ensures that decisions on the content of the NPF are made in an *informed and transparent* way. (SPD 2007, p. 1 – emphasis in the original)

In order to ensure that the 2NPF really did consider at the outset the range of feasible alternatives and choose as its preferred alternative one that best fulfilled environmental preferences, SEA was applied to each stage of the overall drafting process:

- stage 1 – initial scoping and review of strategic alternatives;
- stage 2 – assessment of discussion draft NPF;
- stage 3 – supplementary assessment of candidate national developments;
- interim response to key issues raised by consultees at stages 1–3;
- stage 4 – environmental effects of the proposed NPF, including mitigation and monitoring requirements;
- post-adoption procedures SEA statement (SG 2009).

The SEA for Stage 1 focused on scoping the 2NPF, to identify the key issues that should be included in the assessment and what the preferred overall environmental strategy should be. The scoping stage initiated a dialogue between those undertaking the SEA and those drafting the 2NPF on how to compare and assess the strategic planning options confronting Scotland, with four possible thematic scenarios being explored: economy, sustainability, communities and connectivity. Each of these themes was assessed for its potential overall impact on the environment at a series of 2NPF public workshops held across the country (SG 2009, para 3.2). This provided the Scottish statutory environmental consultees with the information they required to determine the focus and level of detail required for the SEA of the full draft 2NPF, and to determine the time required for the statutory and public consultation processes.

Having agreed the preferred option through this scoping process, a full draft 2NPF was produced, which was then subject to a more detailed SEA of its specific policies and proposals (stage 2). This particular exercise also generated a supplementary set of SEA reports on a list of additional candidate 'national developments' that might be considered in the 2NPF funded directly through Scottish Government resources (stage 3). Following an interim response to the key issues raised by consultees, a finalized Environmental Report was then issued, including proposals for mitigating and monitoring the significant environmental effects identified by this process (stage 4), which was followed by a post-adoption procedures SEA statement.

At each stage of this exercise, the Scottish Government team undertaking the SEA of the 2NPF made arrangements to encourage full public engagement as a way of realizing their intentions to use the process to ensure that the resulting plan was agreed in an 'informed and transparent' fashion. A wide range of public meetings and consultations were undertaken, and potential respondents were offered guidance on what issues needed to be discussed, as indicated by the initial briefing note:

- does the assessment take into account all of Scotland's most important *environmental features?* Do you know of any that have been missed out – if so, tell us what they are;
- do you think we have focused on the most important *environmental problems* in Scotland? Can you think of others you would rate more highly?
- do the documents tell you enough about *what's in the NPF* to allow you to consider its potential

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impact? What else do you need to know about the NPF?

- what do you think about the *main conclusions* of the assessment? Do you think the assessment has missed any key environmental impacts? Are their particular parts of the NPF that raise concerns about the environment?
- do you have *ideas for avoiding adverse impacts from the NPF?* Are there ways of improving it so that negative effects can be avoided or compensated for in some way? Is there even scope for making the policy better so that environmental benefits are enhanced? (SPD 2007, p. 2 – emphasis in the original)

One of the key findings to emerge from the 2NPF consultation process was the need to identify ways of measuring the effects of national developments on the ambitious climate change targets adopted by the Scottish Government under the Climate Change (Scotland) Act 2009, which include an overall reduction of 80% in greenhouse gas emissions by 2050, helped by the intention to switch 40% of Scottish power supplies to renewable sources by 2020. Section 4 of the Climate Change Act imposes a duty on Scottish public bodies to exercise their functions in a way best calculated to contribute to delivery of the stringent carbon reduction targets set out under the Act, and to identify 'the most sustainable' options in this respect. The EAS Act requires consideration of impacts of new PPPs on climatic factors, and Scottish Ministers are actively reviewing how SEA procedures can help meet these additional statutory climate change obligations. New advice has already been issued on applying the current qualitative SEA methodology to this end (SG 2010c). Contracts have been allowed to explore the possibility of incorporating environmental modelling software packages into Scottish SEA procedures, which would enable different development scenarios to be tested for their environmental and carbon footprints (Jackson and Illsley 2008).

The Scottish NPF is a statutory requirement of the Planning Scotland Act (PSA) 2006. It provides the spatial context for the Scottish Government's own PPPs, articulating the statements of national planning policy set out in Scottish Planning Policy (SPP) (SG 2010a). Scottish planning legislation requires SPAs to take the NPF and SPP into account in preparing development plans, with the contents of these documents forming a material consideration in determining planning applications. The PSA 2006 also includes provisions to rationalize lower tier development plans, following the abolition of the upper tier of local government in 1995 and the creation of 32 single-tier authorities. City-region strategic planning boards have now been established for the four main Scottish conurbations (Glasgow, Edinburgh, Aberdeen and Dundee), leaving other parts of the country to rely on the NPF and their own statutory local development plans.

Scottish national, strategic and local development plans are all now subject to SEA, with the EAS Act 2005 extending this process to any voluntary supplementary documentation considered likely to have significant environmental effects. These arrangements for proofing the Scottish development process for environmental effects have effectively bifurcated the application of environmental assessment in Scotland. SPAs now apply SEA to their development plans, using the tiering process to ensure that each level is compatible. Planning permission for individual projects will then be considered against PPPs that have been subject to SEA. The individual projects themselves still remain subject to the formal screening processes of EIA, which as noted above only trigger the need for an EIS for some 1–2% of planning applications.

4. Lessons from a comparison of SEA practice in NSW and Scotland

The most obvious point of comparison is between the ad hoc approach to SEA in NSW and the comprehensive way this has been applied to Scottish policy formulation in general and statutory land use planning in particular. The recently completed Scottish 2NPF received exhaustive examination for its environmental effects, and the processes of consultation identified a number of major issues that required further consideration, particularly with respect to climate change factors. The cascade effect of tiered plans will ensure that these issues are given due consideration in city-region and local development plans, and in this way the pattern of Scottish development will be shaped by SEA processes intended to make public sector policy-makers take environmental effects fully into account in examining new development applications.

In Scotland, the process now affords very little scope for the exercise of Ministerial or official discretion, since the EAS Act sets out clear requirements that must be followed. Following the implementation of the EU SEA Directive, failure to apply these requirements has resulted in a number of successful legal challenges in the UK High Courts, so SPAs are conscious of the need to adhere to the statutory requirements of SEAs, which require early application of the technique during the formulation of PPPs. Case law has found against the practice of applying it as an add-on after a PPP has been formulated, as tended to happen prior to the EU SEA Directive, when SEA had little legal standing and was pre-eminently a voluntary exercise (Esson *et al.* 2004). Environmental groups have broadly welcomed the impact of the EAS Act on Scottish public sector policy formulation, particularly with respect to its extension to all aspects of public sector PPPs rather than the more narrow focus in the rest of the UK. One of the benefits identified is the contribution SEA is making to procedural environmental justice, by ensuring that public sector decision-making becomes more transparent and accountable and engages more effectively with its constituency (Jackson and Illsley 2007).

In this respect in particular, NSW clearly has a long way to go. A contentious situation demonstrates its failure to apply any front-loaded SEA to planning decisions.

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This involved a historic coastal mining village north of Sydney named Catherine Hill Bay, where the population is around 250 persons.[10] The Minister for Planning dealt with a project to expand the village to accommodate approximately 600 additional dwellings under Part 3A EP&A Act.[11] Curiously, the guiding plan at the time, the Draft Lower Hunter Regional Strategy, made no reference to the site. According to the *Sydney Morning Herald*, a survey by the DoP of 91 sites for urban expansion throughout the Lower Hunter sub-region ranked Catherine Hill Bay at the second bottom (Jones *et al.* 2008). When the final version of the Regional Strategy was released, however, Catherine Hill Bay was allocated for major urban expansion. At the time when the then Minister Sartor issued his approval, he had already entered a 'memorandum of agreement' with the developer relating to an associated transfer of private lands into public ownership for conservation purposes.

The local community legally contested the Ministerial approval. Because there was no opportunity to appeal against it on its merits, the only means of challenge was by judicial review, i.e. contesting the lawfulness of the decision. To the delight of not only the local community but also a wider audience, the Minister was found to have breached a fundamental rule: in exercising his discretion in assessing and determining the application, the Minister was found to have breached of the principle of apprehended bias.[12] Indeed, the Court went as far as disparaging the Minister as having been 'enamoured with the whole proposal as a land bribe for rezoning and associated development'.[13] From a planning perspective, the key point is the uselessness of the regional strategy. Although the general mechanism might be regarded as a potential example of SEA, here it was turned it into a toy that could be readily dismissed. This raises questions concerning the worthiness of a flexible, non-statutory application of SEA that can be easily manipulated at the political decision-maker's whim.

5. Conclusions

Scottish practice suggests that enhanced consideration of the current and future status of the environment, connecting the social, economic and natural aspects under the umbrella of sustainability, must be further incorporated into the design of policy formulation and strategic planning in NSW. In order to avoid political and executive resistance, closer integration of plans and policy requires an improved and more holistic environmental and natural resource management regime and more informed public policy formulation and plan-making. Expanding the role of merits review before the courts must be considered. Should a questionable decision be made by politicians or the executive, concerned citizens should be able to challenge it.

The Scottish SEA experiment offers a role model. Explicit well-articulated statutory provisions must be seriously considered to facilitate if not drive SEA into the NSW planning system. While the benefits of flexibility are acknowledged, the statutory framework must be sufficiently solid to avoid relevant factors being merely taken into account and then set aside. The fact that SEA is scarcely a new concept should prod its expansion, as should its use for promoting sustainability. The global acceptance of SD supports cross-jurisdictional approaches to environmental planning and community involvement. However, a more transparent process is warranted that is open to community members and all spheres of government. In Australian jurisdiction, improvement under SEA must be open to further debate and research.

The Australian Commonwealth's EPBC Act provides some promise for SEA, but currently has minimal practical implications for NSW owing to constitutional limitations and the Commonwealth's tardiness in broadening its environmental scope. Nevertheless, it offers a framework that extends across all Australian jurisdictions, offering opportunity for further strategic and jurisdictional cooperation. However, in NSW, the sheer paucity of SEA in a fractured planning pseudo-system warrants even more attention. The idea of investigating the Scottish SEA experience arises immediately. The best approach would be a bipartisan study with solid recommendations for legal and policy change, but the report must not be left on the shelf to gather political dust. In following SEA principles, it must involve public input, embrace sustainability principles and avoid the rhetoric that is found in too many NSW public planning documents.

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Notes

1. For a helpful description of relevant cases in NSW and the notion of statutory objectives, see Bates (2010), pp. 167–172 and 208–216.
2. See former Environment Protection (Impact of Proposals) Act 1974 (Cth).
3. See *Commonwealth v Tasmania* (1983) 158 CLR 1. The judicial challenge involved the controversial Gordon below Franklin dam in south-western Tasmania.
4. Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 3(1)(b).
5. Upon its commencement, the EP&A Act provided for another environmental planning instrument, namely the 'regional environmental plan' (REP). While REPs were viewed as a substantial element in the planning system by the architects of the EP&A Act, their potential gradually diminished. More recently, the Environmental Planning and Assessment Amendment Act 1998 (NSW) saw REPs enveloped by relevant SEPPs in mid-2009 as they were deemed to be SEPPS (see Sch. 6, items 120–121).
6. Environmental Planning and Assessment Act 1979 (NSW), s. 33A.
7. See note 5.
8. Environmental Planning and Assessment Act 1979 (NSW), s. 117(2).
9. Part 3A Environmental Planning and Assessment Act 1979 (NSW) was removed in 2010 by the newly elected Coalition State Government.

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10. See http://www.catherinehillbay.org.au/our_heritage/our_heritage.htm (accessed 12 January 2011).
11. See State Environmental Planning Policy (Major Projects) 2005 (NSW) (Amendment No. 26).
12. *Gwandalan Summerland Point Action Group Inc v Minister for Planning* (2009) 168 LGERA 269, per Lloyd J.
13. *Gwandalan Summerland Point Action Group Inc v Minister for Planning* (2009) 168 LGERA 269 at 298. Note that, at the time of writing, a second attempt to develop the land is in process with the period for public consultation having closed: Catherine Hill Bay Progress Association and Dune Care Inc., *Catherine Hill Bay* (n.d.), http://www.catherinehillbay.org.au (accessed 12 January 2011).

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