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Participation: a voice crying in the wilderness

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Participation: A Voice Crying in the Wilderness

Is it time to repeal s5(c) of the Environmental Planning & Assessment Act (NSW) 1979? If there is no meaningful role for public involvement and participation in the decision-making and decision-review mechanisms in the EP&A Act, then the reform process should be taken to its logical conclusion by the repeal of s5(c).

A Thesis submitted in fulfilment of the requirements for the award of the degree

MASTERS BY RESEARCH

From

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By

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ABSTRACT

In the 1980s Patrick McAuslan identified the three grundnorm ideologies of land use planning namely: the ideology of Private Property; of the Public Interest and of Public Participation. From at least ancient Roman times until very recently the ideology of private property governed land use transactions. Whilst building regulation has a long historical tradition, formal land use planning laws were not enacted until the early twentieth century. With the advent of such laws the ideology of public interest dominated land use policy until the 1980s when it was challenged by the neo-liberal movement. Since that time there has been an ideological power struggle between the protagonists.

The guardians of the ideology of public interest have railed against the neo-liberal agenda to ‘devalue’ the institution of planning in seeking to reduce it to being a mere siphon for development. The guardians of the ideology of private property, in turn, have disparaged calls for greater state intervention questioning whether there is any case for government intervention given that cities are such complex social systems. It seems that as society moves beyond the neo-liberal paradigm in land use planning in search of a new explanatory theory to guide its way the very notion of planning is being questioned. Yet, in this debate the function of public participation has been largely ignored; it has been an island in the flux of power. The ideology of public participation remains the untried path in land use planning.

In March 2011, the New South Wales opposition political party went to an election and won government with a policy to reform the land use planning system pledging to empower the people by returning ‘planning controls to local residents’ through their councils. Empowerment is emblematic of democratic principles. But to implement democratic processes in land use planning decision-making would require the government to depart from McAuslan’s ideology of public interest and to embrace the ideology of public participation. It is argued in this research that to change the status quo the government must overturn one hundred years of planning law history. It requires the enactment of legislative mechanisms that elevate the voice of the people to the status of power.
The purpose of this research is to consider the nature and role of public participation in the land use planning system of NSW. The research undertakes a synoptic traverse of the historical narrative relying on an array of secondary sources to understand the dynamic of participation in the context of Patrick McAuslan’s land use planning ideologies. Presently, s5(c) of the Environmental Planning and Assessment Act 1979 (NSW) elevates participation to the status of an objective of the Act; but the mechanism by which the objective is to be attained is absent in the Act. By framing the thesis as a call to repeal the provision places the government’s dilemma into sharp relief.

The conclusion of the research is that despite the call to reform the NSW land use planning system creating an opportunity for planning to become more participatory and democratic, it is unlikely that any reform will actually achieve that end. If that conclusion is correct, then s5(c) should be repealed. If participation remains an objective of any new planning legislation without an effective legislative mechanism it will only lead to a perpetuation of the confusion and disarray that presently exists in the land use planning system.
ACKNOWLEDGMENTS

The journey to this point has been via a winding road with some detours along the way. It has demonstrated why short cuts make for long delays, as Pippin says in Tolkien’s Lord of the Rings. So first and foremost I acknowledge the support and encouragement of my wife Kathleen and of my daughters Eileen and Meredith. They have been my inspiration and spur to see this journey through to its conclusion. I am not sure what I have been to them along the way (apart from distracted by this effort) but I hope that in realising this goal I have shown a way forward.

I wish to especially acknowledge the support, guidance and counsel afforded me by my supervisor Professor Andrew Kelly. I have been fortunate to draw upon the well of Andrew’s intellect and knowledge of the area of local government. His enthusiasm for my project has been unstinting over the years. I also wish to recognise the contribution of the Dean of the Faculty of Law at Wollongong University, Professor Luke McNamara. It was an inspired comment in the preliminary course that gave me the insight for frame the thesis thus enabling me to focus my energies in a useful fashion.

Part time study is a hindrance to full-time employment. I accordingly wish to acknowledge the generous support of my firm and practice comrades who have tolerated this diversion from the matters at hand. As always, without their forbearance, this work would not have been possible.
Thesis Certification

I GRANT NORMAN GLEESON declare that this thesis, submitted in fulfilment of the requirements for the degree Masters by Research, in the Faculty of Law, University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The document has not been submitted for qualifications at any other academic institution.

Grant Norman Gleeson
Dated: May 2012
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Chapter 1: Introduction

‘...it is the Government’s intention that town and country planning shall be democratic and that, under skilled guidance, the people themselves shall join in the planning to the greatest extent possible. We will not have planning imposed from above.’

Joe Cahill NSW Minister for Local Government
November 1945

1.1 Introduction

The election of a new government in New South Wales in 2011 heralds an era of change in the NSW land use planning system. In his election victory speech on 26 March, 2011, the new Premier of New South Wales, Barry O’Farrell, announced that his government would overhaul the New South Wales planning system. The policy of the new government is to empower the people by returning ‘planning controls to local residents’ through their councils. The policy document proclaims a belief ‘that local decision-making delivers better outcomes for communities.’

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1 The Minister was addressing the first meeting of the County of Cumberland Council – see Australian Labor Party, Five Critical Years: Story of the McKell Labor Government in New South Wales, May 1941-May 1946 (1946), 52.
3 NSW Liberals and Nationals, ‘Putting the Community Back into Planning’ (2009), 1. The policy documents specifically says:
   ‘We believe that local residents – through councils – are best placed to make local planning decisions affecting their suburbs. After all, it is local residents – not Macquarie Street planners – who have to live with the results of these planning decisions.’
When a government says that it will empower the people in the land use planning system what does that mean? To empower people is suggestive of democratic processes. But in order to implement democratic processes in land use planning it would require a government to depart from McAuslan’s ideology of the public interest and to embrace the ideology of public participation. This remains the untried path in land use planning even though there have been calls for it to be explored. Empowerment suggests real participation in decision-making structures as opposed to tokenistic gestures. As American academic Sherry Arnstein famously suggested ‘participation is a categorical term for citizen power.’ To change the status quo requires legislative mechanisms that elevate the voice of the people to the status of power. Referencing participatory mechanisms signals a move by government towards exploring the ‘third way’ approach to planning ideology. It is a significant change in strategy for the state.

The Environmental Planning and Assessment Act (NSW) 1979 (EP&A Act) is the principal mechanism in the State of New South Wales by which land use planning is regulated. It contains an express objective in section 5(c) namely ‘to provide increased opportunity for public involvement and participation.’ The New South Wales Court of Appeal has recently confirmed that it is ‘one of the principal objects of the Act.’ It is argued here that unless there is a meaningful role for public involvement and participation in the decision-making and decision-review mechanisms in the EP&A Act, the object is otiose. The purpose of framing the thesis question as a call to repeal the object is to bring into relief the on-going debate in planning as to whether or not planning laws should be inclusive. Planning laws can be made

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6 Ibid, 269.
8 McAuslan, above n 5, 269. McAuslan saw the ideology of participation as the ‘ideology of opposition to the status quo.’ He noted that ‘[o]nly by ending ideological conflict about the aims and ends of society and government, will the law and administration of planning cease to present a picture of confusion and disarray.’
9 Harry Smith, ‘Place Identity and Participation’ in Cliff Hague and Paul Jenkins (eds), *Place Identity, Participation and Planning* (2005) 39, 49. As Smith notes:

‘The third way is different [to strong state welfarism and neo-liberal ideology]. Just as customers do have power in markets and producers seek to manipulate their preferences, so in the public arena participants also have power that politicians seek to mould and capitalize upon. Participation can be a new channel for political action, bypassing clogged arteries of traditional representative democracy. Participation can reconnect politicians and the public.’

11 It is recognised that social inclusion is a value laden concept. In Mike Geddes, ‘International Perspectives and Policy Issues’ in Paul Smyth, T Reddel and Andrew Jones (eds), *Community and Local Governance in Australia* (2005) 22-4, Geddes suggests that the phrase ‘is, notoriously, a slippery concept’ and that it is located within a ‘structuring and limiting neo-liberal context’ aligned with ‘corporate capital and power.’ McAuslan’s work was published in 1980 when the neo-liberal ideology was emerging in planning. In that context, it is suggested that McAuslan’s ideology of public participation presaged an emerging course for planning law to explore. In this research social inclusion is
to advance the public interest (as interpreted by the government of the day) or to advance the
cause of public participation; but they cannot do both at the same time. Which ideology is to
prevail is therefore of significance at a time when there are calls to overhaul the NSW planning
system.

This paper undertakes a synoptic traverse of the historical narrative to understand the dynamic
of participation in the context of Patrick McAuslan’s land use planning ideologies. If as a
matter of public policy, the extent of participation in the ‘new’ planning system is to change,
then it is suggested that the government should clearly signal the ideology which it believes
should underpin the future planning policy. If the new strategy is to accord with McAuslan’s
ideology of public participation, then the government will have to overturn one hundred years of
planning law history. Could that really be the government’s intent?

1.2 Aim of the Research

Since McAuslan formulated the ideology of public participation in 1980 there has been a dearth
of research into whether or not it could be adopted as public policy. For decades the NSW
government has created the illusion of participation by retaining an express reference to
participation in the objects clause of the EP&A Act. Yet, successive reforms to the Act since its
enactment in 1979 have diluted the original legislative intention such that the objective is now
meaningless. In December 2009 the standing committee of the NSW Legislative Council on
State Development (the Standing Committee), published a report on the New South Wales
Planning Framework (the Standing Committee report). The report included the following
recommendation:

used in the context of citizenship as theorised by A Bora and H Hausendorf, ‘Participatory science
Policy 478. They view citizenship as being relational concept, as ‘a mode of social inclusion.’
Semantically, legislation can tend to be either socially inclusive or it can be socially exclusive. As Bora
and Hausendorf note (at 482):

‘If citizenship is to acquire real social relevance, rather than remaining an inanimate husk
depending solely on formal rights of participation, it has to prove itself in terms of social
positions emerging in the course of the participation process.

12 McAuslan, above n 5, 2.
13 Standing Committee on State Development, ‘Report 34: New South Wales Planning Framework’ (NSW
Legislative Council December 2009) (Standing Committee Report), 34. The report, commissioned by the
then Minister for Planning Mr Sartor MP shortly prior to his leaving the planning portfolio in June 2008,
included terms of reference to examine ‘the need, if any, for further development of the New South Wales
planning legislation over the next five years, and the principles that should guide such development.’

3
‘If the EP&A Act is subjected to fundamental review then it should be the case that the objects honestly reflect the purpose of the legislative outcome of that review. Just as the legislation needs to support the intent of the planning system; so do the objects need to reflect how the legislation will provide that support.’

The new state government seeks to return planning power to the people through local councils; but a review of history suggests that local government structures evince a non-participatory tradition. To introduce a policy of inclusion in land use planning decision-making will therefore necessitate the creation of specific legislative mechanisms in the reform Act. By telegraphing in this research the repeal of section 5(c) the essence of the government’s dilemma is placed into sharp focus. Objects provisions are meant to have legal force. If the new planning system is to incorporate participatory mechanisms, then the government will need to do more than just pay lip service to the ideal of participation. Empowerment suggests a legislative right to do more than just make a submission. As Arnstein postulated in the 1960s, the people in the neighbourhood do not want to be ‘planned for.’ If the government is offering to empower the people, then it must be prepared to cede control over planning processes to the citizens.

Committee recognised that in its examination of the planning system, the issues raised ‘included whether the current objects, some of which date back to the inception of the EP&A Act, are still valid; the need to prioritise the objects; and the inclusion of objects more relevant to today’s needs and goals.’ The new government has commenced the review process – see The Hon Brad Hazzard MP, Minister for Planning & Infrastructure, ‘Overhaul of the Planning System Heralds a new era in NSW’ (Media Release, 12 July 2011).

Adopting a utilitarian approach, the thesis of this research calls for the champion of participation to come forth. As Jeremy Bentham, *A Fragment on Government* (1776), xv, observed: ‘For if the institution is in truth a beneficial one to the community in general, it cannot but have given an interest in its preservation to a number of individuals. By their industry, then, the reasons on which it is grounded are brought to light.’

As a matter of law, objects clauses are interpreted to have effect. See *Woollahra MC v Minister for the Environment* (1991) 23 NSWLR 710. And see also J. Rohde, ‘The objects clause in environmental legislation; the Nature Conservation Act 1992 (QLD) exemplified’ (1995) 12 *Environmental and Planning Law Journal*, 80. Rhode argues (at 80-81) that because objects clauses are contained in legislation, they have ‘the status of a clause of paramount force. … As a result, all other powers conferred under the Act are subject to the primacy of the objects clause …’ The observation can be made however that in order for the object to have ‘some work to do’ there must be other machinery provisions in the Act to call in aid.

Arnstein, above n 7, 221.
1.2.1 Planning Ideologies

Patrick McAuslan’s ideologies of planning will frame the analytical reference. These ideologies are the ideology of private property; the ideology of the public interest; and the ideology of public participation.18 What McAuslan did not do was locate these ideologies within their historical context. Over the course of history, state control over decisions affecting urban planning has ‘waxed and waned.’19 It will be seen from the historical analysis in chapters 3 and 4 that the ideology of private property held sway for centuries due to the fact that ownership of land was tightly held in the hands of the ruling elite. The ideology of public interest has only been dominant during the later stages of the era of nation-states. This coincides with a period when land has been more generally held in private hands.

Since the 1980s there has been a reaction to the dominance of the ideology of the public interest by those professing a preference for market mechanisms, particularly sourced to the ideas of Friedrich Hayek (of the Austrian School of Economics).20 The Austrian school advocates a return to the ideology of private property as the dominant mechanism for determining land use planning decisions. Gleeson and Low view this development as ‘the subjugation of politics to economics.’21 Whilst the neo-liberal renaissance in land use planning is in the ascendancy, it is argued here that the tide of history is against a return fully to the ideology of private property.22

Competing within this ideological space have been the advocates of a ‘third way’ raised by Smith.23 Such scholars espouse ideas associated with Jurgen Habermas and Charles Lindblom.24

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18 McAuslan above n 5, 2.
19 Christopher Webster and Lawrence Wai-Chung Lai, Property Rights, planning and markets: managing spontaneous cities (2003), 2: ‘Historically, the degree of state control has waxed and waned, influenced by economic prosperity, internal and external political conditions and by beliefs and values’
22 This is not to say that it could not happen. As Mark Pennington, 'Hayekian Political Economy and the Limits of Deliberative Democracy' (2003) 51(4) Political Studies 722, 729, notes, its allure lies in the efficiency of the market:
   ‘Under conditions of complexity, where millions of individual decisions must be coordinated with one another, it would be impossible for deliberative committees to comprehend the nature of the interrelationships between all relevant actors.’ … In markets, … [t]he price system, albeit imperfectly, transmits knowledge in a compact form which represents the complex interrelated decisions of many dispersed actors.’
Accordingly, it is not impossible for the people to elect to return to a completely market driven paradigm. However, to do so it would be first necessary for that policy position to be put forward by a government or political party as a choice so that a mandate for that policy could be sought.
23 Smith, above n 9, 49:
In its urban context land use planning is about the space called the neighbourhood, but viewed as part of a wider region territorially defined by rules of governance. Adopting a place based theory of planning, Hague and Jenkins argue that urban planning is ‘a set of institutions, ideas and practices that sits within a social context and is embedded in power relations.’ The ideology of public participation, as framed by McAuslan, is within this ideological stream in that it stands for greater participatory mechanisms as an alternative to private property (price) mechanisms.

As society moves into what Bobbitt styles ‘Market-States’, a new planning paradigm may be necessary. Whether that will result in a move away from the prevailing ideology of the public interest and towards the ideology of public participation is the moot point. McAuslan recognised in 1980 that the ideology of public participation lacked a ‘constituency.’ The ideology remains the untried path awaiting exploration by government.

‘The third way is different. Just as customers do have power in markets and producers seek to manipulate their preferences, so in the public arena participants also have power that politicians will seek to mould and capitalise on. Participation can be a new channel for political action, bypassing the clogged arteries of traditional representative democracy. Participation can reconnect politicians and the public…’


Admittedly, it is an imprecise term for an artificial construct. It is here applied in the sense of the locality in which the people live. It is a place in transition, it has always been. As Sugerman J observed in Mitchell v Sydney City Council (1956) 2 LGRA 152, 157, neighbourhood and the ‘amenity of the neighbourhood’ are ‘relative, and flexible concepts giving rise, in the widely varying contexts and circumstances in which they have to be applied, to many difficulties of application.’ Sophie Body-Gendrot, The Social Control of Cities? A comparative perspective (2000), xxviii, suggests that neighbourhood ‘is a social construct that plays a role in its own formulation, articulation and disarticulation.’ Fran Tonkiss, Space, the City and Social Theory (2005), 73, discusses the modern problem of the privatisation of public spaces such as neighbourhood. He describes the tendency by which the ‘meaning and the contours of space are redrawn’ … ‘what passes as public space increasingly is an addendum to private development – the atrium, piazza or porte cochére of international corporate style which stands as vacant temples to an urban cult of privacy.’ To market theorists, the neighbourhood could be said to be the ‘geography of economic location’ see - Neil Smith, The New Urban Frontier: Gentrification and the revanchist city (1996), 58.

Hague and Jenkins, above n 6, 8. Hague and Jenkins see planning as being ‘about place-making.’

Phillip Bobbitt, The Shield of Achilles, War, Peace and the Course of History (2002), 228. Bobbitt suggests that a new constitutional arrangement is emerging which he describes as the Market-State. Bobbitt sees the period of the twentieth century as involving a struggle ‘over a single set of constitutional issues which were unresolved until the end of the Cold War.’ He describes this period as the ‘Long War,’ which begins with the First World War and ends with the Treaty of Paris of 1990. In the aftermath of that struggle, the constitutional arrangements we know as Nation-States began to undergo structural change and ‘market-states’ emerged. Bobbitt defines a market-state as follows:

‘The market-state is a constitutional adaptation to the end of the Long War and to the revolutions in computation, communications, and weapons of mass destruction that brought about that end. … Its political institutions are less representative (though in some ways more democratic) than those of the nation-states. … Where as the nation-state justified itself as an instrument to serve the welfare of the people (the nation), the market-state exists to maximise the opportunities enjoyed by all members of society.’

McAuslan, above n 5, 5.
Yet, for participation to be effective it needs to be dynamic. As Saul reminds us: ‘if democracy fails, then it is ultimately the citizen who has failed, not the politician.’ The people of New South Wales do not have a long tradition of active participation in governance. From the outset, the people refused to take responsibility for local government. Halligan and Paris theorise that a ratepayer ideology emerged in the people of New South Wales in the early years of settlement. It negated civic involvement in local governance. This ideology, rooted in McAuslan’s ideology of private property, remains a pervasive force working against participation in local governance in New South Wales.

The aim of this research is to show how closely land use planning law is related to politics and power. Gleeson and Low suggest that it is arguable that planning is ‘a servant of power.’

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29 Erhard Berner, ‘The metropolitan dilemma: global society, localities and the struggle for urban land in Manila’ in Ayşe Öncü and Petra Weyland (eds), *Space, Culture and Power: New identities in globalizing cities* (1997) , 108. Berner suggests that: ‘The necessary basis for the “sense of belonging to the city” is a sense of belonging to a place, namely the locality.’

30 John Ralston Saul, *The Unconscious Civilization* (1997), 82. Saul goes on to say: ‘The politician can always find a new place in a new configuration of power – witness the growing attachment of the elected to private sector interests.’

31 Andrew Kelly, *The role of local government in the conservation of biodiversity* (Ph. D. Thesis, University of Wollongong, 2004), 73-75. Kelly describes the ‘antagonism’ of the people to submit to property taxation (and therefore municipalisation) as being ‘a direct result of the community’s historical reliance on the central government for all services.’ People of property resisted paying tax because they had already benefited from facilities provided without cost by the government. As the early forms of voluntary incorporation excluded from the franchise those who did not have property, there was no incentive for the people generally to participate in local governance.

32 John Halligan and Chris Paris, ‘The Politics of Local Government’ in John Halligan and Chris Paris (eds), *Australian Urban Politics* (1984) 58, 61; ‘[t]his ideology derived from the legacy of property franchises and the centrality of property to municipal affairs. … The effect of this ideology was to limit the number of people who could formally participate and also the content of local politics.’ Kelly above n 31, 72-74 concurs, suggesting that what began as antagonism to property taxation in the 1830s, crystallised into a social ethos. The ‘community’s historical reliance on the central government for all services’ and the government’s provision of infrastructure and services fuelled an antipathy to participation in local government structures. See also FA Larcombe, *The Origin of Local Government in New South Wales 1831-58* (1973), 54. Larcombe attributes the ‘trenchant’ opposition to land taxation, first manifested in the resistance of the community to system set up under the *Public Roads Act* of 1840, as the origin of public hostility to civic participation in the funding of infrastructure for the colony. The historical study in chapter 5 identifies that the ratepayer ideology continues to be manifested today.

33 James Gruy Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order* (1990) 139(2) *University of Pennsylvania Law Review* 289, 304. Whilst written in the context of the United States, the sentiment expressed demonstrates the point:

‘Most of the citizenry most of the time is simply too apathetic, ignorant of public issues, and selfish to engage in political activity. A serious attempt to eliminate these obstacles would require a system of “coercive democracy,” which would force citizens to pay attention, for example, by compelling them to send an hour or two each day discussing public issues. Since the coercive cure is worse than the liberal pluralist disease, the normal operation of politics must be conceded to interest group representation – albeit bounded by civic-minded judicial review.’

34 McAuslan, above n 5, 268:

‘It is quite simply a question of political power, against which the theories of planners, however noble in intent, are quite irrelevant. The law and administration of planning is operated,
NSW land use planning system draws heavily on its UK heritage, both in the context of its legislative framework and in the context of the model for public participation. If the EP&A Act excludes civic participation from the decision-making processes, the antecedents for this can be traced to the historical roots of planning law. If planning law is to become participatory, then it will need to become democratic.

1.2.2 Participation and Democratic Theory

Bates describes the advent of planning laws as a ‘great social revolution.’ Planning laws were spawned out of the industrial revolution in Britain in the eighteenth and nineteenth centuries. The social changes of this period have their genesis in the political revolution of the seventeenth century in England when the people rose up to take sovereign power over their governance after a long history of struggle. It was a struggle against tyranny. Tyranny results when a government exercises power without consent.

It was Hobbes who postulated a theory of civil society under the dominion of a forceful sovereign. As Uhr reformulated the concept, this civil society would function through ‘the accommodation of competing self-interests, regulated into peace and security by the forceful sovereign’.

Locke softened the impact of Hobbes’ position by postulating the concept of popular sovereignty in which ‘legitimate government rests on the consent and not simply fear of the governed’. Stein argues that under Locke’s conceptualisation of civil society, its purpose was to protect property rights which ‘precede government and are inviolable’. Yet, in the history of the development of land use planning law, these property rights were interfered with regularly by a forceful sovereign, exercising coercive legislative power for the common good.

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35 Gleeson and Low, above n 21, 102.
36 Gerry Bates, Environmental Law in Australia (7th ed, 2010), 8: ‘The environmental movement [hardly four decades old] must therefore rank as one of the great social revolutions of history.’
37 J. Uhr, Deliberative democracy in Australia: the changing place of parliament (1998), 23, 44.
38 Ibid.
40 Ibid. Stein cites Ambler v Village of Euclid (1926) 272 U.S. 365 where the US Supreme Court determined that planning law was ‘a proper regulatory subject for the good of the community, whereby the state can modify rights associated with the free and unfettered use of one’s land.’
John Keane’s theory of *monitory democracy* has recently located the historical development of public participation in democratic governance.\(^{41}\) There is a direct correlation between the use of law as an instrument of power and the struggle of the people to participate: to *wrest* power from the governing elite. Understanding the history of this struggle for democratic participation explains why, as land became more generally owned in Britain, there was interest by government in using the law to retain control over the development of land. This interest was fostered by the new ‘town planning professionals.’\(^{42}\) It culminated in the enactment of the *Housing Town Planning etc Act 1909* (UK). As is discussed in chapter 4, by legislation the state, and not the people, defined ‘the public interest’ in land use planning decision-making. In this system, participation was at the discretion of another powerful institution, the administrator/bureaucrat.

When introducing the first solid planning regime into NSW sixty years ago, the State of New South Wales suggested that planning would be democratic.\(^{43}\) Yet this did not occur. Thirty years

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\(^{41}\) J. Keane, *The Life and Death of Democracy* (2009), xxvii. ‘[T]he emerging historical form of “monitory” democracy is a “post-Westminster” form of democracy in which power-monitoring and power controlling devices have begun to extend sideways and downwards through the whole political order.’ Monitory democracy is differentiated from other forms of democracy (at 737) as follows: ‘assembly based democracy belonged to an era dominated by the spoken word, backed up by laws written on papyrus and stone, and by messages despatched by foot, or by donkey and horse. Representative democracy sprang up in the era of print culture – the book, pamphlet and newspaper, and telegraphed and mailed messages – and fell into crisis during the advent of early mass communication media, especially radio and cinema and (in its infancy) television. By contrast, monitory democracy is tied closely to the growth of multi-media-saturated societies – societies whose structures of power are continuously “bitten” by monitory institutions operating within a galaxy of media defined by the ethos of communicative abundance.’ Keane’s conclusion is supported by John Wiseman, ‘Designing Public Policy after Neo-liberalism?’ in Paul Smyth, T Reddel and Andrew Jones (eds), *Community and Local Governance in Australia* (2005), 59. Wiseman notes that: '[t]hese expectations [that the government must play a significant role] have been reinforced by the increasing transparency and rapid circulation of information about the actions of government. This has provided individuals and organisations with more detailed understandings of the consequences of policy choices and increased expectations that the government can and should be accountable for their actions. At the same time there has been a widely documented fall in the levels of trust that citizens express in governments of all political persuasions (Pharr and Putnam 2000).'</p>

\(^{42}\) Andrew Kelly and Christopher Smith, *The Capriciousness of Australian Planning Law: Zoning Objectives in NSW as a Case Study* (2008) 26(1) *Urban Policy and Research* 83, 84. As Kelly and Smith note, the ‘garden city movement’ which coalesced around the ideas of Ebenezer Howard in the last decade of the nineteenth century was instrumental in ‘fostering a new profession that lobbied, successfully, for legislative institutionalisation of town planning’, and for the creation of the first town planning legislation which ‘empowered local authorities to formulate planning schemes for areas in the course of development.’

\(^{43}\) See Minister Cahill’s comments above n 1. As is discussed in Chapter 5, the minister was not in fact advocating participatory democracy. The clue is in the reference to ‘skilled guidance.’ The McKell Government was intent on undertaking ‘master planning’ for the State of NSW to redress the failures of private enterprise and past governments. As the ALP notes (at 6), the McKell Government desired that:
later, the state adopted a new strategy when enacting the EP&A Act. Instead of democracy, the public was offered the prospect of increased ‘involvement and participation’ in planning decision-making.\textsuperscript{44} Once again the people were to be disappointed. The people of New South Wales are still not participants in the NSW planning system.

In her seminal work: \textit{A Ladder of Citizen Participation},\textsuperscript{45} Sherry Arnstein identified a typology of eight levels of citizen participation in land use planning which she described as the ladder of participation (Fig 2 below). At the lowest levels, that of Manipulation and Therapy, the government promotes participation ‘to educate or cure the participants.’ In the middle rungs, Placation, Consultation and Informing, participation exhibits degrees of tokenism, with no real power in the citizens to influence the outcome. At the highest level, that of citizen control and delegated power, the citizens ‘obtain the majority of decision-making seats, or full managerial power.’\textsuperscript{46}

\begin{itemize}
\item [\textsuperscript{44}] The phrase used in section 5(c) of the EP&A Act.
\item [\textsuperscript{45}] Ibid n 7.
\item [\textsuperscript{46}] Arnstein acknowledges that the typology is simplistic and that in reality there may be many more rungs in the ladder, but the point of the classification is to show that to be meaningful, citizens must have ‘enough power to make the target institutions responsive to their views, aspirations and needs.’ Arnstein’s typology has been refined by the International Association for Public Participation as the ‘Spectrum of Public Participation.’ see EDO, ‘The State of Planning in NSW: With reference to social and environmental impacts and public participation’ (Environment Defender's Office, 2010) (EDO 2010 Report), 38. There are five rungs in this reformulation: Inform; Consult; Involve; Collaborate; and Empower. Power only occurs in the final two levels. At Collaboration, there is partnership with the community; at Empowerment, the final decision is in the hands of the public.
\end{itemize}
If citizens are to be empowered in the planning process, then theoretically power should be vested in the people either directly or through their democratically elected local councils. In that way, the participation of the public in the plan-making and decision-making phases of the planning process would approach Arnstein’s higher rungs of participation where there exists ‘degrees of citizen power.’ Presently, the EP&A Act does not confer power on the people. The local planning instrument is made by the minister, not the elected council. Decisions on whether or not development should occur in the locality are now generally not determined by the council. What exists, in empirical terms, is a socially exclusive system. Participation remains at the placation rung or below on Arnstein’s ladder. The people lack the power to impact on the deliberations of the decision-maker so as to affect the outcome.

47 The comments in AJ Brown and HM Sherrard, *Town and Country Planning* (1959), 8 remain apposite: ‘Today the impelling force [in planning] must be the community itself, whose welfare is at stake. Social betterment has become one of our primary political objectives.’ For Brown and Sherrard, the meeting of the needs of the people was best met ‘through their democratic representative institutions.’

48 Arnstein above n 7, 217.

49 The pending repeal of Part 3A effected by the *Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011* (NSW) does not mean that all planning decisions have been returned to the local council. As is discussed in chapter 2, the current rationale of the planning system is to facilitate approvals via the Exempt and Complying development Codes.

50 Arnstein, above n 7, 220. That is, ‘citizens may realize that they have extensively “participated” but have not profited beyond the extent the powerholders decide to placate them.’

51 See Tonkiss, above n 25, 59. Tonkiss argues that: ‘Politics, like other social relations, unfolds in space. To think about politics and power is nearly always to invoke a set of spatial relations. … Urban spaces, that is, provide sites for political action and are themselves politicized in contests over access, control and representation.’
1.3 Theoretical Framework

Broadly, the thesis of this research engages the theoretical debate about the changing nature of the role of the state in a global market and the direction of social policy in a post neo-liberal world. Within that debate is the discourse about the role of social inclusion in governance. It addresses philosophical questions about the nature of democracy. Conceptually, the thesis grapples with the question of power in the planning system. Citizenship per se does not connote power. It is the state that has power. It is responsible for creating the ‘legal environment.’

Having the right to vote in an election once every four years is not participation in land use decision-making. At the level of the neighbourhood, land use decisions have a direct and long lasting impact. If the NSW land use planning system is to change, then the question of who should have the power to control land use policy at the level of the neighbourhood becomes a relevant question. Should it be the government, the market or the people?

In essence, the thesis addresses the question relevant to any reform of the New South Wales planning system namely: should planning be democratic? Up to now it has not been. Under

52 Pope, above n 33, 293:
‘According to Webber, power is “the possibility of imposing one’s will upon the behaviour of other persons.” Power may be, but need not be, exercised through economic or physical coercion. The “power of persuasion” is also, as the phrase indicates, a form of power.’

53 Bobbitt, above n 27, 216. As Bobbitt explains:
[The State] came into being in order to establish a monopoly on domestic violence, which is a necessary condition for law, and to protect its jurisdiction from foreign violence, which is the basis for strategy. If the State is unable to deliver on these promises, it will be changed; if the reason it cannot deliver is rooted in its constitutional form, then that form will change. A State that could neither protect its citizens from crime nor protect its homeland from attack by other states would have ceased to fulfil its most basic reason for being.

54 Webster and Lai, above n 19, 70, according to market theory:
‘As the monopoly supplier of violence, the state has a fundamental role in creating a legal environment for market-based exchange and economic growth. At the minimum this includes making rules and sanctions that confer on individuals a) the secure right to exclusive use of private property, b) the rights to derive income from property and c) the right to trade (alienate) property.’

55 Robert Freestone, Urban Nation: Australia’s Planning Heritage (2010), 63 notes:
‘The neighbourhood unit is inseparable from the rise of modern urban planning and design, its ongoing evolution connecting with enduring themes such as social welfare, efficiency, public participation, and sense of space.’

56 In doing so, it is recognised that there is a strong counter argument, well put by Elizabeth Farrelly, ‘Our cities reveal the ugly side of democracy’, Sydney Morning Herald (Sydney), 6-7 Oct 2007, 26. Farrelly argues that:
‘Democracy makes effective planning impossible. … The solution, as with so many cultural difficulties, lies in our preparedness to rise above narrow self-interest and become involved in culture-making at a broader, more communal, more altruistic level.’

Either Farrelly is calling for a benevolent dictator or perhaps she is making a call for the people to become more engaged in the political, not planning process?
both of McAuslan’s ideologies of private property and of the public interest, there is no inherent right in the people to participate in the processes of land use planning. Neither the ideology of private property, nor the ideology of the public interest is democratic in their intent. Only the ideology of public participation has that prospect. Participation is, fundamentally, an action that requires a deliberate intention to engage with the processes of governance.

Insofar as Yiftachel suggests that planning can be categorised by reference to analytical, procedural and substantive debates, the research in this work is located within the procedural debate. It examines the evolution of decision-making procedures in the context of civic participation in planning policy and decision-making. The rhetoric of the EP&A Act is considered in the context of its practical application to the social task of participation, identified by reference to the objects of the Act.

Because of the focus on participation, the research does not engage the analytical debate directed to the question of what type of urban planning is best for NSW. Similarly, the substantive debate about the impact of development authorised by the procedures created under the Act is not examined. It is assumed that the relevant context for the consideration of the limitations to participation is through an examination of effectiveness of participation by the citizenry is the legal frame of reference, principally the EP&A Act. In that context, the law referred to in this research is current to 26 March, 2011.

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57 Brown and Sherrard, above n 47, 196. Brown and Sherrard suggested, as early as the 1950s, that if we were to judge democratic systems by their results, then ‘the chaotic conditions in our towns is the result’ of too much ‘rugged individualism.’ They argued that ‘[i]n place of a discipline imposed from above by a despot or a bureaucrat, the individual must be prepared to discipline himself and to subscribe to behaviour which is for the common good rather than for his selfish ends.’ Demographer Bernard Salt recently suggested that individualism continues to curse society today – see Bernard Salt, ‘It’s all about me: the rise and rise of individualism’, The Australian (Sydney), 2011, 33. He suggests that in contrast to past generations, today we expect the world to revolve around ‘us’. More particularly:

‘Not so much us as “me”, to be precise. Frankly, I'm not that much interested in you; I’m far more interested in me. And that’s the transition in thinking that has taken place over the past 30 years. The first half of the 20th century was inhabited by a strange race which, get this, valued bizarre concepts such as sacrifice and ”going without”. They saw virtue in subjugating individuality in order to serve a higher cause.’


59 Andreas Faludi, Planning Theory (1973), 5. Faludi suggests that ‘procedural rather than substantive theory should be regarded as planning proper.’

60 This is the date of the 2011 NSW state election at which the Liberal National Party coalition received a record electoral swing to it in the order of 16% resulting in the loss of 32 seats for the sitting Labor Party. The election result gave the incoming government the ‘largest majority in NSW political history’ according to Antony Green, the ABC election analyst see: http://blogs.abc.net.au/antonygreen/ accessed 1 April 2011. The only amendment to the EP&A Act since the election was the repeal of Part 3A. Whilst assented to on 27 June, 2011, it is yet to come into force.
Having regard to the potential scope of inquiry, space dictates selectivity. For the purpose of examining the historical continuum, the research focuses specifically on the development of land use planning laws in the UK and New South Wales. The examination of planning in other jurisdictions is a matter left for later research. In order to appreciate the social context in which the thesis question is located, reference is made to social commentary, including newspaper articles. The views expressed in such publications reflect contemporary views on topical matters of relevance to the community in the context of land use planning policy and decision-making.

Arnstein’s work informs the examination of the nature of public participation in land use planning processes and governance generally. Bora and Hausendorf’s analytical work on the theoretical approach to the semantics of citizenship forms the basis for an empirical analysis in chapter 5 of the legislative procedures in the EP&A Act. Understanding the reason for dissonance between the administrator and citizen roles established by the procedures mandated by the Act helps to explain why members of the public resort to extrajudicial and political mechanisms to alter the outcome of decisions taken within the planning system. It also explains the highly emotional position adopted by members of the community opposed to certain state policies and development approvals who consider that they have no voice in the processes.

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61 In saying this, it is recognized that the analysis, research and conclusions will have general relevance in that the principles examined in this research are common and apply to other jurisdictions in both Australia and elsewhere.

62 Bora & Hausendorf, above n 11, 480. Bora and Hausendorf adopt as their ‘programmatic keyword’ for the analysis of the language of participation the concept described by them as ‘communicating citizenship’. Under their theoretical model, the degree of social inclusion can be assessed through an analysis of the social positions as observed in participatory decision-making procedures.

63 McAuslan, above n 5, 6. McAuslan argues that it is the conflict of the ideologies (as identified by him) that is ‘one of the causes of the general disarray in, and disillusion with, the planning system.’ At 11, McAuslan identifies that by increasing the expectations for participation, but by failing to ‘adapt the law’ [this]... ‘adds fuel to the flames of disillusionment and frustration with the planning system.’ It is a commentary relevant today, having regard to the evidence before the Standing Committee.

64 Pending the publication of the Standing Committee report in 2009, the EDO published a discussion paper ‘Planning in New South Wales: Reconnecting the Community with the Planning System.’ Throughout November 2009, the EDO conducted six workshops in Sydney and five regional locations (Wollongong, Newcastle, Moruya, Ballina and Coffs Harbour). In August 2010 the EDO published its report, above n 46. The main conclusion of the report (at 3) was that ‘the community generally feels disconnected with the planning process, deeply cynical about whether it is worthwhile to engage, and extremely frustrated about the current system.’
1.4 Structure of the Research

By reason of the focus on McAuslan’s ideologies, the work does not undertake empirical research. Rather, in a synoptic fashion, it examines the nature of public participation in land use planning by taking a long view of history relying on an array of secondary sources. Through this method, the paper undertakes a critical historical examination of the evolution of public participation in political discourse, firstly in England and then in the colony of New South Wales. In this way the paper seeks to present an original view in the current debate about the theoretical role of participation in land use planning. The analysis confirms that the ideology of public participation is yet to find expression in legislation in either Britain or New South Wales.

Chapter 2 sets the framework of the discussion in its land use planning context and introduces the elements of the research. The historical analysis commences in chapter 3 with a consideration of the origins of the ideology of private property founded in the ancient Roman civilization. That society was an example of a nascent market economy operating exclusively on the institution of private property. In chapter 4 the analysis considers the long struggle in England for the right of the people to participate in governance. This chapter also examines the historical origins of the ideology of the public interest which emanates from the impact of the industrial revolution in Britain.

Chapter 5 details the history of land use planning in New South Wales from its colonial origins. This history is relevant to an understanding of the particular nature of the culture of participation in the state of NSW. Under the influence of British imperialism and the ideology of private property there developed in NSW what Halligan and Paris have styled as the ratepayer ideology. This peculiar anti-participatory approach to local governance suggests that

65 Webster and Lai, above n 19, 15: ‘The institution of private property – a set of rules governing competition – achieves two significant functions. On the one hand, it transforms anarchy into a state of affairs in which the full benefits of the division of labour and the associated accumulation of wealth in society are possible by voluntary interaction. On the other hand, it also defines and protects an individual’s liberties: the freedom to enjoy the use and exchange of possessions; the freedom from undue interference with the fruits of labour by theft, slavery violence, or unreasonable government exaction; the freedom from opportunism in exchanges with partners in markets or government; the freedom from unreasonable levels of external costs arising from other individuals’ production or exchanges of goods or services; and as an option, the freedom from interacting with others altogether.’

66 Halligan and Paris, above n 32, 60-1: Halligan and Paris note that the ‘scope of local politics has been historically shaped by power relationships between political spheres and economic interests.’ The ratepayer ideology is:
if it prevails, it is likely to thwart the development of a participatory culture in local politics in NSW for the reasons discussed in Chapter 6. In this final chapter the paper returns to a consideration of the question of whether it is likely that the New South Wales parliament will adopt McAuslan’s public participation ideology as the basis for any reform of the planning system.

‘derived from the legacy of property franchises and the centrality of property to municipal affairs. … The effect of this ideology was to limit the number of people who could formally participate and also the content of local politics.’
Chapter 2: The Nature of Planning Today

‘In discussing the need to plan and how to plan we must confront the choice which society may make between forms of social organisation which are highly centralised and authoritarian, and forms which leave people to settle their own affairs as much as possible in their workplace and communities.’

Royal Town Planning Institute 1976

‘Participation in the debate about the future of society is decreasing while conflict is replacing dialogue and consensus. If planning decisions are to be accepted there is a need for new approaches which will ensure the INCLUSION of all who are affected by change;’

Royal Town Planning Institute – New Vision 2001

2.1 Introduction:

As Bates notes, the system for land use and environmental planning is the ‘framework within which members of the public often get the chance influence strategic planning at state and local levels.’ In New South Wales, that framework is articulated by laws made by parliament, principally the EP&A Act. In terms of the chance that the public has to ‘influence’ planning decisions, the functional role of public participation under the EP&A Act is tokenistic; the public is to be consulted and allowed to make submissions. The NSW planning system is simply not structured to advance the cause of public participation.

In this chapter the major themes of the paper are introduced. It begins with a consideration of the nature and purpose of land use planning and participation. The chapter then examines the

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3 Gerry Bates, Environmental Law in Australia (7th ed, 2010), 244.
4 See in this regard the discussion in chapter 5.4 below. The discussion demonstrates that the participation mechanisms in the Act are weak. The 2008 reforms effectively silenced the voice of the public in the development-assessment and decision-review processes of the Act.
concept of participation in the context of McAuslan’s ideologies. Finally, the chapter considers the importance of history as an aid to understanding the choices that confront society in a global age to demonstrate why participation is not a matter of history, it occurs in history.

2.2 What is Land Use Planning?

Urban planning, in its physical manifestation, has deep historical roots. In contrast, the profession known as ‘Planning’ has very shallow historical roots. Land use planning, as an institution, was first promoted by the Garden Cities Association formed in Britain in 1899. However, the profession of land use planning was created out of the social chaos caused by the Great Depression and the Second World War. These significant social moments signalled the end of laissez faire economics and the reliance by governments on the self-regulating market.

Conceptually, land use planning is fluid and contextual. In the 1950s Brown and Sherrard defined town planning as follows:

‘Town and Country planning is the direction of the development and use of land to serve the economic and social welfare of a community in respect of convenience, health and amenity.’

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5 AJ Brown and HM Sherrard, *Town and Country Planning* (1959), 9. Brown and Sherrard recognise the debt we owe to archaeologists who ‘have brought to light evidence that in the dawn of history man had an appreciation of planning, of civic architecture and of engineering.’

6 Andreas Faludi, *Planning Theory* (1973), 13. Faludi suggests that: ‘one of the component elements of the definition of a profession is that its skills are based on theory.’ … ‘[planning] developed out of architecture, engineering and surveying, its area of concern being that of “ system of land use settlement, ” to use a modern term.’

7 Andrew Kelly and Christopher Smith, ‘The Capriciousness of Australian Planning Law: Zoning Objectives in NSW as a Case Study’ (2008) 26(1) *Urban Policy and Research* 83, 84. Ebezener Howard’s garden city movement and the association ‘provided a launch for planned separation of conflicting land uses, the centrepiece of Western land use planning.’

8 Leonardo Benevolo, *The history of the city* (1980), 928: ‘Large-scale public intervention, in order to regulate to some extent the growth of England’s cities, only became possible in the 1930s when attempts were made to tackle the effects of the 1929 crisis, …’ As will be seen in chapter 5, in Australia it was post-war migration and demand for housing that proved to be the catalyst for legislative intervention. In NSW the government introduced Part XIIA to the *Local Government Act* 1919 to enable the implementation of planning schemes.

9 B. Gleeson and N. Low, ‘Revaluing planning: Rolling back Neo-liberalism in Australia’ (2000) 53 *Progress in Planning* 83, 87, 90: ‘The world society which grew during the 19th century, based on the principle that the self-regulating market was a law of nature, had catastrophically failed by the 1930s. This failure was perceived to lie not in contingent political events such as the rise of Fascism, or even the war itself, but in the socially destructive power of the unfettered market.’ … (at 90) ‘The idea of societal planning, hitherto associated with dictatorial regimes, had to be reconciled with democracy.’

10 Brown and Sherrard, above n 5, 3.
This definition locates the discipline of planning within Yiftachel’s urban form debate – ‘urban form solutions to metropolitan problems.’

It is an anthropocentric definition that arguably divorces planning from its environmental context. It suggests that planning is an exact science; organic to the nature of urban civilization and societal organisation. The definition captures the socio-political context within which planning systems of law have developed in the twentieth century.

Gurran, reflecting a modern approach, reformulates the definition of land use planning as the ‘formal process regulating the use of land and the development of the built environment, in order to achieve strategic policy objectives.’ This explains Thompson’s comment that planning ‘is a continuously evolving process.’

Godden and Peel recognise the centrality of law in land use planning processes. They assert that:

’[A]ny understanding of environmental governance is incomplete without due recognition of the role of political systems and institutions as key avenues for the articulation of environmental values, for the airing and potential resolution of conflict over environmental issues, and for the implementation of environmental reforms, many of which will result in environmental laws.’

Wiggins actually dismisses the use of the word ‘planning,’ preferring the term ‘environmental management.’ It is this type of semantic that risks casting the concept of planning into what Stone has described as a ‘category of meaningless reference.’ Any redescription of the function of land use planning which correlates the profession with management only hastens the...

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‘Recent advances in planning knowledge, which have demonstrated beyond doubt that urban planning affects unevenly the allocation of societal resources, are bound to gradually erode the myth according to which planners are portrayed as neutral and apolitical experts.’


15 Danny Wiggins, ‘Professional Challenges in Local Planning’ in Robert Freestone (ed), Spirited Cities (1993) 25. Wiggins also argued (at 26) that it is ‘inappropriate for the profession to use the generic term “planning”. Wiggins suggested that:

‘if we were able to recast government’s core functions, the use of land is a sufficiently discrete functional area. The focus would be on land use but the scope would be broad, reflecting the increasing sophistication of the field.’

16 J. Stone, Legal System and Lawyers’ Reasonings (1968), 241-246. It is not suggested that the phrase is meaningless, rather, it is suggested that to categorise the discipline of land use planning by reference to the tag ‘environmental management’ neuters the independence of the profession and reduces the discipline of planning to the level of a department of government charged with responsibility to execute the policy formulated by the government.
demise of the discipline as a discrete academic school. By recognising the actuality that planning is a matter of opinion, land use planning loses its theoretical foundations. That is, land use planning becomes wholly political in character.\textsuperscript{17}

In its urban context, land use planning is relational; the relationship to power cannot be ignored. This is why Hague and Jenkins suggest that power is ‘embedded’ in the processes.\textsuperscript{18} Whilst a system of law to regulate property rights is fundamental to a civil society,\textsuperscript{19} planning laws are not essential to the organisation of the state. The societal institution of urban planning evolved out of a determination by government to impose order on the ‘chaos [of] unplanned urban spaces’ created in the aftermath of the industrial revolution.\textsuperscript{20} Chapters 4 and 5 discuss this development.

Market theorists often argue that development of land does not need to be regulated.\textsuperscript{21} There is an acceptance within this school of thought that the market ‘requires’, for its efficient operation, the state.\textsuperscript{22} But the role of government within this conception is to act as the agent of the market. The purpose of urban planning is merely to facilitate the institution of property by enabling the operation of markets and the subdivision and transfer of property rights within those markets mediated through the regulatory mechanism of price.\textsuperscript{23} Webster and Lai suggest that institutions

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\item \textsuperscript{17} Yiftachel, above n 11, 36, refers to the comments of Blowers, ‘Town Planning – paradoxes and prospects,’ \textit{The Planner}, April 1986, 82, 14:
\begin{quote}
‘Planners regard themselves as experts on shaping our surroundings. But it may be that the use we make of our land and the design of our built environment are not matters of expertise but matters of opinion, of values rather than facts, in short, they are political.’
\end{quote}
\item \textsuperscript{18} Cliff Hague and Paul Jenkins (eds), \textit{Place Identity, Participation and Planning} (2005), 8.
\item \textsuperscript{19} Jeremy Bentham, Etienne Dumont and Charles Milner Atkinson, Bentham's Theory of legislation: being Principes de législation, and, Traités de législation, civile et pénale (1914), 146-7. Bentham’s theory being:
\begin{quote}
‘Property and law were born together, and would die together. Before the laws property did not exist: take away the laws, and property will be no more.’
\end{quote}
\item \textsuperscript{20} Sophie Watson, 'Cities of Dreams and Fantasy' in Robert Freestone (ed), \textit{Spirited Cities} (1983) , 142:
\begin{quote}
‘Order and logic were the name of the game. At its most extreme a grid system derived from Le Corbusier’s ideas replaced chaos and unplanned urban spaces.’
\end{quote}
\item \textsuperscript{21} This is the argument of neo-liberals, drawing on the theories of Hayek - see Gleeson and Low above n 9, 96:
\begin{quote}
‘Hayek argued for individualism (individual freedom from state interference), the rule of law, the virtue of the “catallactic” workings of the market, consumer sovereignty, private property rights, and a minimal “nightwatchman” state.’
\end{quote}
\item \textsuperscript{22} Christopher Webster and Lawrence Wai-Chung Lai, \textit{Property Rights, planning and markets: managing spontaneous cities} (2003), 53: ‘the market requires the state, in particular the institutional frameworks it creates, in order to operate efficiently.’
\item \textsuperscript{23} Mark Pennington, 'Land Use Planning: Public or Private Choice?' (2003) 23(2) \textit{Economic Affairs} 10, 10. As Pennington notes:
\begin{quote}
‘From an Austrian [Hayekian] perspective the shifting structures of costs and benefits associated with environmental externalities are inherently subjective and may only be revealed through the choices that people make when confronted with a range of competing alternatives. Without a set of relative prices signalling the significance of such alternatives, planners will not be able to
\end{quote}
\end{itemize}
such as private property are the ‘sinews’ of society dating back to ancient times.\textsuperscript{24} The institution of private property dates back to at least Roman times.

It is only when the government decides to intervene in the operation of the market to distort the outcome of property right transactions that the institution of planning emerges as a player in the market.\textsuperscript{25} Planners cannot ‘function’ without government action (law) to favour them with power to regulate for planned outcomes.\textsuperscript{26} The prescriptions generally relate to the use of land.\textsuperscript{27} Legislation is the only means by which development can be regulated within the territorial boundaries of the state.\textsuperscript{28} Absent laws made by parliament, the development of land is regulated by property rights sanctioned by law. In the absence of planning laws, development of land occurs by application of the residual negative legal principle, namely that which is not prohibited by law is axiomatically permitted.\textsuperscript{29}

Land use planning is therefore essentially a creature of statute.\textsuperscript{30} It is the machinery articulated in legislation by which government gives effect to its deliberate policy.\textsuperscript{31} Planning professionals are the ‘servants’ of that machinery process.\textsuperscript{32} They worship at the altar of the ideology of

\begin{itemize}
\item judge the “social costs” of different schemes and must rely on their own subjective preferences to determine what will constitute an improvement in the “quality of life.”\textsuperscript{24}
\item In the context of sustainable development, some like Michael J Jacobs, ‘Sustainability and Community’ (1995) 32(2) Australian Planner 109, argue (at 110) that “[t]here is little doubt that sustainable development will lead to a greater, not a lesser role for governments in economic policy.”\textsuperscript{26}
\item Gurran, above n 12, 41: ‘All planning systems need a legal source of power to legitimise their bureaucratic and development control functions. This source of power will typically be articulated within a major or principal piece of legislation, or, in some cases, may be drawn from several legislative sources.’\textsuperscript{27}
\item Peter Butt, Land Law (6th ed, 2010), 7. Butt notes that under common law land means ‘any area of three dimensional space, with its position identified by natural or imaginary points located by reference to the earth’s surface.’ As such, it is a legal construct, but one with real significance. In its legal context, the definition of land is relational. As Jenkins notes, Paul Jenkins, ‘Space, Place and Territory: An Analytical Framework’ in Cliff Hague and Paul Jenkins (eds), Place Identity, Participation and Planning (2005) 19, 20: ‘Place is also a relational concept as it is defined as the relationships between elements perceived in multiple ways through socio-cultural filters.\textsuperscript{28}
\item Brown and Sherrard, above n 5, 3: ‘The technique of planning must involve more than the preparation of a scheme, if action is to follow design. It involves legislative control machinery to ensure that an adopted plan is given effect as the years pass.’\textsuperscript{29}
\item See in this regard the discussion of deontic logic and axiomatic reasonings in Stone, above n 16, 195.
\item Robert Freestone, Urban Nation: Australia’s Planning Heritage (2010), 43, suggests that town planning statutes were ‘the goal of the modern town planning movement of the 1910s’.
\item G Bramley, W Brartlett and C Lambert, Planning, the Market and Private Housebuilding (1995), 38. They describe planning as ‘a particular form of public policy intervention in the arena of private decisions with regard to the use of land, governed by particular legislation.’\textsuperscript{30}
\end{itemize}
public interest. At the technical end of the spectrum, land use planning is no more than the collection of ways to give effect to spatial concepts of urban living. At the policy end of the spectrum, planning expresses the current rationale or strategy of the government of the day to address societal problems confronting it.

Land use planning is land centric. When democratic governments formulate land use planning policy and enact law to give effect to that policy, the implementation of the policy intersects with fundamental property rights enjoyed by people who own land. Planning policy and law is therefore best understood in the socio-political dimension. The implementation of government policy is felt directly in the neighbourhood in which people often reside. As the Standing Committee of the NSW Legislative Council noted in its 2009 report, decisions on whether or not to approve development ‘can have a profound effect on individuals and communities.’

JS Mill was undoubtedly correct when he said: ‘No man made the land. It is the original inheritance of the whole species.’ The difficulty that arises is that since time immemorial, man has made property laws. The inheritance has been fractionalised ever since. The subdivision

The basis of a view which portrays planners as the servants of their political masters can be traced to the development of bureaucracies. The implication of this view in terms of decision-making is that politicians decide on ends, and that planners indicate the means for their attainment.

The instrumental view of planning, which is what the master-servant concept amounts to, is very widespread and rests on the traditional view of the role of experts in public administration …’

P McAuslan, The Ideologies of Planning Law, Urban and Regional Planning Series (1980), 261. As McAuslan notes:

‘[D]espite pressure and suggestions to reform and alter, the broad framework of administration and management in government is still firmly anchored to an ideology of public interest and rejects the ideology of public participation.’

Bates, above n 3, 239. Bates suggests that:

‘[P]lanning is the antithesis of chaos.’ … ‘Planning introduces order, a measure of certainty and security, and a principled framework against which applications to carry out development of land and access natural resources

As Clive Forster, Australian Cities: Community and Change (1995), 71, notes:

‘Australia’s major cities are, above all, residential environments. Most of their built-up areas consist of houses, streets and local facilities that constitute “home” for 10 million people. The kind of housing people live in, whether it meets their needs and what they have to pay for it largely determines their standard of living.’


For a recent example of the application of the subdivision principle see s 88AB of the Conveyancing Act 1919 (NSW). This is the section which deems carbon sequestration rights to be a profit à prendre. See also the discussion in Samantha Hepburn, 'Carbon Rights as New Property: The Benefits of Statutory Verification' (2009) 31 Sydney Law Review 239, 246. Hepburn reviews the legislative schemes for carbon rights in Australia and suggests that the schemes in Australia are in the forefront of recognition of carbon rights in the context of forestry legislation. The schemes variously seek to ‘formalise the separate
genie is out of the bottle. Comprehensive legal structures have been created to facilitate the fractionalisation of land to enable even space to be alienated by way of sale. Webster and Lai describe this as the application of the ‘subdivision rule’ to property rights.

There is presently a ‘lively’ academic and professional debate about the means to achieve the ends of spatial planning policy. The guardians of the ideology of public interest rail against the neo-liberal agenda to ‘devalue’ planning by reducing it to being a mere siphon for development. The guardians of the ideology of private property, in turn, disparage state intervention questioning whether there is ‘any case for continuing intervention’ in light of its failures. In this debate, the function of participation is relegated to being an island in the ‘flux of power.’ An adjunct to market forces providing the noisy ‘voice’ in the ‘political market’. But absent the articulation of policy intent (as opposed to a political slogan prior to an election), proprietary existence of carbon rights.’ This is an example of a recent fractionalisation of property rights by the application of the subdivision principle. Carbon rights have become valuable, and so the market is looking for ways to commercialise the proprietary rights opportunities presented by forests. The NSW legislation enables the offsetting of rights as part of the NSW greenhouse gas abatement scheme.

At common law, land in NSW was subdivided merely by deed (‘old system’ conveyancing). This gave rise to a need to register the deed to evidence the partition (in NSW see Registration of Deeds Act 1897 (NSW). Later, formal procedures for recognising title to land subdivided by registration of an identifying plan were created by statute – see for example in NSW: Real Property Act 1862 and 1900 (NSW); Local Government Act 1906 and 1919 (NSW) and the Conveyancing Act 1919 (NSW).

In NSW see Strata Schemes (Freehold Development) Act 1973 and its amending legislation.

Webster and Lai, above n 22, 11, 89: ‘Any particular configuration of property rights over a resource is a function of the value of the resource and of the costs of assigning effective property rights. … If the value of a resource rises, or the cost of assigning property rights to a valued resource falls (due to technological or institutional innovation), then there will be a demand for a reassignment of property rights.’ (89) ‘In this way, urban land and buildings evolve by subdivision. As knowledge about a superior location spreads, the number of bids for land and buildings increases and prices rise. At some point it becomes profitable to demolish single homes and subdivide land rights into many smaller plots.’

Yiftachel, above n 11, 23-26, charts the ‘lively’ debate among planning theorists citing the contributions of Faludi, Paris, Scott and Roweis, Simmie, and Taylor, which, he suggests, ‘have confused students and practitioners of planning … leading to a loss of credibility in both theory and policy.’

See for example, Gleeson and Low, above n 9, 135. They propound that: ‘What is new, however, about the contemporary attack on planning is its conceptional and political reach: neo-liberals desire both to contract the domain of planning (deregulation) and then to privatise segments of the residual sphere of regulation (out-sourcing). In both instances, the raison d’être of planning as a tool for correcting and avoiding market failure is brushed aside in favour of a new minimalist form of spatial regulation whose chief purpose is to facilitate development.’

Pennington, above n 23, 13 (emphasis in original).

Gleeson and Low, above n 9, 153.

Webster and Lai, above n 22, 6: ‘Spontaneity in political markets depends on the inherently more noisy signals of votes, press, lobbying and other forms of “voice”.’
the people cannot give democratic legitimacy to the subsequent policy decision. The people have no opportunity to vote on that new system.\textsuperscript{47}

There is no manual that says that planning law must be designed according to the ideology of public interest. There are alternative ideologies indicating that a choice is available. It is when the people perceive that there is no democratic legitimacy to the planning policy adopted by government that social discord is bound to arise.\textsuperscript{48} The people can feel ‘tyrannised’ because the law made by parliament has usurped them of rights inherent to the ownership of property.\textsuperscript{49}

Following the logic of Lindblom’s theory of ‘incremental planning,’ Stein suggests that planning could be perceived as a regulatory system that facilitates a ‘battle’ between the ‘community and commercial interests vying for power, causing planning to be primarily a political exercise.’\textsuperscript{50} But, if the people do not in fact have power in the planning system, then arguably there is no battle. The government has the power to regulate (or not to). It is commercial interests that have the capital to acquire property to exploit its potential. The community is rendered a mere consumer of the product delivered by others. This explains Flyvberg’s observation that ‘there can be no adequate understanding of planning without placing the analysis of planning within the context of power.’\textsuperscript{51} Planning law is intimately related to the exercise of power by the sovereign government over the use and development of

\textsuperscript{47} See in this regard the discussion in Andrew Geddis, ‘Three conceptions of the electoral moment’ (2003) (28) \textit{Australian Journal of Legal Philosophy} 53. Normally, when there is a contested vision as to the policy to be adopted, political parties seek a mandate from the people at an election for a policy. The people participate by voting for the party representative that best accords with their self-interested position. As Geddis suggests, under the ‘deliberative vision’ of voting: ‘the electoral moment is not perceived as being solely a site of conflict between competing, incompatible interests. … Voting acts as a “contingent vicissitude”, to be used where some decision is practically required, but members of a society find they cannot come to a consensual solution.’

\textsuperscript{48} As McAuslan, above n 33, 11, notes ‘the failure to adapt the law to meet these increased expectations [to participate] adds fuel to the flames of disillusionment and frustration with the planning system.’ Not only is it the failure to adapt the law, it is also in the failure of politicians to articulate a vision so that the intent of the government can be discerned.

\textsuperscript{49} Property rights are recognised by the UN Universal Declaration of Human Rights, Article 17 of which states: ‘(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.’ See also John Locke, \textit{Two Treatises of Government} (1821), 360. Locke, in his chapter XV111, \textit{Of Tyranny}, suggested: ‘As usurpation is the exercise of power, which another hath a right to; so \textit{tyranny is the exercise of power beyond right}, which no body can have a right to.’ (emphasis in original)


land by the people.\textsuperscript{52} It is government that enacts the laws directed towards distorting the operation of the market to achieve, inter alia, social and economic goals, being outcomes determined by the Government.\textsuperscript{53} The normative means by which political voice is expressed is at the ballot box. But if there is no real choice between competing social programmes, then a changing of the guard at the ballot box will not alter the adopted policy. If ‘voice’ is simply the expression of dissent, then it will not result in a change of ideology.

As we move beyond the neo-liberal paradigm in planning in search of a new explanatory theory to guide our way, the very notion of planning is being questioned.\textsuperscript{54} As Yiftachel says: ‘the theoretical foundations of land-use planning are still excessively eclectic, deeply divided, confused and of little help to students and practitioners.’\textsuperscript{55} What is the purpose of planning – is it to be just a ‘functionary of the capitalist state apparatus’?\textsuperscript{56} An opportunity emerges with the call for a reform of the New South Wales planning system for planning to become participatory and democratic.

\section*{2.3 What is the Purpose of Participation?}

Recognising the historical fact of the struggle for democratic participation in governance is important to an understanding of the development of McAuslan’s ideologies of planning.\textsuperscript{57} Each of McAuslan’s ideologies is founded on the paramountcy of the concept of the rule of law. Stone formulated this \textit{grundnorm} of English law as: ‘What the King in Parliament has promulgated or authorised or permitted to be promulgated as law ought to be observed.’\textsuperscript{58}

\begin{itemize}
\item \textsuperscript{52} Godden and Peel, above n 14, 276: ‘Planning law systems, therefore, are fundamental to the regulation of land use and human activities across Australia, operating in conjunction with the more discrete, site-based development control laws.
\item \textsuperscript{53} See Stefano Moroni, ‘Rethinking the theory and practice of land-use regulation: Towards nomocracy’ 9(2) \textit{Planning Theory} 137, 145. Moroni argues that it is simply not possible to ‘define an idea of the right city’ because we (that is governments) cannot attempt to do so without recognising the ‘impossibility’ of defining the construct. Moroni cites Rogge’s position on the ‘good city’ namely: ‘Given the fact of the enormous internal diversity of human population, and given the neverending changes in tastes and circumstances, it is impossible per se for there to be constructed a universally valid, objective definition or description of the Good City. City planning is by definition, then, an exercise in either futility or coercion (or both).’
\item \textsuperscript{54} Yiftachel, above n 11, 24-27, charts the course of this debate. Yiftachel concludes (at 28) that the three prevailing debates (analytical, built form and procedural) ‘compliment one another because in the main, they operate on different levels of social processes and are related to largely different phenomena.’
\item \textsuperscript{55} Ibid 23.
\item \textsuperscript{56} Gleeson and Low, above n 9, 100.
\item \textsuperscript{57} McAuslan, above n 33, 3-5. Of McAuslan’s three identified ideologies, the ideology of public participation is ‘the most recent and least developed’ of the ideologies.
\item \textsuperscript{58} Stone, above n 16, 108.
\end{itemize}
Embedded in this grundnorm is the concept of parliamentary power. It has been long recognised that if this power untempered by checks and balances, it can lead to tyranny.  

The French economist Frederick Bastiat (1801-50) suggested that the responsibility of government is enormous. He argued that: ‘Good fortune and bad fortune, wealth and destitution, equality and inequality, virtue and vice – all then depended upon political administration.’ Over time, the burden on government has increased. Viewed through the lens of modern parliamentary government, it is sometimes easy to overlook or forget the significance of the power wielded by a sovereign government. In our representative parliamentary processes, without participation in the political process our democracy is nominal. When a social minority controls parliament, it makes the laws. Whoevery has the ear of government calls the tune. In the context of participation in governance, unless the community is engaged in the political process, a social minority called the political elite controls the parliamentary processes. This control is potentially despotic if it is used to the exclusion of the people.

2.3.1 Ideological Conflict:

The normative discourse suggests that planning laws are necessary in the public interest. Farrier argues that ‘the state has a vital interest’ in the regulation of land use because land (especially in its environmental context) is not only a scarce resource, it is irreplaceable. Yet in a capitalist

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59 J. Uhr, *Deliberative democracy in Australia: the changing place of parliament* (1998), 62. Uhr, referencing (at 60) Edmund Burke’s ‘classic exposition of the constitutional orthodoxy’ that parliament is the trustee of government, paraphrases Burke and summarising the position as follows:

‘A parliament which distances itself from “the public opinion” might well make for “a great, wise, awful senate” but it would fail to serve “any popular purpose”, transforming itself from an institution of “procuration and delegation” to one of original power. (Burke 1963, 128, 199-200; Mansfield 1965, 138-41)’

60 Frederick Bastiat, *The Law* (Kessinger Publishing 2004), 46.

61 J. Keane, *The Life and Death of Democracy* (2009), 747:

‘Monitory democracy certainly feeds upon communicative abundance, but one of its more perverse effects is to encourage individuals to escape the great complexity of the world by sticking their heads, like ostriches, into the sands of wilful ignorance, or to float cynically upon the swirling tides and waves and eddies of fashion – to change their minds, to speak and act flippantly, to embrace even celebrate opposites, to bid farewell to veracity, to slip into the arms of what some carefully call “bullshit”.’

62 K Mannheim, *Freedom, Power and Democratic Planning* (1951), 45:

‘There is a great difference between functional and arbitrary power. Any society, however, may rightly be called despotic which permits ruling groups and individuals to wield more power than their functions require or allows them to use power arbitrarily.’

63 Farrier, above n 37, 7. Farrier endorses Mill’s concept that land is the original inheritance of the people. Yet the counter argument runs that property rights are ‘sacred’.
society, the state has also legitimated the primacy of rights to, in and over property. When the ideology of property (which promotes the rights of individual owners of land) collides with the public interest ideology (which promotes the interests of the people as a collective), the public interest is meant to prevail. This raises an issue of control, namely: who is best placed to determine the public interest?

Hirst suggests that ‘[p]olitics is necessarily about power, about inequality.’ Mannheim argues that democracy ‘implies a theory of power’ that is about the ‘ways of distributing and controlling communal power.’ Planning law is equally about power; it is about the power of the state to regulate what, if any, development occurs within the state, including what occurs in a neighbourhood – a concept developed further in section 2.5.4 below. Planning laws do not draw upon a participatory democratic tradition. As discussed in chapter 4, planning laws draw upon the historical precedent of parliament, through private bills, using the power of the law to secure and maintain control over land for private purposes.

It is at this point that the public participation ideology has relevance. If the public interest justifies the making of planning laws, and if the state has exclusive power to make such laws, then the state both defines what is in the public interest and makes lawful the disposition of the right. This is a valuable right. It is the right of the individual to determine how land in their

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64 Uhr, above n, 59, 51. Uhr, referencing the Lockean conception of government, makes the point that ‘legislative power may not be used to take away subjects’ property without their “own consent, that is, the consent of the majority.”

65 WJV Windeyer, Lectures on Legal History (1938), 247. Windeyer dates the emergence of collectivism to the mid nineteenth century. This was a social moment when: ‘The idea that the state should not interfere with individual enterprise and freedom of contract gave place to a realisation that the state must interfere.’ And what ‘price’ should the individual/community pay? Sometimes compensation is not enough. It is difficult to quantify intangible rights such as the amenity of the neighbourhood. As Justice Young in the Court of Appeal recently observed in ING Bank (Australia) Ltd v O’Shea [2010] NSWCA 71 (at [161]): ‘However, when compensation for loss of land rights is being considered, one must always bear in mind the aphorism of Lord Sumner cited in Campbell JA during the oral argument: “I doubt … whether it is complete justice to allow the big man … to have his way, and to solace the little man for his darkened and stuffy little house by giving him a cheque that he does not ask for.” (Leeds International Co-Operative Society Ltd v Slack [1924] AC 851, 872).

66 In Shoalhaven CC v Lovell (1996) 136 FLR 58, 63, Mahoney P noted that the term ‘public interest’ was not defined in the EP&A Act. Citing with approval O’Sullivan v Farrer (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ) the Court affirmed the following statement of principle: ‘Indeed, the expression “in the public interest”, when used in a statute classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only “in so far as the subject matter and the scope and purpose of the statutory enactments may enable … given reasons to be [pronounced] definitively extraneous to any objects the legislature could have in view”: Water Conservation and Irrigation Commission (NSW) v Browning (1947) 74 CLR 492 at 505 per Dixon J.’


68 Mannheim, above n 62, 45.
ownership is to be developed. When a parliament legislates to make law, it is, according to democratic theory, exercising a power conferred by the people.\textsuperscript{70} It is the people that are sovereign. When a parliament assumes responsibility for defining the public interest, unless that interest is coincidental to the wishes of the people, a form of tyranny may arise.\textsuperscript{71} It is the creation of participatory structures that protects the rights of the people against state tyranny. As discussed in chapter 5, the absence of such structures in legislation suggests that a socially exclusive, rather than inclusive, dynamic exists.

The right to participate in the land use planning process is recognised by the NSW government to be a ‘fundamental right.’\textsuperscript{72} But for the people to participate, it is essential not only that the people ideate the notion of government as the sharing of power, but also that the people actively look for and take opportunities to participate in the structures of governance. There must be both the opportunity to participate and a willingness to do so. Without a willingness by the people to take such power as is ceded by government, the governing elite will retain control over the making of laws, including planning laws.

The ‘topical’ nature of development and the fact that it occurs in the neighbourhood makes planning relevant to the people both at a policy-making and decision-making level.\textsuperscript{73} However, different and multiple ‘public interests’ exist at one and the same time in relation to each proposal to develop land in a locality.\textsuperscript{74} This suggests, at a normative level, that there should be communicative structures to facilitate dialogue between the various actors in the social system

\textsuperscript{70} Uhr, above n 59, 25. As Uhr notes:
‘deliberative institutions are less important as generators of wisdom than as conduits of consent, providing greater certainty for the legitimacy of government which, for all practical purposes, is retained in the hands of a small ruling group performing the related functions of executive decision and judicial arbitration.’

\textsuperscript{71} Ibid, 75-6. Uhr suggests that under A V Dicey’s formulation of responsible government:
‘It is not clear what protective capacity a sovereign parliament has in the event that a people or segment of people is unable to make its own case heard about oppressive legislation or illiberal government action. … courts are only permitted to recognise rights which parliament itself has declared.’

\textsuperscript{72} NSW Department of Planning, ‘Discussion Paper: Improving the NSW Planning System ’ (2007) (2007 Discussion Paper). The discussion paper was published by the government ahead of the 2008 reforms. It notes (at 20) that the public involvement provisions ‘should remain in the legislation as a fundamental right.’

\textsuperscript{73} The Macquarie Dictionary (1981): ‘Topical: 3: of a place, local.’ Topical is used here in the context of place and locality. The EP&A Act regulates how the development selected by the applicant will proceed in the place chosen by the applicant. Jenkins, above n 27, 20 suggests: ‘Place on the other hand is seen as being the predominantly socio-cultural perception and definition of space, and is an important element of social identity – whether individual or collective – and can be understood as social geography.’

\textsuperscript{74} Erhard Berner, ‘The metropolitan dilemma: global society, localities and the struggle for urban land in Manila’ in Ayşe Öncü and Petra Weyland (eds), \textit{Space, Culture and Power: New identities in globalizing cities} (1997), 103. Berner argues that a locality ‘is the focus of everyday life; it is not merely the place where people reside but where they spend much of their life, their \textit{Lebenswelt} (life-world).’
controlled by planning law to enable the system to function. In land use planning, the formal structures that facilitate dialogue are created by legislation. If legislation does not facilitate dialogue, then a tokenistic socially exclusive model operates.

McAuslan’s accepts that parliament has the right to determine what is in the public interest and to frame legislation to give effect to its policy. However, he also makes clear that where law is made by parliament to advance the cause of public participation, then that legislative intent ought to be expressed in the language used in the Act. If the participation mechanism is absent, then despite the language used in the Act, the legislation will still manifest McAuslan’s public interest ideology because a semantic communicative lacuna will exist between the language and the operation of the Act.

2.3.2 What is Participation?

Whilst participation is a monolithic term descriptive of the act of taking part, the phrase public involvement and participation requires an analytical context. For the purpose of this research, the phrase will be treated as being synonymous with the phrase public participation. The phrase the people is used extensively in this research. It is recognised that it is not a monolithic phrase. Aroney suggests, in the context of governance, that the ‘social reality’ is that the phrase

75 A Bora and H Hausendorf, ‘Participatory science governance revisited: normative expectations versus empirical evidence’ (2006) 33(7) Science and Public Policy 478, 483-484. Bora and Hausendorf suggest that in semantic terms, social positions are ‘manifested as communicated expectations.’ The administrator position is a typical social voice in the socio-linguistic framework of social positioning. The image of self of the administrator is ‘that of a neutral, impartial, unbiased decision-maker who is obeying the law and political will.’ The relevant actors, in the context of planning law, are the ‘competent authority (fulfilling the role of administrator), the applicant for development and the public.

76 It is this absence of voice that causes people to resort to other ‘noisy’ means of protest such as petitions and demonstrations. However, exercising this right is no guarantee of effecting change or influencing the decision-maker.

77 McAuslan, above n 33, 20. As McAuslan says: ‘not only must the bare right be set out in the statute, but some outline procedures and mechanisms must also be present.’

78 Macquarie Dictionary, above n 73: ‘participate; 1. The act of participating; 2. A taking part, as in some action or attempt.’

79 Neither the word participation nor the phrase public involvement is defined in the Act. They are not standard words or expressions defined in the Interpretation Act 1987 (NSW). The United Nations Rio Declaration on Environment and Development of 1992 includes Principle 10 which is in the following terms:

‘Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have the appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.’
‘includes a sense of our “peoplehood” at both a state and national level.’ Similarly, in the context of local government, the phrase connotes ‘the people of each particular locality.’ In this socio-political dimension, planning policy and decision-making exhibits a functional duality. The people form the polity which gives the government its mandate to govern. The people also live in the neighbourhood which is to be subjected to the planning law made by the government. The phrase the people is therefore descriptive of the conceptual duality of the people being simultaneously part of the polity and part of a local community, of being the governed and the government.

Civic participation and involvement is therefore emblematic of democratic processes. Indeed, in democratic societies, citizenship denotes the right of a person to participate in social institutions and to exercise deliberative rights. Arnstein suggests that participation ‘is the cornerstone of

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‘Our dogged attachment to local electorates, despite the results that they produce, brings us back to the fact that we continue to think of ourselves simultaneously as both one people and as many different people, organised into various localities and groupings at local, state and federal level.’

81 This duality has ancient roots. In early medieval times, autonomous cities enjoyed economic and political freedom. Residents of the city were, at the one and same time, citizens of the town/city and subject under the sovereign. The state, from the twelfth until the nineteenth century, constantly sought to distance the citizen from their historical autonomy within towns and to subjugate them to control of the state. See Engin Fahri Isin, Cities without Citizens (1992), 33. Isin discusses this process of disenfranchisement. He notes:

‘towards the end of the seventeenth century, cities became subordinate to the state and were separated from the body of citizens who had originally made up the governing bodies of the city.’

Isin cites the 1661 Act ‘An Act for the Well Governing and Regulation of Corporations’ (13 Charles, c. 2). This Act (post Great Fire and restoration), created closed, i.e. not elected, councils of Boroughs which, he suggests, ‘meant that the governing body was either directly in contact with the State or appointed by it.’ This was not redressed in England until the municipal reforms of the mid nineteenth century.


‘Planning Law prescribes the procedures – it sets the battlelines – for the resolution of conflict over land use between the interests of private property and the prevailing “public” interest or “community” interests. It is neither static nor a neutral system of rules, and the balance which it sets between private and public interest and between different institutions representing the public interest is constantly changing.’

83 Hugh Mackay, Advance Australia ... where? : how we’ve changed, why we’ve changed, and what will happen next (2007), 286-7. As Mackay notes:

‘we are social creatures who thrive on the sense of belonging to a community. … there’s a strong intuitive sense that we need to feel part of the local neighbourhood where we actually live; no matter how connected we may feel in other ways, there is a special meaning of “community” that relies on locality.’ Mackay also notes that ‘enlightened’ planners and developers are ‘paying attention to the creation of local neighbourhood spaces.’

84 Uhr, above n 59, 6. Uhr, referencing Rawls, suggests that ‘public reasoning by a free and open citizenry is a central feature of the good polity. Public deliberation is the political activity of shared – and in the best of worlds – consensual reasoning...’
democracy.' Participation is different to consultation. Without rights of participation, we are rendered mere subjects – in the sense of being under the dominion of a sovereign power. There is therefore a tension between the concepts of participatory democracy (or public deliberation) and political representation. And there is a tension between the role of central government and the rights of the individual. Uhr suggests that the tension is about the means by which participation is made active.

Planning laws demonstrate this tension. In the NSW planning system there is a tension between the right of the state to define the public interest and dictate planning policy and the resultant exercise of that power manifested in the approval of development. The social consequences of the exercise of that power creates tension because of the competing public/private interest dimension to each and every exercise of the discretionary power to zone land and/or approve/refuse a development proposal.

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86 Participation was differentiated from consultation in the UK Dorbry Report (1975), para 10.2 (cited in McAuslan, above n 33, 16) as follows:

‘The process needs to be in effect ‘participation’ (which means taking an active part, from the outset, in the formation of … decisions of strategic importance) rather than ‘consultation’ (which means giving the public an opportunity to express views on planning applications).’

87 John Ralston Saul, The Unconscious Civilization (1997), 76:

‘The most powerful force possessed by the individual citizen is her own government. … The individual has no other large organized mechanism that he can call his own. There are other mechanisms, but they reduce the citizen to the status of a subject. Government is the only organized mechanism that makes possible the level of shared disinterest known as the public good.’


‘At stake is a redrawing of what constitutes the legitimate responsibilities of individuals, collectivities, and the state.’

89 Keane, above n 61, 731-742, traces the development of ‘monitory democracy’ to the historical epoch of the immediate post war period starting with the development of the UN Declaration of Human Rights in 1948: ‘a new weapon to be used anywhere and everywhere against the presumption that the state had priority over the individual human being.’ Keane suggests that since that time:

‘the age of monitory democracy [has witnessed] constant public scrutiny and spats about power, to the point where it seems as if no organisation or leader within the fields of government or social life is immune from political trouble.’

90 Uhr, above n 59, 11:

‘Advocates of liberal democracy have long been interested in exploring ways in which practices of active citizenship can be devised to keep alive the prospects of popular sovereignty in fact as well as in theory.’

91 McAuslan, above n 33, 5. McAuslan sources the public participation ideology to this tension. Reduced to its elements, the ideology is based in the primacy of the rights of the individual over the state, it is captured by the concept:

‘that all who are likely to be affected by or who have, for whatever reason, an interest or concern in a proposed development of land or change in the environment should have the right of
2.3.3 The Semantics of Participation

The wording of section 5(c) of the EP&A Act evokes a normative approach to social inclusion in the processes created under the Act. By raising such an expectation at the surface level of discourse brings into question whether the institutional and procedural arrangements created under the Act to ‘increase’ involvement and participation actually allow for social inclusion. Social inclusion is here discussed as an aspect of citizenship. According to Bora and Hausendorf, citizenship can be defined in theoretical terms as ‘a communicative, semantic concept that gives a specific answer to the structural question of how persons become relevant in social systems.’

Bora and Hausendorf have identified a theoretical approach that is open to empirical validation. It provides an insight to answer the structural question of how people are addressed in social systems. Their theoretical perspective ‘combines systems theory with socio-linguistics methodology, based on shared communication theory.’ They view citizenship as a mode of social inclusion in social systems. In this conceptualisation, legislation is viewed as a communication system that creates a social system described as the legal frame of reference.

Under this methodology it is possible to identify within the procedures created under the EP&A Act: the social task or problem being addressed in the semantics of citizenship (public participation); its function (influencing the decision-maker) and its locus of interest or reference (the legal system created by the EP&A Act). Within this system of reference there are structures of communication (i.e. the decision-making and decision-review processes under the Act), which are intended to be the means by which the social task is realised by ‘provid[ing] for direct, every day contact among competent authorities, interested parties and the concerned public.’

Within the legal frame of reference, the valid form of communication is prescribed by the procedures established in the Act. As Bora and Hausendorf suggest:

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92 Bora and Hausendorf above n 75,480.
93 Ibid.
94 Ibid.
95 Ibid 483.
‘They are the most direct form in which citizenship can be realised and can be made tangible for the participants. They provide for direct, everyday contact among competent authorities, interested parties and the concerned public.’

Empirically, through the socio-linguistic framework of social positioning, it is possible to identify structures of communications, or social positions, which allow various actors (or social voices), to communicate. In each structure of communication there are dynamics among social positions. The dynamic can be either active or passive. Where it is active, it can be said to be mutually inclusive. Where it is passive, it can be said to be mutually exclusive. This methodology will be used in chapter 5 to test whether the procedures under the EP&A Act are inclusive or exclusive.

2.4 Planning Law: The Power to Control

Isin suggests that ‘citizenship originated as membership in the city as an institution.’ The people were citizens of the city/town before they were subjects of the state. There were, for a time, multiple sovereignties as autonomous city/towns emerged from the fall of Roman civilization to rival the power of kings and princes. However, beginning with the Norman invasion, English citizens would, over time, be brought under the control of the state; to become once again citizens with power would involve struggle.

In order for it to be propitious for a society to move from a traditional identity schema to a cooperative compact schema, it is necessary for the individuals in the society to believe that they can be the government. The people have to move to the rational action paradigm of self-

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96 Ibid.
97 Ibid 485.
98 Isin, above n 81, vii. Isin refers specifically to the city as an incorporated entity – such as the autonomous cities of the twelfth century which had de facto status as a separate legal entity:

‘Cities and citizens emerged as the anthesis of feudal lordship and kingships that were simultaneously emerging with cities, and stood for the supremacy of law rather than the supremacy of will – for association rather than subjugation.’

99 L. M. Edwards, 'Ideational social capital and the civic culture: Extricating Putnam's legacy from the social capital debates' (2009) 23 Social Epistemology 125, 139. In a traditional identity schema, a gemeinschaft, Edwards suggests that ‘social coordination was primarily achieved through the socialization of identities. Traditions tightly prescribed appropriate behaviour in any given circumstance based on age, gender, kinship structure or other significant identity markers.’ Edwards suggests (137) that Putnam’s civic culture can be described as a ‘Cooperative Compact’ where:
interest. It is by embracing such a strategy of behaviour, which Edwards explains as an ideational structure which is transferable and therefore adaptable to new contexts, that society reaches Tocqueville’s strategy of self-interest. This was reformulated by Putnam as the concept of ‘self interest properly understood.’

Chapter 4 considers the actions of the English landed elite in the seventeenth century that unleashed a participatory dynamic beyond their control. It resulted, ultimately, in parliament making laws to advance the public interest. The history of the people’s struggle in England for power over parliament informed their self-conceptualisation of governance. Out of this process would emerge capitalism and the Westminster style of representative parliamentary government. Australia would follow a different path. As is shown in chapter 5, the democratic theme would infuse the polity of Australia to create its own ideation of the role of government in the lives of the people. It was an ideation that was antipathetic to participation.

In Britain, the people had to rise up and violently take power. In New South Wales, within a short few years of colonisation the people had representative government conferred on them, as if by right it was an entitlement. In Britain, participation was real, it mattered. As is discussed in chapter 4, civic culture grew from participation in local governance. In New South Wales, participation was nominal. Because of a general absence of local governance structures before

‘People come together to address an issue of common concern. They agree to coordinate their behaviour and govern the compact through just rules. The maintenance of cooperation rests on maintaining the legitimacy of the rules.’

100 Ibid 134.
101 Ibid 129. Alex Tocqueville (1805-59) was a French Aristocrat who, after touring the United States in 1831 published (1835-40) the seminal work for the period on democracy, De la démocratie en Amérique. Putnam in Bowling Alone (1993), 167, cited Tocqueville’s comment that the Americans understood self-interest differently to the British. According to Tocqueville:

‘Each American knows when to sacrifice some of his private interest to save the rest: we want to save everything and often we lose it all.’

Putnam described this as “self-interest properly understood.”

102 EA Wrigley, People Cities and Wealth (1987), 54. As Wrigley notes:

‘when authority appears to be failing to fulfil its side of the bargain upon which a hierarchical structure of authority rests, hostility towards it which was once successfully repressed, may surface.’

103 Phillip Bobbitt, The Shield of Achilles, War, Peace and the Course of History (2002), 6. Bobbitt suggests that law and strategy are not made ‘in history’. Rather, history is the ‘self portrayal’ that ‘enables a society to know its own identity.’

104 In a lament, Tony Moore, Death or Liberty (2010), 397 says:

‘All of these rebels and reformers [political prisoners transported to Australia] agreed that a republic was more than simply replacing the monarch with a president. A republic was about liberty, extended to all citizens through thoroughly democratic institutions and bills of rights. This plant, which republican poet Henry Lawson called the Young Tree Green, broke the soil in the 1880s but was trodden down in the rush to Federation and imperial war.’
1906, the state and not the people carried the burden of delivering necessary social infrastructure – often supplied without cost to the people.

In New South Wales, for a long time the only avenue for the people to participate in governance would be state parliament. But, as an institution, it was despised by the people as being ‘a distinctly raffish and disreputable collection of politicians.’ Even when unionists collectivised in the late nineteenth century and formed the Labor Party, the desire for power and control would quickly exclude the membership from having a deliberative right in the processes of party governance. Such manoeuvres left little prospect for the development of a true civic culture in the Putnam sense.

In so far as Arnstein has argued that power has to be ‘taken by the citizens,’ the history of the development of representative democracy in Britain and Australia confirms the accuracy of the intent of that statement. The analysis of the historical record in this research also suggests that the concept of the people is elastic. When an elite obtains sovereign power it inevitably seeks to retain that power until the citizens arise again and take power.

Clark and other historians including Hobsbawm, O’Farrell and Moore, confirm that the deliberate strategy of the British ruling class, especially after it secured its position following the restoration of the monarchy in the seventeenth century, was to ‘concede token political representation … to forestall more radical challenges to the dominant system.’ In New South Wales, whilst the accession of the political elite to power was not the result of violent revolution, the strategy of government adopted in the colony demonstrates a similar propensity. In the context of local governance, participation appears to have been nominal.

105 John Hirst, 'Empire, State, Nation' in Deryck Schreuder and Stuart Ward (eds), Australia's Empire (2009), 149. This perception continues to linger. See Andrew Leigh, Disconnected (2010), 64-5. ‘What matters in terms of civic engagement and social capital …[is] whether [the people] are politically active.’ Leigh then cites Chris Puplick’s 1994 book, Is the Party Over? The future of the Liberals, (1994) and the comment Puplick attributes to ‘an early significant figure in the Liberal Party’ who said that those who join political parties are ‘the mad, the lonely, and the ambitious.’

106 Rodney Cavalier, Power Crisis: The Self-Destruction of a State Labor Party (2010), 14. Cavalier chronicles the origins of the administration of the Labor party from its inception in the 1890’s. He suggests that at its inception the party was controlled by its members. But at the annual conference in 1916 the party was ‘captured by a group calling themselves the Industrialists.’ After 1916 the party ‘was under the control of affiliated trade unions’ in whose care it remains.

107 See above n 101.

108 Arnstein, above n 85, 222.

109 Mannheim, above n 62, 149. As Mannheim suggests: ‘Once tyranny is in the saddle, however, civic resistance has meagre means at its disposal.’

110 See chapter 4.6 below.

It is arguable that those representing the people have never believed for one moment that the people should actually have power. In Australia, the ideology of private property (particularly its manifestation in the ratepayer ideology) would dominate political and social thought. The apathy of the people towards participation would stifle opportunities to develop a civic culture. Larcombe suggests that this led to the state government capitalising on the void created to ‘tamper with local government politically, and to damage its prestige.’

Once the power to control governance is taken, the question that immediately arises is how the power of control is to be exercised. The decision rests on the structural paradigm that wields power. Whether or not the experience of governance is socially inclusive (or participatory) depends upon whether the power of parliament is exercised according to either the ‘bureaucratic or technical’ theory or the ‘participatory’ theory of democracy. It is only the latter which is seen as ‘pluralist’ or ‘social democratic’ in its approach.

Modern land use planning law can therefore properly be described as a creature of the industrial revolution; but only in a derivative form. It was the industrial revolution that created the need for planning law. The struggle for power between the government and the people over who should control the neighbourhoods continues. The EP&A Act signalled a paradigm shift to a socially inclusive approach to planning. The express objects of the Act evoked the philosophy of participatory governance. However, since its inception, parliament has ensured that it, and not the people, has had the final say in what development will occur in the neighbourhoods of the people.

2.5 What should the role of public participation be?

As will become apparent from the discussion in this section, to avoid what McAuslan describes as the ‘confusion, disarray and sharp conflict’ in the planning system, a social policy choice

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112 Uhr, above n 59, 61. As Uhr notes, in the Burkean theory of representative government: ‘[T]he people lack “experience in business” and experience “of speculation in the closet” (Burke 1963, 322). Yet despite their inexperience in government and philosophy, the people are effectively the voice of political authority – even if sovereignty is never formally assigned to them.’


115 McAuslan, above n 33, 269.
needs to be made in relation to the role of public participation in the land use planning processes. The role for public participation could be as nominal as being the end consumer of a product made available by the market. That outcome is possible under planning regimes constructed according to both the ideology of private property and the public interest. The conscious choice that is made in either case is to exclude public participation from the land use planning processes. It is only in the circumstance where participation is intended to be meaningful that consideration needs to be given to the task of making participation relevant.

2.5.1 Participation as Consumer

Under market theory, cities are such complex organisms that it is best not to try to plan for future outcomes. No conscious decision is made other than the individual decision of the transactors in the market to participate in the exchange of property rights. The role of the government is passive. It is there to facilitate the transaction. The function of law is to uphold the institution of property. In this reality, the people become consumers in the property market. Every individual decision to purchase land or undertake development will impact on a locality; but only in an incremental and unconscious fashion. The shape and nature of the locality will be determined over time by the application of the ‘subdivision rule’ and by the price mechanism. Public participation occurs as a function of consumerism only.

In contrast, land use planning decisions require a conscious decision about the expected future built form of a locality. Decisions taken by government to impose planning instruments impact upon citizens because the plan is intended to shape the nature and character of future development that might occur in a locality. Planning laws therefore have both societal and local

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116 Moroni, above n 53, 146. Moroni acknowledges the neo-liberal argument is that ‘it is both impossible and undesirable to (authoritatively) plan complex social systems’ such as cities.

117 Juval Portugali, ‘Learning From Paradoxes about Prediction and Planning in Self-Organizing Cities’ (2008) 7(3) Planning Theory 248, 257. Portugali goes so far as to suggest that cities are ‘dual self-organising systems’ (emphasis in original). Significantly, in such complex social systems: ‘the interacting elements in such systems are agent and not parts, that is, entities that have cognitive capabilities such as learning, thinking, decision-making and the like; one of these capabilities is planning – agents plan and take decisions according to their past experience (learning) and their plans.’ In this system, ‘an individual, a household, a private company or the city’s planning authority, is a planner at a certain scale.’

118 Webster and Lai, above n 22, 11.

119 As Rosemary Lyster et al, Environmental and Planning Law in New South Wales (2 ed, 2009), 28 note: ‘in a market the only type of participation that is recognized is financial participation by those who can afford to enter the market. Clearly, the goal of efficiency, well served by the market, is often at odds with the principle of equity.’
impacts. For example, when a decision is made to adopt a policy to favour urban consolidation, a deliberate choice is made by government to intervene in the operation of the market. The government is expressing the desire to achieve some built form outcome which it perceives the market cannot deliver without the planning instrument. In this scenario, the process does not require the people to participate. The government can make the relevant decisions as the representatives of the people, if necessary, calling in aid experts in various fields.

In this bureaucratic scenario, the citizens do not have power (in the Arnstein sense) in the decision-making processes leading to the making of the planning instrument or the individual decision to approve development. The people may be consulted and asked to comment, but this is tokenistic participation. In this reality, the people are, in the planning law context, mere subjects under law. The function of public participation is as consumers of the product delivered as a result of the operation of the plan.

2.5.2 Self-Interested Participation

Whilst it may be correct, as Portugali suggests, that it is not possible to predict (and therefore to legislate for) changes in localities over time, this does not mean that the community has no interest in the resultant built form of the neighbourhood. This ‘public’ interest continues to be reflected within daily newspapers, not uncommonly, on the front page. The frequency with

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120 Scholars such as Jacobs, above n 25, 111, would suggest that participation may be an anathema to the desirable outcome. As Jacobs suggests:

‘personal liberty and individual action cannot secure the environmental benefits people seek. I do not have freedom to choose clean air if the city streets are clogged with cars. My personal liberty to spend a weekend in the countryside is meaningless if my favourite landscape has been turned into a motorway. I do not have the choice of protecting my children from future insecurity if everyone else continues to burn fossil fuels at current rates.’

121 Keane, above n 61, 867. Keane says that a ‘cheer’ should be given to democracy ‘for democratic power-sharing [which is] the best human weapon that has ever been invented against the folly and hubris that always comes with concentrations of unaccountable power.’

122 Portugali, above n 117, 250, notes that ‘current urban theory suggests that cities are complex, self-organising and non-linear systems and that as a consequence their future behaviour is in essence not predictable.’

123 The examples are numerous. The debate and interest generate headlines: see News Review, 'The Question: Should Sydney have more high-rise apartments?' Sydney Morning Herald (Sydney), 30-31 October 2010, 12. The SMH noted that with ‘Sydney’s population forecast to hit 6 million by 2030, the pressure on housing will be enormous.’ Four ‘experts’ we invited to comment. Architect Craig Allchin noted that ‘[c]hanging the city’s housing stock to a more appropriate form is an inherently difficult process.’ Aaron Gadiel, described as a developer, suggested ‘[t]own planning laws are being used as a tool to deprive Sydneysiders of housing choice, affordable living and good access to public transport.’ Tony Recsei, (of the political party Save our Suburbs) described as ‘the resident’, said that ‘[u]nwillling communities should not be made to endure yet more high-rise housing and an inferior quality of life.’ Bill Randolph, described as the academic, argued that ‘[t]he current debate is unsophisticated and driven
which planning matters are being politicised, made the subject of newspaper reports, media comment and the subject of investigations by the Independent Commission Against Corruption (ICAC),\textsuperscript{124} suggests that there is genuine public interest in the outcome of planning and investment decisions. The people seem to have an idealised notion of the neighbourhood that is offended by unsympathetic approvals.\textsuperscript{125}

Brown and Sherrard suggested, as early as the 1950s, that in democratic society participation should be one of the ‘primary political objectives’ of the community.\textsuperscript{126} Individual decisions made to reside in a locality, to purchase land, to build or renovate a dwelling have real meaning to both the person who makes that decision and to their community. There is in fact a community of interest as these decisions are interrelated. The externalities of locality impact on the subjective enjoyment of being resident in a place as well as on the financial decision made to invest capital in a locality and/or to exploit an investment opportunity. As Kelly observes, amenity is a notion which ‘is easy for constituents and politicians to grasp.’\textsuperscript{127} Consequently, decisions made by others in a locality impact directly upon the perceived amenity of the locality and its attractiveness as an investment opportunity.\textsuperscript{128}

Davies and Whinston argued, as early as 1966, that the property value implications of residential amenity were ‘so obvious as hardly to merit discussion.’\textsuperscript{129} Historically, this is why communities in the twentieth century sought to influence decisions made about development in

\begin{itemize}
\item\textsuperscript{124} Most notorious recently see ICAC, 'Report on an Investigation into corruption allegations affecting Wollongong City Council' (ICAC, 2008).
\item\textsuperscript{125} Ayşe Öncü, 'The myth of the 'ideal home' travels across cultural borders to Instanbul' in Ayşe Öncü and Petra Weyland (eds), Space, Culture and Power: New identities in globalizing cities (1997) , 60. Öncü suggests that the concept of an 'ideal home' is a 'global myth in the sense of discursive construct which claims for itself the moral superiority and legitimacy of a timeless and placeless truth.' However, he concedes that the 'optics of the local' through which such myths are 'mediated is always historically grounded.'
\item\textsuperscript{126} Brown and Sherrard, above n 5, 8.
\item\textsuperscript{127} Andrew Kelly, 'Securing urban amenity: does it coincide with biodiversity conservation at the local government level?' (2006) 13(4) Australasian Journal of Environmental Management 243, 245.
\item\textsuperscript{128} Gurran, above n 12, 17: ‘Over time, the cumulative affect of many such developments can make a significant impact on the qualities of our shared urban and regional landscapes.’
\item\textsuperscript{129} Otto A Davies and A B Whinston, ‘Chapter 3: The Economics of Urban Renewal’ in James Q Wilson (ed), Urban Renewal: The Record and the Controversy (1966) 50, 53:
\end{itemize}

‘First of all, the fact that the value of any one property depends in part upon the neighbourhood in which it is located seems so obvious as hardly to merit discussion. … Pure introspective evidence seems sufficient to indicate that persons consider the neighbourhood when deciding to buy or rent some piece of urban property. If this is the case, then it means that externalities are present in utility functions; that is to say the subjective utility or enjoyment derived from a property depends not only upon the design, state of repair, and so on of that property, but also upon the characteristics of nearby properties.’
the locality. Whether the decision is about the type of zone to be applied, or the type of particular development proposed for a site; there is both self-interest and community interest in the outcome of the resultant planning decision.

2.5.3 Public Participation as ideology

McAuslan first articulated his public participation ideology in 1980. To invite public participation suggests, at a normative level, that legislation intended to regulate development in a locality will have a socially inclusive mechanism. If it was intended that the citizens should have power in the plan-making and/or decision-making processes, legislative mechanisms would be present to facilitate this. What is required, McAuslan suggests, is legislation which provides for:

‘participation in such a way that the right of the public to participate [is] separate and independent from the bodies whose proposals and plans were to be the subject of participation.’

The historical discussion in chapter 5 demonstrates that legislation to give effect to this ideology is yet to be enacted in NSW. In that context, the discussion in this research is reflective of the on-going debate which Geddes describes as being between the theories of ‘managerialism and democracy.’ The aim of the government, expressed in the 2009 Standing Committee report, is to deliver ‘Australia’s best planning system.’ Yet the report noted that the committee ‘did not receive much evidence to suggest how community engagement could or should be

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130 Kelly, above n 127, 248, highlights that neighbourhood amenity was first specifically referenced in NSW in clause 27(e) of the County of Cumberland Planning Scheme of 1951. This planning scheme empowered local authorities to take into consideration when determining an application ‘the existing and future amenity of the neighbourhood.’

131 As Neil Smith, The New Urban Frontier: Gentrification and the revanchist city (1996), 190 suggests, there is a dividing line between disinvestment and reinvestment: ‘Disinvestment involves the absolute or relative withdrawal of capital from the built environment, …Reinvestment involves the return of capital to landscapes and structures that previously experienced disinvestment.’

132 McAuslan, above n 33, 5. At the time he noted: ‘this ideology is not more than twenty years old,’ that is, dating to the 1960s, the same time when Arnstein was writing her paper.

133 The converse, argued by Elizabeth Farrelly, ‘Our cities reveal the ugly side of democracy’, Sydney Morning Herald (Sydney), 6-7 Oct 2007, 26, is that ‘public participation is as likely to militate against good architecture and beautiful cities as against bad or ugly ones; to enhance mediocrity at the expense of both extremes. The reasons for this go back to questions of art, control and authorship.’

134 McAuslan above n 33, 2.

135 Geddes above n 47, 25.

136 Standing Committee Report, above n 36.

137 Ibid 34.
improved.’138 If any resultant reforms do not empower the people, then they will be, in essence, socially exclusionary in their operation.

If democracy in operation means the ‘open weighing of contending opinions about how best to protect the diverse interests of society against the partial interests of any ruling group,’139 then the functional model for participation will be one which, as Bora and Hausendorf suggest, ‘prove[s] itself in terms of social positions emerging in the course of the participation process.’140 That is, a legislative structure that is dynamic but which allows for ‘mutual resonance among the social positions involved.’141

If the public interest in planning decisions is to be informed by participation, then it could be assumed that the system created to determine both the nature of the local plan and also applications for development under the local plan would facilitate the views of the community being not just heard, but heeded.142 After all, the community is simply seeking to protect both proprietary rights and its ‘community’ interest in the neighbourhood.143 It is at this intersection of rights that planning law has its genesis. The subjugation of the individual’s property rights was a concomitant outcome of the necessity to create civil society.

2.5.4 Participation to create an umwelt

The people who control the development of land create the ‘umwelt’ of the neighbourhood.144 Equality and access to power are essential to a functioning democracy.145 It is at this junction of

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138 Ibid.
139 Uhr, above n 59, 24.
140 Bora and Hausendorf above n 75, 482. Social position is here used in the Bora and Hausendorf’s concept (see 483) of ‘coherent sets of social expectations.’
141 Ibid 484.
142 See EDO, 'The State of Planning in NSW: With reference to social and environmental impacts and public participation' (Environment Defender's Office, 2010) (2010 EDO report) 33, 36. As the report notes: ‘If the DoP genuinely wishes to reconnect the community with the NSW planning system then it must implement measures to ensure that community input is properly considered and mandatory feedback loops are embedded in the system to show how input has been considered and explain to the community why their recommendations have been refused or amended.’
143 Webster and Lai, above n 22, 58: ‘A city’s neighbourhoods – residential, industrial and commercial clusters – are, like firms, nexuses of agreements and understandings about entitlements to shared and pooled resources. They differ to firms in that they are spatial clusterings and in that they cluster around resources that remain to varying extents in the public domain. They are like spatial clubs. Members cooperate by various forms of informal and formal rules and agreements in order to ensure the continued supply and enhancement of shared public domain goods.’
144 Gleeson and Low, above n 9, 151. Umwelt is the German concept for the environment which unites all semiotic processes of an organism into a whole – to function, all parts must work together co-operatively.
property rights and land use planning laws that the concept of public interest needs to be considered more closely.\textsuperscript{146} If land use planning is to facilitate the life of the people living in a neighbourhood, then the planning laws should aim to respect the principle of the neighbourhood.\textsuperscript{147}

Brown and Sherrard expected that participation would lead to this occurring ‘spontaneously.’\textsuperscript{148} This is a different type of spontaneity to that which occurs by reason of the operation of the market. Markets rely on the price mechanism and the application of the subdivision rule to unconsciously determine the nature of the built form of the neighbourhood.\textsuperscript{149} Over time, by the fractionalisation of property rights, neighbourhoods would form and reform. Depending on the choices made by participants, even failed outcomes would lead to new opportunities.\textsuperscript{150}

If the people and not the market are to determine the nature of development that is to occur in the neighbourhood, then the choice comes down to the adoption of the public interest ideology or the public participation ideology.\textsuperscript{151} It is only the latter ideology that is socially inclusive. For that path to be taken, government will have to share power. An opportunity emerges with the


Deely suggests that an umwelt is ‘the manner in which [the aspects of the environment] are networked together as and to constitute ‘objects of experience.’ In the context of a neighbourhood, it is ‘an invisible bubble’ within which we live.

\textsuperscript{145} Echoing Arnstein above note 85, 216, the 2010 EDO report above n 142, 45, notes:
‘Public participation forms the cornerstone of the planning system. Planning is about people and communities and their environment, so it is essential that they have a genuine say in the future development of their areas. Further, the planning system is only workable if the community has confidence in it.’

\textsuperscript{146} Aroney above n 80, 216. Aroney identifies the substantive theory of deliberative democracy ‘in which the virtues of participation and discussion are seen as essential to a healthy system of popular self-governance.’

\textsuperscript{147} As William M Rohe and Lauren B Gates, *Planning with Neighbourhoods* (1985), 57-58 note:
‘[P]articipation in neighbourhood planning programs takes place within familiar local neighbourhoods, close to home and with familiar people. … Thus, higher rates of participation are expected in neighbourhood planning programs. … For planning to be effective it must develop a stronger political constituency among the public.’

\textsuperscript{148} Brown and Sherrard, above n 5, 227:
‘The creation of such a community [the neighbourhood] should not be artificial, but should come as a spontaneous movement on the part of its members with the object of enriching life.’

\textsuperscript{149} Webster and Lai, above n 22, 11.

\textsuperscript{150} Ibid 89:
‘Asia’s failed giant condominiums and shopping malls may lie rusting for a while, but not for long. Given the intensity of demand for space within which to make exchanges, new uses will be dreamt up, new organisations created, property rights reassigned and new bids made.’

\textsuperscript{151} McAuslan, above n 33, 215:
‘No strain is involved in seeing the debate on open government as being an extension of the debate on public participation in planning, … the former [ideology of public participation] providing the main support for open government, the latter [ideology of public interest] providing the main opposition to it.’
call for reform to the structure of the current planning system. The government could change its strategy towards participation. Or perhaps the process of review could lead to a ‘republican moment’ in the approach of the people towards participation in planning?\textsuperscript{152}

2.6 What is the relevance of History?

History gives an answer to the structural question of how people become relevant in social systems. Democratic societies trace their roots to Athenian democracy. It was born out of urbanisation and of the desire by the people to participate in the governance of local matters. But as Keane notes, Athenian democracy was ‘rooted’ in two centuries of struggle by the middle class to be seen as ‘the political equals of the old aristocratic lords of the city.’\textsuperscript{153}

The Athenian democratic period also spawned a built form that is treasured today as a global heritage. Yet Athenian democracy was itself displaced by the autocratic Roman state which dominated the then known world subsequently for some seven centuries. As is demonstrated in chapter 3, Roman civilization was based on capitalism.\textsuperscript{154} Out of the fall of the Roman Empire emerged the independent cities of Europe. The medieval city would be the impetus for the renaissance of the ideal of citizen participation. As Isin points out, it was in the twelfth century that participation in civic affairs emerged once again as a function of governance. Cities again ‘defined the sphere of citizenship.’\textsuperscript{155}

\textsuperscript{152} James Gray Pope, ‘Republican Moments: The Role of Direct Popular Power in the American Constitutional Order’ (1990) 139(2) University of Pennsylvania Law Review 289, 319, 367. Pope describes a ‘republican moment’ as an occasion when the citizenry is awakened from its apathy by the actions of direct popular power:

‘While political life degenerates into stalemate, civil society continues to change. Gradually, the state grows apart from society. Government ceases to reflect either the needs or preferences of the people. … republican moments are a sort of “surrogate for revolution” that reconnects the state to civil society. …

(367) Republican moments are the times when the basic direction of the country (or state or municipality) is at issue, and our core ideals of liberty and equality become matters of urgent concern to broad sections of the populace.’

\textsuperscript{153} Keane, above n 61, 28.

\textsuperscript{154} WG De Burgh, The Legacy of the Ancient World (1961), 258-9:

‘We find in fact at Rome a situation analogous to that which prevailed in eighteenth century England, when the forms of parliamentary government were manipulated in an era of commercial and imperial expansion, by a coterie of Whig houses.’

\textsuperscript{155} Isin, above n 81, 182: Isin notes that in medieval cities:

‘[C]itizens as members of the city as a corporation had liberties of law making, regulation and administration as a collective, and practicing these liberties defined the sphere of citizenship. To put it differently, in the medieval power configuration and law, citizenship and liberty became synonymous.’
The second millennium would see Britain discard feudalism early among western cultures. Feudalism did not promote participation. As is discussed in chapter 4, a capitalist class would develop out of the mercantile period of the sixteenth and seventeenth centuries. This new class of people would seek to directly participate in the governance of the nation. They would take participation seriously. In the process, the institution of property, rooted in the Roman system of law, would morph into what Lenin would style (in 1916) as ‘monopoly capitalism.’

Imperialism and the emergence of nation-states from the nineteenth century, fuelled by social change wrought by industrialisation, impelled greater state control over the lives of people. Within democracies such as Britain, the public interest ideology would begin to dominate over the private property ideology. Mannheim’s ‘creative politics,’ or as Pope characterises it, ‘the placing of the general good ahead of personal gratification,’ became the strategy of governments in both Britain and Australia.

Over time, urban planning would move from the study of heroic architectural and engineering feats, and into the realm of social engineering. The nineteenth century would see firstly, the

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156 V.I. Lenin, *Imperialism, the highest stage of capitalism* (1973), 72. Lenin suggests that ‘old capitalism’ involved the export of goods. Monopoly capitalism arose out of the export of capital:

‘On the threshold of the twentieth century we see the formation of a new type of monopoly: firstly; monopolist capitalist combines in all capitalistically developed countries; secondly, the monopolist position of a few very rich countries, in which an accumulation of capital has reached gigantic proportions. An enormous “superabundance of capital” has arisen in the advanced countries.’

157 Bobbitt, above n 103, 204:

‘This new form of state undertook to guide and manage the entire society, because without the total effort of all sectors of society, modern warfare could not be successfully waged. Not only the power of the state but its responsibilities as well were extended into virtually all areas of civil life. All aspects of life were accordingly promised to improve.’

Keane, above n 61,461:

‘The architecture of politics changed. Territorially defined governments, fed by their control of taxes, legal expertise, administration and the means of violence, began to wield enormous power over their subjects.’

158 Mannheim, above n 62, 29:

‘Our task is to build a social system by planning, but planning of a special kind: it must be planning for freedom, subjected to democratic control: … planning that counteracts the dangers of mass society by coordination of the means of social control but interfering only in cases of institutional or moral deterioration defined by collective criteria.’ (emphasis in original).

159 Pope, above n 152, 296-7:

‘To make possible this “civic virtue,” republicanism rejects liberalism’s procedural vision of justice, which tolerates wide disparities in wealth, and insists that if citizens are in fact created equal, then they must enjoy a rough measure of actual equality in the distribution of wealth.’

160 Gleeson and Low, above n 9, 86-7.

161 Ibid 92:

‘The interpretation of planning history was dominated by accounts of the historic endeavours of city builders and city building. This disconnection [from the mainstream political economy]
enactment of laws aimed at alleviating the poor living conditions of the bulk of the citizens; and secondly, the passing of land use planning laws. Initially in Britain, and later in Australia, bureaucratic governance models evolved to regulate land development. These new laws facilitated an intrusion by government into a domain previously the exclusive realm of the private sector. These laws initially had participatory elements through the introduction of the inquiry processes. But ultimately, planning laws remained faithful to the public interest ideology.

stunted the intellectual development of the [planning] discipline and prevented town planning as a professional and intellectual field from contributing usefully to the debates which eroded its philosophical foundations.’

162 Webster and Lai, above n 22, 23-4:
‘If violence is defined as the taking of individual property rights, then the nationalisation of the right to develop land by a government, as the British government did so effectively after the World War II, may be interpreted in this light. That drastic constitutional revision was carried because of the compelling requirement for organised reconstruction after the war, helped by the economic crisis besetting the world before the war.’

163 Transport and the Regions Department of Environment, UK 'Environmental Court Project Final Report' (2000) (UK Court Project Report), section 9.2.3:
‘A major change in the balance of responsibility between Parliament and the Executive started in relation to sanitation in urban areas with the Public Health Act 1848, … the 1848 Act was passed at the height of the worst London cholera epidemic … and contained a provision requiring a public inquiry to be held if required by one-tenth of the ratepayers, in an area where the death rate exceeded 23 per thousand.’

164 Housing Town Planning etc Act 1909 (UK). See Andrew Kelly, The role of local government in the conservation of biodiversity (Ph. D. Thesis, University of Wollongong, 2004), 200. Kelly notes: ‘In presenting the bill, the President of the Local Government Board stressed that “[t]he object … is to provide a domestic condition for the people in which their physical health, their morals, their character and their whole social condition can be improved by what we hope to secure in this bill.’

165 Gurran, above n 12, 22. Gurran argues that the early twentieth century saw the ‘emergence’ of a ‘defined planning profession’ in Australia. This led to the enactment, by 1945, of laws facilitating the creation of statutory land use plans in every state other than South Australia.

166 McAuslan, above n 33, 45, notes that Inquiries became ‘the most common public listening and debating device in British public administration. It is ubiquitous throughout administration.’ However, by the 1970s, the dangers to ‘efficient administration’ inherent in such a participatory process were realised by the British government and it changed tack. McAuslan (at 40-41) cites the introduction in the 1970s of the ‘public examination’ procedure (implemented by the adoption of a statutory code) as the ‘nemesis’ of the Inquiry procedure. McAuslan sources this change to the Greater London Development Plan brought forward in the 1960s. It prompted some 28,000 objections and the inquiry took 2½ years to hear ‘at considerable expense.’ After this experience, the Department pressed for change to the procedure. McAuslan says of the procedure adopted by the code: ‘The public examination is the policy-orientated forum, and in order to ensure that it is and remains so, total control of the process, the participants, and the matters to be discussed is vested in the Secretary of State …’

It is difficult to find a more overt example of legislation based on the ideology of public interest as opposed to the ideologies of private property and public participation.
2.6.1 Participation in History

In the 1960s, Arnstein formulated her ladder of citizen participation as a provocative typology. It was done to encourage dialogue towards the empowerment of the people in land use decision making. To Arnstein, ‘citizen participation is citizen power.’¹⁶⁷ She was of the view that historically, where power has been shared with citizens ‘it was taken by the citizen, not given by the city’¹⁶⁸. This reflects the historical reality of the struggle of the people to have a say in their governance. Planning law was born out of the wider struggle of the people to have a voice in the corridors of power. That struggle continues.

As is suggested above,¹⁶⁹ it would not be until the late nineteenth century that McAuslan’s public interest ideology would first manifest itself in legislation enacted by the UK parliament.¹⁷⁰ The nation-state, which in large measure had been created in the nineteenth century by virtue of ‘popular participation’,¹⁷¹ used its power to control the development of land for seemingly public benevolent reasons.¹⁷² The public interest ideology has continued to hold sway in the corridors of power in both the United Kingdom and Australia since that time.¹⁷³

The historical analysis in chapter 4 demonstrates that it took centuries for some of ‘the people’ in England to have the right to participate in government, to be ‘the state’. Once that right was achieved, the state changed its governance strategy.¹⁷⁴ The new political elite, whilst purporting

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¹⁶⁷ Arnstein, above n 85, 216. Whilst Arnstein identified in her typology eight rungs, she notes (217) that ‘[i]n the real world of people and programs there might be 150 rungs with less sharp and “pure” distinctions among them.’

¹⁶⁸ Ibid, 222, emphasis in original.

¹⁶⁹ And as is developed in chapter 4 below.

¹⁷⁰ Kelly, above n 164, 198. Kelly dates the origins of the Anglo-Australian planning systems to the nineteenth century ‘post-industrial urban reform.’ As is indicated in chapters 4 and 5, it is here argued that the origins of planning law probably date back to the Private Bills procedures developed in the eighteenth century notably through the Enclosure Acts and the development of Clauses legislation to facilitate the passage of site and locality specific development.

¹⁷¹ Bobbitt, above n 103, 190: ‘popular participation became the instrument that both created the nation-state and was itself reinforced by the institutions of the State it created.’

¹⁷² Isin, above n 81, 52. Isin suggests that: ‘Modern city planning practice, as yet uncodified [in the nineteenth century], arose out of a will [of the State] to induce in the working classes habits and customs that were conducive to industry and health through a minute and unprecedented attention to the design of their living spaces.’ (emphasis in original)

¹⁷³ McAuslan, above n 33, 265: ‘Both context and law place the emphasis on the ideology of public interest rather than, and at the expense of, the ideology of public participation.’

¹⁷⁴ Godden and Peel, above n 14, 62. As Godden and Peel note: ‘governance is concerned with the interface between people and the state institutions and structures (including legal rules) that govern those people within defined ambits.’
to govern ‘in the name of the people,’\textsuperscript{175} in reality governed for its own self interest. It conferred benefits on a select few under the protection of the private property ideology.\textsuperscript{176} This suggests a close relationship exists between law and power. This pattern of governance can trace its origins to Ancient Rome. McAuslan’s theory of the private property ideology holds true to an analysis of the civil law of Rome.

Resolving the question of which ideology should guide land use planning law will be an important issue in this century. The scale of urbanisation post industrialisation has continued to grow at such a pace that it is predicted that in the not too distant future, half of the world’s population will live in cities.\textsuperscript{177} Between 1994 and 2025 the rate of urbanisation will have doubled.\textsuperscript{178} If that should become the reality, then new models of land use planning will have to be devised to facilitate built forms to accommodate the anticipated population growth. Every city in every nation will confront the problem of where to house all the people.

2.6.2 History and Modernity

What is the relevance of history to this new and emerging urban dilemma?\textsuperscript{179} It is predicted that Australia’s population will reach 36 million people in 2050.\textsuperscript{180} That suggestion alone generates debate.\textsuperscript{181} How will we as a society accommodate that population, will we cope?\textsuperscript{182} The

\textsuperscript{175}Keane, above n 61, 457:
‘Republicans liked to speak “of the people”. But who exactly “the people” were remained moot. It turned out that republicanism was a subtle ideology of inequality. “And what the people”, asked John Milton, “but a herd confus’d, a miscellaneous rabble, who extol things vulgar?”

\textsuperscript{176}McAuslan, above n 33, 3:
‘Property-owners turned to the courts not just because they were the institutions provided for the resolution of conflicts but because lawyers and the common law that they had fashioned over the centuries were very much concerned with the protection and preservation of rights of property.’

\textsuperscript{177}Dirk Bolt, ‘Internal consultation and cooperation in urban planning: The human dimension’ in Robert Freestone (ed), \textit{Spirited Cities} (1993), 58: ‘The scale of urbanisation is such that even Arco Ramachandran, Executive Director of the United Nations Centre for Human Settlements (Habitat), has admitted to “private moments of despair”.

\textsuperscript{178}Webster and Lai, above n 22, 14: ‘In 1994 approximately 2.5 billion individuals lived in the World’s urban areas. This is set to double to around 5.1 billion in 2025.’

\textsuperscript{179}Ibid 31. Webster and Lai suggest that the ‘story of humanity’ is ‘one that describes the rise and fall of spatial concentrations of households in settlements (the process of urbanisation).

\textsuperscript{180}Bernard Salt, ‘New Population forecast forces a rethink on urban planning’, \textit{The Australian} (Sydney), 18 September 2008, Salt suggests: ‘The new [population] projections are so vastly different that it is now necessary to rethink the scale and form of our largest cities.’

\textsuperscript{181}See for example: Linton Besser and Wendy Frew, ‘Get ready for high-rise Sydney’, \textit{Sydney Morning Herald} (Sydney), 6 January 2009, 1. They announced that ‘Sydney will be reinvented as a high-density metropolis serviced by mass-transit underground subways under a transport blueprint being developed by senior state and federal government bureaucrats.’ Paul Bibby, Matthew Moore and Jacob Saulwich, ‘Populate and perish: Sydney’s time bomb’, \textit{Sydney Morning Herald} (Sydney), 19 September 2009, they argued, based on the projected figures, that Sydney would stretch from Wollongong to Newcastle in ‘a
challenge for government is how to respond.\textsuperscript{183} It is easy to suggest, as Bolt does, that the scale of change will be such that even history will have little to offer by way of guidance.\textsuperscript{184} But history has always been a guide to the solution to future problems. Portugali suggests that history teaches us to be wary of planning paradoxes.\textsuperscript{185} History demonstrates that as population grows there has always been a need, generated by demand for housing, to demolish neighbourhoods to pave the way for development. Whilst it may seem to be a modern vast urban sprawl.’ Matthew Moore and Jessica Irvine, ‘The Big Squeeze’, \textit{Sydney Morning Herald} (Sydney), 12-13 December 2009, 1, they noted that: ‘No one disputes these numbers but few suburbs volunteer to take their share.’ Bob Carr, ‘Perish the thought that we can handle a bigger population’, \textit{Sydney Morning Herald} (Sydney), 19 November 2009, 17. The former Premier warned the people: ‘Don’t believe that there is a magic potion called Good Planning that will settle every argument.’ But who needs planning - see Chris Berg, ‘Give or take a million, there’s nothing to fear’, \textit{Sydney Morning Herald} (Sydney), 18-20 December 2009, 9. Berg reassures: ‘from an historical perspective, these concerns [about lack of infrastructure] are pretty silly. Infrastructure development doesn’t pre-empt population growth, it follows. People build the stuff when they need it.’ His view was that ‘anti-development lobbyists and activists are a big problem.’ Yet the people, not necessarily the developer, have to fund the works. As Langley of Sinclair Knight Merz suggests: ‘Infrastructure requires 100 year planning that does not fit in with the four-year vision of state government,’ noting that councils do not have the resources and are forced to ‘rely on an incompetent state government that has shown itself to be interested only in short-term.’ See Miranda Devine, ‘By George, this blight has to stop, for Sydney’s sake’, \textit{Sydney Morning Herald} (Sydney), 14 January 2010, 13. Josh Gordon, ‘Population boom is inevitable, PM told’, \textit{Sun Herald} (Sydney), 14 November 2010, 3: ‘Julia Gillard’s election pitch to avoid a “big Australia” is to be abandoned after a Treasury warning that strong future immigration “is probably inescapable.”’

\textsuperscript{182} Berg, ibid, 9. Berg, citing the Treasury Intergenerational report estimate of population, went on to assert: ‘Population growth requires governments that are willing to build needed infrastructure – governments which are able to stand up to those who don’t want infrastructure built in their backyards, and to those who don’t want people to have backyards at all. Right now it seems that state governments are leaning on population concerns to avoid taking the blame for failing to do their jobs.’ The former premier, Bob Carr, ibid, 17, had the opposite view preferring to stop the very development his government had sought to promote.

\textsuperscript{183} Standing Committee Report, above n 36, 5. Part of the reason advanced to examine the planning system yet again is attributed to population pressure: ‘The aim and efficiency of a planning system has a significant impact on the achievement of social, economic and environmental policy objectives. New South Wales is not unique in the need to ensure that its planning system responds to the challenges of increasing population, sustainable economic growth and climate change.’

\textsuperscript{184} Bolt, above n 177, 58, believes that history ‘offers little guidance’ because the socio-economic; environmental and political impacts ‘will be an entirely new experience to humankind.’

\textsuperscript{185} Portugali, above n 117, 253: ‘[A planning paradox] arises when a set of apparently acceptable assumptions about the past, followed by apparently acceptable deductions-predictions about the future, further followed by apparently acceptable policies and actions, leads to apparently contradictory results.’ Portugali then relates the experience of Israel, when confronted with the likely influx of an ‘immigration’ wave following the break-up of the Soviet Union. The government, anticipating the influx, purchased a large number of relocatable homes and put them on the outskirts of the towns and cites. The population (which he describes as ‘latent planners’), anticipating the same shortage of housing ‘and the prospect of making money’, ‘transformed existing non-residential buildings into residential ones’ which by reason of location within the towns and cites, meant that the government was left with unused and unwanted housing.
phenomenon, development pressure has historical antecedents.\textsuperscript{186} Baer recognises that ‘current growth control disputes’… ‘re-enact and rehearse’ arguments ‘first uttered 400 years ago.’\textsuperscript{187}

Whilst Bobbitt agrees that society will experience significant change in which nation-states will give way to a ‘society of market-states,’\textsuperscript{188} he believes that history will be vital to understanding the strategic choices facing society. Bobbitt sees the challenges of today as being ‘recombinations of choices confronted and resolved in the past.’\textsuperscript{189} Globalisation and the impact of immigration are not new to history.\textsuperscript{190} History, viewed as it is through the lens of the particular historian, frames the events which the passing of time has made static to explain those events. As Monateri noted, all history is related to strategy:

‘If we remember that the understanding [of history] depends on adapting a framework, the grouping of events depends on a theory, and the adoption of a theory depends on a strategy.’\textsuperscript{191}

In urban planning, strategies of the state are now implemented by land use laws.\textsuperscript{192} There are renewed calls to change the current strategy for urban planning in NSW.\textsuperscript{193} Law is not made of history; rather, it is made in history.\textsuperscript{194} Fukuyama was wrong when he predicted ‘the end of

\begin{thebibliography}{99}
\bibitem{186} Brown and Sherrard, above n 5, 9: ‘We must not expect to find that ordered growth of towns was the invariable rule; more often the reverse was the case. Some towns have evolved over centuries of time, while others are of mushroom growth. The latter usually show evidence of deliberate design, but it must not be imagined that the former is devoid of organic form.’
\bibitem{188} Bobbitt, above n 103, 228-9.
\bibitem{189} Ibid 6.
\bibitem{190} Deryck Schreuder and Stuart Ward (eds), Australia's Empire, Oxford History of the British Empire, Companion Series (2009), 7. As Schreuder and Ward note: The ‘process of critical enquiry really begins outside Australia, with a recognition of the global forces that have driven modern history itself. The British Empire was to become a transforming agency for historic trans-oceanic change which came to touch all corners of the globe. And the making of Australia has to be seen within that international history …’
\bibitem{192} Gleeson and Low, above n 9, 90-91: ‘The idea of societal planning, hitherto associated with dictatorial regimes, had to be reconciled with democracy, … Such ideas provided the touchstone for public sector planning all over the English-speaking world.’
\bibitem{193} Standing Committee Report, above n 36, 34: ‘There is a discernable trend in planning reform both nationally and internationally. This is a sign of the times as all governments are confronting similar challenges. All governments have to provide for growing and changing populations while managing and preserving their natural resources. Similarly all governments need to meet the challenge of climate change while fostering economic growth through sustainable development.’
\bibitem{194} Or as Portugali, above n 117, 254, suggests: ‘[P]redictions and plans, once produced, become participants in complex urban dynamics. This is one of the main reasons why the ‘normal responses of market forces’ are hard to predict.’
\end{thebibliography}
history.\textsuperscript{195} By remembering our history, we can see where strategies lead to. As Isin argues, between the twelfth and fifteenth centuries, ancient English cities were subjugated by the State. These cities were reformulated as ‘a weapon of State authority, which interpreted local autonomy as a creation of the State.’\textsuperscript{196} In the process, cities became ‘cities without citizens’ because local autonomy was lost.\textsuperscript{197} If we continue to atomise our conception of civic involvement, reducing participation to the expression of an opinion in the ballot box or as a land transaction, then there is little prospect that autonomy will be regained.

If, as is recognised by the Standing Committee report, the planning system in New South Wales needs comprehensive reform,\textsuperscript{198} then does that suggest that the planning strategy adopted by the state up to now has been misdirected?\textsuperscript{199} If so, what is the direction it should now take? A call to embrace the ideology of public participation is a radical call to challenge the status quo. It is a call to change history.\textsuperscript{200} As McAuslan suggests, it is a challenge to alter:

\begin{itemize}
\item Keane, above n 61, 667-70. Referencing Fukuyama’s book \textit{The end of History} (1992), Keane says that it seemed to Fukuyama that ‘[s]omething like the “end of history” was unfolding before the eyes of the world.’ But the clocks did not ‘stand still.’ Keane suggests that what was occurring was the advent of the ‘third wave’ of democracy. See also Peter Hartcher, ‘Facebook, thymos and the individual’, \textit{Sydney Morning Herald} (Sydney), 25 January 2011, 13. Hartcher cites Fukuyama’s comment that: ‘[T]he triumph of democracy and the success of the market economy are due to the fact that these are the political and economic systems that address the thymos, the deep need for the recognition of the individual.’
\item Unfortunately, as history now shows, Fukuyama went too far suggesting that ‘with the collapse of communism and the triumph of democratic capitalism, human societies had reached the ultimate point of political evolution.’ It is appropriate to heed Keane’s warning (671) that ‘history is not unidirectional, so that waves of democratisation typically remain vulnerable to tidal reversals.’
\item Isin, above n 81, 56.
\item Ibid vii. As Isin notes:

‘We are citizens of nations. But, in the history of Western civilization, citizenship originated as membership in the city as an institution. Both the Greek and Roman practices of citizenship were inextricably associated with cities – \textit{polis} and \textit{civitas}. Yet neither the Greek \textit{polis} nor the Roman \textit{civitas} was organised as a corporation. It was throughout the medieval centuries that this association evolved into a unique practice of cities as corporations.’
\item Standing Committee Report, above n 36, 30. Unsurprisingly, the submission of the New South Wales Government in evidence before the committee ‘argued that a fundamental review of the planning system and the governing legislation … was not warranted nor is it a priority.’ The committee did not agree with this submission, noting (at 31) that it could not ignore the weight of evidence and the ‘general consensus on the need for a fundamental review …’
\item Webster and Lai, above n 22, 16, taking a general position from the perspective of the Austrian school suggest:

‘Cities are highly complex systems and it should be of no surprise that attempts by any authority to manage and plan by prescription frequently fail. Where such attempts do succeed it is likely to be because the prescriptions – major infrastructure investments for example – have created conditions within which a spontaneous, decentralised order can flourish.’
\item Mannheim, above n 62, 47:

‘Once the structure of society changes, its pressures and means of control will change concomitantly. Accordingly, a new type of authority will be established, using new sanctions against the non-conformist.’
\end{itemize}
‘the existing state of property relations in society, the existing capitalist system with its emphasis on private property and a functioning market for that property.’

2.6.3 Participation Australian Style

In Australia, the citizenry tends to take its democratic institutions for granted. As discussed in chapter 4, the right to participate in governance, even to win the right just to vote has elsewhere entailed struggle and sacrifice. Australians are fortunate in that these privileges have been conferred without violent struggle. Meaney suggests that this is due to our colonial status and our ‘Britishness.’ Yet there are consequences flowing from that history.

As a polity, Australians have been happy to acquiesce in being governed. We are not prone to participate in the institutions of civic society. The study of history can show that it is through participation in institutions that the skills needed to participate in governance are learned.

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201 McAuslan, above n 33, 268-9. 
202 John Hirst, Looking for Australia (2010), 256: ‘Politics is simply there. We appear sometimes to believe that we have politics only because a few egomaniacs want to be politicians. To be suspicious of politicians may be no bad thing. To be suspicious of politics is unhealthy for a free people.’ Keane, above n 61, xiii, suggests that the point that needs to be hammered home is that ‘forgetting, or remembering the wrong things, is dangerous for democracy, and that things that seem timeless are never so.’
203 In the Anglo-Australian context, this struggle dates to end of Roman civilization in Britain in 407CE and traces a line through the Norman Invasion of 1066, Magna Carta in 1215, the Tudor reformation and the Civil War culminating in the Bill of Rights of 1688 and the Great Reform Act of 1832. The British experience was also greatly influenced by the trauma of the American Declaration of Right in 1776 and the French Revolution of 1789. Under fear of experiencing a similar fate, the British parliamentary system was reformed in the nineteenth century. 
204 Neville Meaney, ‘In History’s Page’: Identity and Myth’ in Deryck Schreuder (ed), Australia’s Empire (2008), 363-5. Colonial Australia was the beneficiary of the struggle of others in the eighteenth and nineteenth centuries for democratic rights. As Meaney notes:

The [Australian] colonists constructed their new political system in the classical period of British Liberalism. … Identifying with Whig history of the English Civil War and the ‘Glorious Revolution’ they turned to the most advanced reform movements in Britain, especially the Chartists and Utilitarians, to find inspiration for their Antipodean commonwealth. … Freed from the limiting prescriptive privileges of the Old World the Australian colonists undertook to carry forward and develop further this inheritance of liberty.’

205 Leigh, above n 105, 13. Over the period between 1967-2004 the number of people that were ‘active members’ of two or more organisations dropped from 14% to 4%.
206 Richard Waterhouse, 'Settling the Land' in Deryck Schreuder (ed), Australia’s Empire (2008), 67. This brings the discussion back to the ratepayer ideology discussed further in chapter 5. Waterhouse, in examining the struggle between large and small scale agricultural production in the nineteenth century Australia, identified three different value sets:

‘one related to entrepreneurship, which involved single-minded preoccupation with accumulating wealth as quickly as possible; another to a reluctant self-sufficiency, with aspirations to entrepreneurship; and a third grounded in an opposition to authority, a resentment of squatters, and (especially from the 1890s) a commitment to mateship.’

To create a participatory culture, these values need to be melded into a participatory ethos.
The experience of democracy in New South Wales has been anti-participatory. In the ideation of the people, urban planning was an irrelevance because of the vastness of the continent that had to be conquered. As Kelly and Stoianoff note, public attention was initially focused on establishing a representative assembly. But the intent was to secure from the Imperial parliament local power over governance to maintain control over land. Those large landowners took the view, according to Manning Clark, that '[w]hen ever the principle of property came into collision with the equality principle the former must prevail.' If the landed elite had had their way, they would have maintained control over government to the exclusion of the people to ensure that the property rights of those owning land were protected.

Without government interference to shape how land is to be developed, the market will determine the ultimate built form of the city. Those with capital will have the power to buy land and develop it. Arnstein is correct. The only way that the people can share power is if it is ‘wrested’ from the powerful. If that is so, then to win the right to participate in land use

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207 The exception may be the Federation Conventions. Hirst, above n 105, 152-3, notes that: ‘Part of the inspiration of the leaders of the federal movement was that federation would carry politics to a new level. A parliament dealing with the life and destinies of a nation would be a grander and nobler institution than the parliaments that haggled over local infrastructure.’ The result, he suggests, was that the federation referendums were ‘an amazing democratic exercise.’

208 Waterhouse, above n 206, 67: ‘The squatting leaseholds hindered the establishment and growth of rural towns in nineteenth-century Australia for they acted as barriers to significant population increases.’ It would be the discovery of gold and the extension of the Railway that would ‘result in significant rural population growth.’


210 Waterhouse, above n 67: ‘The squatting leaseholds hindered the establishment and growth of rural towns in nineteenth-century Australia for they acted as barriers to significant population increases.’ It would be the discovery of gold and the extension of the Railway that would ‘result in significant rural population growth.’

211 This group, composed of exclusivists and emancipists, anti-transportationists and pro-transportationists, survivors from and inheritors of old family feuds, united in their determination not to allow the lower middle-class men of Sydney to use the institutions of the free either to destroy the sheep-walk of New South Wales or to create a Yankee-style democratic, egalitarian republic.’

212 Ibid, 211. As Manning Clark notes: ‘This group, composed of exclusivists and emancipists, anti-transportationists and pro-transportationists, survivors from and inheritors of old family feuds, united in their determination not to allow the lower middle-class men of Sydney to use the institutions of the free either to destroy the sheep-walk of New South Wales or to create a Yankee-style democratic, egalitarian republic.’

213 Webster and Lai, above n 22, 20-1: ‘What can be said about the congestion and evolution of the city as a whole is true of the parts of the city. Neighbourhoods change – rapidly or imperceptibly; by intrinsic or extrinsic influences; by market activity or government activity. Citizens standing to lose from the emerging order may react by exit or by voice. New spontaneous order emerges in response to exit, and new planned order emerges in response to voice.’

214 Arnstein, above n 85, 222.
planning decisions the people may have to raise their ‘voice’ and declare their rights. The question is whether or not this is possible?

2.6.4 Participation and Democracy

As Maddox reminds us, it was Aristotle that argued that the role of the state is that of ‘procuring for us the good life.’ The study of the history of the struggle of the people to ideate an entitlement to, and then take, sovereignty, illuminates the difficulties confronting the people if government will not willingly share power. Even democratic governments can have a quasi-tyrannical nature if a political elite controls the parliament. The American Revolution was framed around the catchcry of no taxation without representation. But even when representation is achieved, that does not guarantee that the government will be a government of the people. As will be seen in chapter 4, at every step, the people of England had to apply pressure to the governing elite to make their voice heard.

If the state is to recreate the NSW planning system, should the new system be based on the current model which is squarely based on the ideology of the public interest? If the right to participate is a fundamental right, then should it be restricted to just a right to be consulted? Or should the citizens be empowered in the planning process such that their contribution has the prospect of influencing the decision-maker? If history is a guide then two things are certain: firstly, the market is disinterested about the creation of a planned space. According to market

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215 Under conditions of perceived, if not actual, tyranny the people of England (more than once), the United States and France (and of course, other peoples) have all at one time needed to take a stand against government. In Australia, the skirmish that was Eureka stands in stark contrast to the measured way in which the colonists approached federation. Violent uprising seems not to be an Australian way.


‘The state exists, then, for the purpose of security, but, as Aristotle argued so long ago, it acquires the role of procuring for us the good life. There is obviously much room for controversy about what “the good life” is, and various philosophies and creeds have their suggestions to make. We could argue that the functions of the state should progress from the basic protection of life and limb to providing minimal economic security for all. As soon as we go this far, however, we enter the realm of political doctrine, for if the state is to provide goods and services to the poor or otherwise disadvantaged, these goods have to be provided from somewhere, and bitter controversy may result from the necessary reallocation of resources.’

217 Body-Gendrot, above n 88, 227. Body-Gendrot argues that:

‘the market does not favour cohesiveness but generates tensions: it reinforces economic polarisation and inequalities in cities, the recomposition of space unveils power conflicts among major actors, and hundreds of thousands of marginalized people and their children may use their “voice” as a threat to express their claims.’
theory, order will happen organically.\textsuperscript{218} Secondly, the state will not willingly share power with the people.

In introducing planning legislation in 1945 the New South Wales government avowedly did so to democratise the planning process.\textsuperscript{219} If that was the government’s intention then it failed in its endeavours. By 1976 a new call for reform of the planning system to make provision for proper public participation was heard by the government.\textsuperscript{220} Once again, the rhetoric of the new legislation (introduced by a subsequent Labor government) would appeal to democratic principles by invoking the cause of increasing opportunities for participation. Both the earlier and later legislative models, examined in chapter 5 using Bora and Hausendorf’s methodology, disclose that these Acts contain socially exclusionary mechanisms. If we are to avoid repeating the mistakes of the past, we must remember our history. If the exhortation of 1945 for planning to be democratic is to become a reality,\textsuperscript{221} then the ideology of public participation will need a champion in parliament.

Bobbitt says that ‘history is the medium by which the legitimacy of the constitutional structure is married to the success of the strategy of the state.’\textsuperscript{222} In the next two chapters the exclusionary strategies of governance essential to the ideologies of private property and the public interest are examined in an historical context. Socially exclusive strategies disempower the people. History suggests that socially exclusive strategies are only successful under a model of governance that allows the state to impose its rule over the people, irregardless of the concerns of the people.\textsuperscript{223}

\textsuperscript{218} Webster and Lai, above n 22, 20:

‘The co-operative patterns in a city adjust in response to secular changes in congestion, crime, pollution and other social costs. Firms change suppliers, location, and market strategy. Individuals change shopping destinations, places of schooling, locations of work, outlets for leisure activities and modes of transport.’

\textsuperscript{219} Planning laws were first introduced in NSW via the enactment of the Local Government (Town and Country Planning) Amendment Act (NSW) 1945 which introduced Part XIIA into the Local Government Act 1919. Writing in 1946 on the achievements of the McKell government, the ALP suggested that the reason for the legislation was to arrest ‘the haphazard and unregulated growth of New South Wales during the past 153 years...’ - see Australian Labour Party, \textit{Five critical years: story of the McKell Labour government in New South Wales, May 1941-May 1946} (1946), 48. This discussion is developed in chapter 5.3 below.

\textsuperscript{220} NSW Parliamentary Debates, Legislative Assembly, 30 March 1976, Hansard 4910  Hon Mr Healey Minister for Planning (second reading speech Environmental Planning Bill):

‘There has long been widespread dissatisfaction with the planning provisions of the Local Government Act, 1919, which were considered to be too cumbersome and time-consuming, led to excessive involvement of the state planning body in matters of purely local significance and made no provision for proper public participation in the planning process.’

\textsuperscript{221} The comments of the Minister to the County of Cumberland Council quoted in Chapter 1 n 1 above.

\textsuperscript{222} Bobbitt, above n 103, 207.

\textsuperscript{223} Whilst market theorists are sceptical about rigid state governance, they view democratic approaches to solutions of urban planning as being problematic. As Webster and Lai, above n 22, 149, suggest:
An historical review of the origins of McAuslan’s ideologies of planning is illuminating in that regard. That review begins in the next chapter with a consideration of the origins of the ideology of private property.

‘[t]he danger of relying on the public to safeguard the interests of future generations through democratic processes is that too little action emerges because of various collective action problems.’
And this is why the ideology of public interest resonates so easily with the ideology of property.
Chapter 3: The Origins of the Ideology of Property

‘While many of Shanghai’s colonial-era architectural treasures are being restored, bulldozers have razed whole neighbourhoods so the city can look as modern and shiny as possible’

Malcolm Moore1

‘Totalitarian movements find their most fertile soil in the political anomie that results from stalemate politics and popular disempowerment.’

James Pope2

3.1 Introduction

The planning law of New South Wales is a product of modern British industrial history. The express strategy for the historical excursus in this research into the later Roman period in Roman Britain is to examine an emerging civil society where there was effectively no role for public participation in the decisions made about the operation of that society. This will connect the discussion to the examination (in the next chapter) of the long struggle over the course of the second millennium by the people of Britain for the right to participate in their own governance.

The market theory argument,3 reflected in McAuslan’s ideology of private property, posits that it is not necessary for the people to consciously plan for social outcomes. Despite our self-interest, people will generally promote the interests of society ‘more effectually’ than they intend to by the choices they make.4 The unconscious operation of the market will produce

1 Malcolm Moore, ‘China’s Rock of Gibraltar develops’, Sun Herald (Sydney), 12 February 2010, 17. The reconstruction was occurring ahead of the World Expo in Shanghai in 2010. Autocracies have the luxury of being able to make grand planning decisions.


3 See above, chapter 2.2.

4 Adam Smith, The Wealth of Nations (2010), 240. As Smith argued:
‘by directing [a person’s] industry in such a manner as its produce may be of greatest value, he intends only his own gain: and he is in this, as in many other cases, led by an invisible hand to
socially desirable outcomes, over time. In fact, Pennington argues that land use planning is not necessary because modern liberalism ‘represents a rationally chosen set of practices designed to maximise individual liberty and to enable the fulfilment of individual ends.’

Yet, sometimes the ends desired by an individual are communal in nature. Today, what happens in the local neighbourhood is often a matter where the individual, as a member of a community, desires to assert a right to have a ‘say’ in its local political affairs. Webster and Lai suggest that in a functioning urban market economy, the people in that market have both of Hirshman’s choices: exit and voice. But is that right? Roman civilization had a functioning market economy for centuries but the people did not have the voice option. Roman society highlights that if we abandon land use planning to the operation of the market, then the government will be absent from the field of play (except as enforcer of the rules of exchange). In such a state of affairs how do people exercise the voice option?

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5 Mark Pennington, ‘Hayekian Political Economy and the Limits of Deliberative Democracy’ (2003) 51(4) Political Studies 722, 724. Pennington, putting the Habermas position, neatly captures the competing arguments as follows:

‘The price system operates as a veil, concealing from people how their actions impinge on the lives of others and prevents individuals from thinking about how to coordinate their activities in ways promoting the benefit of society as a whole. In contrast, democratic deliberation of social affairs offers the prospect of more “holistic” decision-making practices, enabling people to reassert active control over the direction of social and economic life through conscious collective action (Adaman and Devine, 1997).’

Pennington goes on to argue (727) the Hayekian position that the price mechanism is superior because it is better at enabling people to learn and adapt in a ‘world of chronic ignorance.’

6 Ibid, 723. Pennington also notes:

‘Individuals are, according to this view, rational agents capable of designing a social system conducive to the fulfilment of their ends (as, for example, in Rawlsian social contract theory) and, if left free to do so, of acting in order to attain these ends in the most efficient way (as, for example, in neo-classical economics).’

7 Christopher Webster and Lawrence Wai-Chung Lai, Property Rights, planning and markets: managing spontaneous cities (2003), 19-21. Webster and Lai cite A Hirschman, Exit voice and loyalty, Cambridge MA, Harvard University Press, 1970. This work specifically relates to employee responses to unsatisfactory organisational situations but Webster and Lai suggest that markets (both economic and political) respond to over-congestion by individuals making decentralised decisions (exit) and by governments making centralised decisions in response to citizens’ voice:

‘Firms and individuals make demands for law and policy that better reflect their private property and give greater security of rights over shared goods and services including neighbourhood facilities and environments – often at the expense of other groups.’ … ‘Citizens standing to lose from the emerging order may react by exit or voice. New spontaneous order emerges in response to exit, and new planned order emerges in response to voice.’
The historical analysis in this chapter explores the origins of the private property ideology from its genesis in the foundations of classic legal tradition. This ideology held sway in Britain until the twentieth century when it was challenged by the emergence of the public interest ideology. The analysis confirms that the market does not necessarily require democratic governance for its operation. The market can operate effectively under a system of governance where patronage prevails. Provided the state can maintain order, market transactions are facilitated. The analysis in this chapter also confirms the validity of McAuslan’s proposition that the law does not provide a ‘neutral framework for the exercise of power.’ It is suggested that in the absence of participatory structures to guide the operation of the market, the risk for society is that the spontaneous order that emerges will be potentially be despotic in character.

3.2 Market Theory and Land Use

Samuel argues that Roman civilization is the ‘starting point for any society that wished to adhere to the notion of private wealth and (to a greater or lesser extent) individualism.’ Whilst Colish sought to show in her well argued paper that in Roman law, legislation was used as a ‘catalyst for social change desired by the legislator;’ the Roman state did not introduce laws directed to advance the public interest. Roman society did not accommodate either civic participation or the ideation of egalitarianism. It was, fundamentally, a discriminatory society. It was built on slavery and was rigidly divided by class. The state generally did not intervene in the private sphere; legislation was minimal. As Yntema shows, such legislation as existed was

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8 WG De Burgh, *The Legacy of the Ancient World* (1961), 315. De Burgh posed the question what did the establishment of the Roman Imperial system mean for the Roman world? He answered the question thus: ‘It is in the equable adjustment of taxation, in the impartial administration of law, in the founding of cities and public works, in the unimpeded development of commerce, in the extension of citizen privileges and local self-government, which for the first time opened up wide prospects of advancement for all freemen, and, above all, in the effective defence of the frontiers and maintenance of universal peace, that the true nature of the imperial system is disclosed.’

9 Webster and Lai, above n 7, 53:
‘the market requires the state, in particular the institutional frameworks it creates, in order to operate efficiently. … Markets and prosperity flourish under freedom of action but, without rules, the costs of co-operating inevitably become too high.’

10 P McAuslan, *The Ideologies of Planning Law*, Urban and Regional Planning Series (1980), 1. McAuslan suggests that we should not have an uncritical acceptance of the role of law or assume that law ‘is not itself biased in any way for or against a particular philosophy or ideology governing the exercise of that power.’ The thesis of his book was a ‘direct challenge’ to this standard orthodoxy.


limited to the terse enunciation of the basic principles of justice.’ Any social change implemented by Roman legislation was therefore directed towards propping up the prevailing system. Even so, as Samuel argues, the Romans ‘were laying the structural foundations for our modern western society.’ It is from this foundation that planning law springs.

Ancient Rome had the indicia of a functioning market economy. Rome was therefore the nascent state where McAuslan’s private property ideology prevailed. It was a highly urbanised and civilized society. In Roman society the people enjoyed: rights of citizenship; the benefit of a rule of law; the institution of property; and competitive markets regulated by the price mechanism. Money was the medium of exchange. Property rights were protected by the Roman civil law system which had developed over centuries. The role of government, while pervasive, was minimal. These are the conditions that promote the spontaneous order that emerges under market conditions.

The neo-liberal argument is that cities are complex social systems. The organising principle of the theory is Adam Smith’s ‘invisible hand.’ The market is regulated by the institution of private property. The market system is said to be superior because it confers ‘the greatest

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13 Hessel E. Yntema, ‘Roman Law and Its Influence on Western Civilization’ (1949) 35 Cornell L. Q. 77, 84.
14 Samuel, above n 11, 187.
15 AJ Brown and HM Sherrard, Town and Country Planning (1959), 13:
‘In spite of the centuries which divide us from the planning achievements of Greece and Rome, the influence of their town building on all subsequent ages, including our own, has been enormous.’
16 K Mannheim, Freedom, Power and Democratic Planning (1951), 126. Mannheim attributes to Rome the ‘originally developed’ concept of property ownership. He believes that the Roman concept of property ‘grants to the owner unlimited use of his property including the right to destroy it, [a right] adopted in legal reforms of the early capitalist era, and [which] has dominated the Western economic system ever since.’
17 Webster and Lai, above n 7, 14. They suggest that cities ‘are systematic concentrations of individuals, each of whom possessing distinct capabilities and who are densely bound together by webs of institutions (informal and formal rules and sanctions).’ This definition aptly reflects conditions in Ancient Roman cities.
‘During the Roman Empire, metallic money acquired conclusively and irreversibly, the form of a standardized small size metallic chattel, issued by the State and stamped by its authority with certain marks and devices.’
19 Webster and Lai, above n 7, 13. Webster and Lai define this spontaneous order as:
‘the order that gives rise to families, households, clubs, firms and markets; to land and housing markets; to urban labour markets; to neighbourhoods within cities; to transport systems that link workers with work places; to cities themselves; and to systems of cities.’
20 Smith, above n 4, 240.
21 Webster and Lai, above n 7, 15. They define the institution of property as follows:
‘The institution of private property – a set of rules governing competition- achieves two significant functions. On the one hand it transforms anarchy into a state of affairs in which the
freedom to the greatest majority’ regardless of status. All that is needed is ‘the freedom for individuals and firms to challenge existing market participants by offering better opportunities than are currently available.’ The lack of access to the necessary information required to plan for the future in such a complex system means that success in planning is a ‘matter of chance.’

Market theorists have a fascination for the spontaneous order that emerges from the apparent chaos of the multitude of individual decisions made by people acting in their own self interest. Under this conceptualisation, by co-operating with others transacting in the market we produce socially beneficial outcomes despite not intending to do so. In the context of land use, market theorists such as Hayek, Friedman and others dating back to Adam Smith, suggest that it is the dynamic of change and not deliberation that determines the form of the city. Market theory suggests that because of the dynamic of market exchanges, the narrative of place is contested regularly by the participants. Adam Smith’s invisible hand guides the outcome of these interactions to bring about socially beneficial spontaneous order to the chaos.

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22 Ibid 180: ‘A market system, however, confers the greatest freedom to the greatest majority in the sense that the status of a person does not decisively dictate how much say he or she has in resource allocation decisions – as is the case with co-operation based on personal relationships. Market-led cities will always be plagued by social problems of alienation, anomie and powerlessness, yet they accommodate the generally peaceful and co-operative co-existence of a huge number of individuals with different characters and ways of life.’


24 Webster and Lai, above n 7, 16: ‘The order that emerges from government plans is therefore capricious, and success in terms of a plan’s stated objectives is a matter of chance.’

25 Smith, above n 4, 240. Writing at the time of the American Revolution in 1776, Smith observed of man: ‘By pursuing his own interest, he frequently promotes that of society more effectually than when he really intends to promote it.’ In Smith’s model, the role of law is minimal. Smith suggests (at 286): ‘Without any intervention of law, therefore, the private interests and passions of men naturally lead them to divide and distribute the stock of every society among all the different employments carried on in it; as nearly as possible in the proportion which is most agreeable to the interests of the whole society.’

26 Webster and Lai, above n 7, 55: ‘Organisation and planning naturally emerge as individuals seek to maximise the value of their property rights and knowledge – in consumption and exchange. Firms, clubs, neighbourhoods and governments emerge to lower the costs of catallactic interaction.’

27 Pennington, above n 5, 726. Pennington argues that Hayek and the ‘Austrian School’:

‘do not assume that individuals are self-interested utility maximisers seeking to optimise a fixed set of preferences. On the contrary, in Hayek’s view, progress is “a process of formation and modification of the human intellect … in which our values and desires continually change” (Hayek, 1960, p40).’ (emphasis in original)

28 Webster and Lai, above n 7, 11. They suggest that under these conditions:
Under market theory, it is accepted that the market needs government to ensure that there are ‘rules’ to regulate competition within the market. The contested intellectual space is the degree and nature of state intervention and whether the people should in fact have power to influence decision-making at either the state or local level. For market theorists, it is not the role of government to impose ‘order by the design of the few.’ Webster and Lai suggest that market-orientated cities are superior to planned cities because ‘cities should not be managed on the erroneous belief that planned order is the best guide to prosperity – or even justice and equity.’ Pennington argues that the ideology of private property, unhindered by government intervention in the private property market, best enables society to creatively adapt to social problems caused by urban density. According to this view, if we let the market spontaneously evolve and if we properly allocate property rights (even to the public goods domain), then spatial order ‘will evolve by subdivision and aggregation of property rights.’ The owner of the property rights

‘Spatial order emerges as individuals and firms seek locations that minimise both travel-related transaction costs and information search costs and that balance these against congestion costs of crowded cities. Public domain order emerges as individuals engage in collective action through governments and other agencies to clarify property rights over jointly consumed goods (externalities, public goods and natural resources) and thereby to reduce the costs of competition, and in the extreme, the costs of anarchy.’

Ibid 53: ‘The lesson is that the market requires the state, in particular the institutional frameworks it creates, in order to operate efficiently.’ Later (at 70) Webster and Lai confirm: ‘As the Monopoly supplier of violence, the state has a fundamental role in creating a legal environment to market-based exchange and economic growth.’

Michael J Jacobs, ‘Sustainability and Community’ (1995) 32(2) Australian Planner 109, 110. Jacobs, who is not a market theorist but an advocate of sustainable development, argues for the retentions of markets but suggests that governments ‘representing the community at large’ use the ‘power of enforcement’ belonging to the state. Through laws and regulations, the state can ensure that uncontrolled markets are ‘constrained’ in such a way that allow producers and consumers make autonomous decisions that promote a sustainable society.

Webster and Lai, above n 7, 25. Significantly, they argue: ‘It was a natural step therefore for architects and engineers who found themselves asked to plan whole towns, to think in terms of physical design and planned order – utopia by physical design. The illusion started to crumble in many western countries as early as the 1960s when it became clear that master plans with their architectural orientation were not effective urban development or management tools in a mixed economy.’

Ibid, 26. They suggest (at 31) that: ‘Modern urbanisation is distinguished from its antecedents, however, by the sophistication of its underlying market exchange systems and more specifically, their capitalist nature.’ The consideration in this chapter suggests otherwise.

Pennington, above n 23, 218. The market does this in two ways: ‘First, the market acts as spontaneous co-ordinating procedure in which the changing ideas and behaviour of individuals and firms are constantly adjusted to one another through the medium of the price system. … Second, the competitive market process acts as an inter-subjective discovery procedure in which contradictory ideas widely dispersed amongst individuals and firms are constantly tested against one another and where successful modes of action are disseminated via a process of emulation (Hayek 1948, 1978).’

Webster and Lai, above n 7, 88: ‘In the spatially equilibrated neo-classical city … households pursue utility gains by moving effortlessly to the city centre or to sources of local public goods. They live at higher density, implying densification and innovation in the way existing property rights are subdivided and new rights allocated.’
will bear most of the transaction costs (success or failure). The resident’s involvement will be to exercise the right of purchase (by acquisition of a subdivided right or by lease). In neighbourhoods where the market has ‘failed’ to provide for the residents, they will exercise the right of ‘exit’ or ‘voice.’

Pennington suggests that there is ‘much greater scope for relying on property rights and market process’ in support of his position that government land use planning has failed to ‘provide an appropriate degree of experimentation’ for urban situations. It can be argued that Roman civilization provides an example of an experiment in market theory outcomes. In ancient Rome, economics and circumstance dictated how towns developed. According to Van Den Bergh, the need to accommodate over a million people within the eight square miles of the imperial urbs at Rome ‘necessitated high-rise building’. Only the rich could live in their own home (or domus). The majority of people lived in rented insulae, large apartments of multi storey construction. On the ground floor were industrial or commercial premises with residential accommodation above. This type of accommodation seems, from the archaeological record, to have been both aesthetically pleasing and economically attractive to the land-owner as

35 Pennington, above note 23, 225: ‘the regulation of land use change needs to be subject to an experimental spontaneous ordering process equivalent to that found in competitive private markets.’ Voice is exercised in the ‘political market’ by participation. Exit is the choice made by citizens choosing to move location either within a jurisdiction or a municipality.


37 Sir Peter Hall, Cities in Civilization (2001), 922. Hall argues to the contrary but only on the basis that Rome ‘was too early’ to be said to be promoting the capitalist system. The analysis in this chapter suggests that Hall is wrong.

38 Leonardo Benevolo, The history of the city (1980), 177: ‘Residential accommodation was built by private entrepreneurs, who were guilty of widespread speculation in both land and housing, a practice which everyone bemoaned from the republican era on. Although the state imposed various rules and regulations, it never succeeded in easing the plight of the vast majority of its citizens. By contrast, the state did intervene adequately to ensure the setting up and smooth running of the city’s public services.’


‘Space in Rome was limited, and it is estimated that the imperial urbs, which covered an area of about eight square miles, had to accommodate approximately 1,200,000 people. In the absence of an efficient transport system, suburban space could not be used to house most of the inhabitants.’

40 Brown and Sherrard, above n 14, 125, citing H Charlton Bradshaw, ‘Restoration of Praeneste,’ (1923) Town Planning Review, 53: ‘By the fourth century, according to statistics, the insulae outnumbered the domus by 25 to 1. … Planned on three or four floors with strict regard to economy … these blocks are very much like a modern block of flats.’
an investment. Surprisingly, even modern social commentators like Farrelly can see the virtue of these arrangements.

3.3 Roman Law

In terms of McAuslan’s typology, Roman law was motivated by the private property ideology. In Lockean terms, property was protected in Roman law by long established and understood legal principles. There existed a system of law which facilitated the creation, recognition, transfer and enforcement of property rights. However, there was no formal planning law. Absent state confiscation for breaches of the law, a landowning citizen enjoyed the security of state protected title. As is discussed in the next section, having an interest in land gave a citizen the entitlement to enforce property rights, even against the state; a necessary precondition to civil society in an urban environment. Land that was not in private hands belonged to the state as res publica or public land. The doctrine of tenure can be sourced to Roman law. Just as was the case in England after the Norman Invasion of 1066, under Roman law territory seized by conquest reverted to the Emperor and formed part of the Imperial Estate.

Britain was conquered in 43AD notionally by the Emperor Claudius following the military success of Aulus Plautius and three legions. Claudius and later emperors could alienate the land of Britain by gift or sale. If it remained part of the Imperial Estate it could be offered for lease to private persons at public auction. This mechanism enabled the development of the conquered territory in a fashion similar to the development of New South Wales following colonisation after 1788. In the case of Roman Britain, land was regularly granted to veterans retiring from the Roman army upon completion of twenty five years of military service. Granting leases of

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41 Van Den Bergh, above n 39, 554. Although Brown and Sherrard, ibid, 125 (citing Bradshaw), suggest to the contrary, indicating that ‘ancient writers complained [of the excessive height] as early as the last century of the republic.’

42 Elizabeth Farrelly, *Blubberland: The Dangers of Happiness* (2008), 189. In Chapter 9 Farrelly suggests a mandated planned urban vision that is strikingly similar to Ancient Rome. She suggests (at 195) that her utopia would see:

‘Outside the city centre, the inner residential neighbourhoods are medium density and medium rise; most are six – and eight – storeyed apartment blocks based largely on the nineteenth century Belgravia model. … Inside, each apartment building is organised around a common staircase. Most have a basement flat, with borrowed light from the street and mews, and one or two storeys of attic flats in the roof. Since access is by walk up, by common stair, the older and less fit favour the ground floor apartments. Others go for the extra view and sunlight of the upper floors. The very wealthy, of course, may own entire buildings, or even install their own solar-powered lifts, while the poor may inhabit the attics.’

the Imperial Estate was a common way to facilitate the exploitation of mines and minerals as it provided income both to the Emperor and the censors who controlled public land on his behalf. It was an effective way to manage the public commons. Indeed, Webster and Lai suggest that it was the ‘switch from private property rights’ that debased large tracts of land in North Africa.

Roman law was dynamic. Its substantial written tradition enabled trained lawyers to understand, interpret and apply settled legal principles enunciated in earlier cases to the case at hand. Zimmermann argues that this tradition was ‘Juristenrecht: it was not laid down in a systematic and comprehensive enactment, but rather was applied and developed by lawyers with great practical experience.’ It was a very sophisticated system of jurisprudence, unlike any other culture in the world of classical history. As Monateri notes, ‘jurisprudence was a national science, because it was controlled by the same men as was political administration.’

Romeo-Britons of the fourth century would have keenly understood the implications of the *pax romana*. Over the previous centuries, the administration of civil society had become specialised and heavily bureaucratised. Wherever Rome went, the system of Roman law followed. The provinces were regulated by the *lex provinciae* a set of statutes common for the provinces. By the fourth century, the office of praetor (or magistrate) had developed a form of equitable jurisdiction which would also have applied in the provinces. As Culp Davis explains,

44 Ibid, 14.
45 Webster and Lai, above n 7, 143:
’Large tracts of North Africa’s arid wastelands were once a breadbasket for the Roman Empire. Their demise followed a switch from private property rights to a common property system of grazing rights’ Citing A Bottomley, ‘The effect of common ownership of land upon resource allocation in Tripolitania’, *Land Economics*, 40, 91-5.
‘The Pax Romana [peace of Rome] established by Augustus, … covered the whole of Europe, Asia Minor, the Levant and North Africa. Roman civilization, and the intricate commercial dealings that that civilization brought about, were regulated by a sophisticated system of private law that was capable of resolving all of the disputes that arise in a complex society.’
50 David A. Thomas, ‘Origins of the Common Law: Part I: The Disappearance of Roman Law from Dark Age Britain’ (1984) 1984 *BYU L.Rev.* 563, 585. In Rome, the assembly of citizens, the comitia, historically only met when summoned by the magistrates and, when assembled, could only vote (and not debate) on the specific matters laid before them. The magistrates were elected in popular assemblies and, once elected, they exercised significant power over the people by declaring the civil law of Rome. These magistrates then took their seats in the Senate after their terms of office expired.
this jurisdiction evolved ‘for the purpose of relieving the rigidities’ of the *ius civile*.

In the provinces, it was the Governor, *legatus Augusti*, who dispensed justice. The Governor was directly responsible to and was appointed by the emperor.

### 3.3.1 Roman Civil Law

Samuel notes that in Roman civil law, the ‘acquisition and keeping of property – of wealth – was not the concern of the state.’ The administration of the civil law, which included: contract, property, mercantile, family and succession; was the domain of the courts and not the state. Roman law recognised the ordinary right of contract to sell land *res aliena*. Actions could be brought against municipal authorities for breaches of property rights. Land was a special category of property known as *res mancipi* in that it could only be transferred by formal means. It was in the law of property and contract, Bodenheimer argues, that the ‘particular genius’ of Roman jurists found its ‘fullest expression.’ Law would not develop to a level of sophistication, in terms of its scale and complexity, until the eighteenth century and the emergence of the British Empire.

Civil law was concerned with things which were *in patrimonio* or *in commercio*. Some things were not capable of being reduced into private possession – *res communes* (belonging to the

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52 Thomas, above n 50, 585. Thomas notes that the extension of Roman influence ‘would have meant an increase of private litigation,’ such that special judicial officers, *legatus iuridicus*, were appointed to assist the Governor by relieving him of some of the legal tasks, especially in connection with the administration of a relatively vast province such as Britain. Where *legatus iuridicus* were appointed, then the Governor exercised an appellate jurisdiction.
53 Samuel, above n 11, 187. Samuel suggests that such rights were part of ‘the natural inheritance of mankind and, consequently, was to be governed by a series of rules which were to be seen as arising from bonds or relationships quite separate from those that flowed between citizen and the state.’
54 Reuven Yaron, ‘Remarks on Consensual Sale (with Special Attention to Pericum Emptoris) Comment’ (2004) 2 *Roman Legal Trad.* 59, 69. The law even recognised a right to contract to sell another person’s property – the limitation being that if the vendor could not get in the title to the land then the vendor would be in breach of the contract and be liable to the purchaser.
55 Wacke, above n 43, 7. There is the recorded example of an action against a municipal authority which leased multi storey premises for use as a cheese factory. The owner of the dwelling in the upper storey brought an action, the *actio negatoria*, to restrain actionable nuisances (by way of smells) emanating from the factory against the municipal authority. The tenant in the upper floor had the legal right to restrain the issuance of smoke into their property from the factory below. The basis for that right was that unless the upper tenant was subject to a *servitude* in the lease, which expressly allowed this impact, the use of the lower property in a manner which allowed the escape of the smoke was contrary to the property law rights enjoyed by the upper residents.
community such as market places, theatres and race courses), res publicae (belonging to the state such as rivers ports and highways) and res universitatum (belonging to mankind such as air, running water and the sea). The law was pronounced by the governor in the courts of law found in the towns and cities of the Empire. Legal disputes were resolved according to a highly refined system of private law which was procedurally akin to the common law with formalised causes of action and the equitable jurisdiction ‘introduced by the authority of a magistrate’. Provided an actionable interest could be identified, a remedy existed. There was even an actione populares whereby a private citizen could take action to protect a public right, but generally, the civil law operated within the sphere of private, not public law.

3.3.2 Administration of Roman Civil Law

Monateri would see the developments of this late Roman period not as the refinement of Roman law but of a culture that incorporated the legal systems of other, arguably more advanced, systems to supplement the defects of its own. But even if that be correct, the Roman legal system nonetheless had reached a level of sophistication that it had the capacity and flexibility to accommodate that necessity. It is unarguable that by the fourth century regular courts had already been in existence for centuries administering a system of written pleading, court administration and judicial execution and enforcement of judgments. True it is that the system was available only to those who could bring themselves within the jurisdiction, but that such a system existed as part of the apparatus of the state was in itself an achievement.

In civil matters, in order to obtain redress against another person, it was necessary to bring an action to enforce a legal right. Citizens enjoyed that privilege and the law protected and enforced property rights. Jurists and forensic advocates were ‘prestigious constituents of Roman society.’ Brundage suggests that Roman citizens relied, just as citizens do today, on the skills in the arts of persuasion to ‘charm, dazzle, cajole, entice, or bamboozle a judge or jury.’ Whilst historically the Lex Cincia of 204 BCE prevented the charging of fees for legal

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58 Yntema, above n 13, 78.
59 Wacke, above n 43, 4.
60 Monateri, above n 48, 541.
61 James A. Brundage, ‘Vultures, Whores, and Hypocrites: Images of Lawyers in Medieval Literature’ (2002) 1 Roman Legal Trad. 56, 59. Brundage suggests that ‘two distinct occupational groups that we would recognise as lawyers – jurists, that is expert legal advisers (iurisperiti, iurisconsulti), and forensic advocates (variously known as orators, patroni causarum, advocate, or causidici) had become accepted, indeed often prestigious, constituents of Roman society.’
representation (on the basis of Roman tradition that those with knowledge of the law should make that knowledge freely available), this impediment was ignored in practice and was replaced in 47CE by Senatusconsultum Claudianum. This Act set a maximum fee of ten thousand sesterces for advocates with those that charged more being liable to prosecution for extortion.\textsuperscript{63}

The Romans thus had a sophisticated legal system which remains the foundation of western legal thought.\textsuperscript{64} In terms of its content and structure, Bodenheim argues that the Roman system of law had successfully imparted ‘a considerable measure of stability to the social system without indulging in undue dogmatism and conceptual rigidity.’\textsuperscript{65} As a system of law, it came close to the ideal. Whilst compiled later in point of time, the size and content of the Justinian Digest (527 – 534 CE) gives some insight into the complexity and detail of Roman law.\textsuperscript{66} When Emperor Justinian directed the digest to be compiled, only a proportion of the known Roman law was codified. The digest compilers reviewed some 1522 books of Roman law compiled over the prior six centuries,\textsuperscript{67} to produce a digest consisting of fifty books divided into titles according to subject.\textsuperscript{68} It was published under the name Corpus Iuris Civilis and combined statute law, annotations and opinions of classical jurists.\textsuperscript{69}

3.4 Roman Planning Law

The suite of property rights available to Roman citizens did not confer a right of participation to citizens to become involved in decisions about the ordering of the town. Citizens had no power expressed in tradition or law to a say in what the town would look like or how it would function. The English socialist Richard Tawney suggested that in densely populated urban communities ‘someone must make the rules and see that they are kept, or life becomes impossible and the

\textsuperscript{63} Ibid, 61. Indeed, Brundage suggests that ‘Roman writers found the greed of lawyers an obvious target for attacks’ as ‘vultures in togas’. Citing Tacitus: ‘Just as bodily sickness gives fees to doctors, so also a diseased legal system enriches lawyers.’ Nothing much has changed some would perhaps suggest?
\textsuperscript{64} Samuel, above n 11, 187.
\textsuperscript{65} Bodenheimer, above n 56, 10.
\textsuperscript{66} Yntema, above n 13, 80.
\textsuperscript{67} Tony Honore, ‘Justinian’s Digest: The Distribution of Authors and Works to the Three Committees’ (2006) 3 Roman Legal Trad. 1, 2.
\textsuperscript{68} Yntema, above n 13, 80.
\textsuperscript{69} Bodenheimer, above n 56, 18.
wheels do not turn. Whilst this applies today, it can be seen from the above that this axiom applied equally to Roman society.

3.4.1 Roman Planning Law

In matters of town planning, Roman towns and cities were designed according to historical precedents, the earliest examples of which are the pattern book of Vitruvius. The design was based on the Imperial city, with a rectangular grid pattern to accommodate ‘the forum, temples theatres baths’ and residential precincts. In the context of development, the power to decide what occurred in a vicus or locality resided either in the government, represented by the army or, once the province was established, in the hands of the governor appointed by the Emperor and the citizens who owned and controlled the land within the town.

Roman civil administration had by the fourth century become highly bureaucratic. Indeed, in contrast to the civilized excellence of the law, Previté-Orton notes that ‘centralization and despotism required the services of an immense, hierarchic bureaucracy’. As Monateri explains:

‘[B]ehind the legal process there was the Patronage, and it is Patronage which really explains the features of Roman Law. Patronage is a social system dividing the

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‘Any society requires some set of collectively binding rules (or laws) in order for the “action-in-common” necessary for it to function, let alone prosper. However, in deciding what these rules will be – or, who should be empowered to decide these rules – members of the Anglo-American societies are forced to confront the existence of a plurality of “conceptions of the good”. This diversity of opinion about the ends towards which each individual should orient his or her life has undermined traditional (or conventional) forms of authority within these societies.’

72 Farrelly, above n 42, 176. Farrelly notes:

‘The earliest pattern books of which evidence remains was a rather dull work of the Roman architect Vitruvius in the first century CE, designed to convey the classical cannons to the ordinary Roman builder. A clutch of Renaissance theorists followed, including Alberti about 1450, Serlio in 1537, Palladio in 1570 and Scamozzi in 1615; all progressively updating Vitruvius and canonising the orders.’


74 Nicholas Aroney, 'Subsidiarity, Federalism and the Best Constitution: Thomas Acquinas on City, Province and Empire' (2007) 26 law and Philosophy 161, 180. In Roman law the neighbourhood was described as the vicus. It was not the village (kômê) of Aristotle. Rather, Aroney suggests (at 184) that it is 'the street or neighbourhood of a medieval town.'

inhabitants into patrons and clients, the former protecting the latter in their social activity.76

Upon conquest the legions would establish a fort. These strongholds, functionally, would be a point from which a service centre would be established to serve the garrison. Often, vici would evolve into a town. Whilst *colonia* were generally towns established by Rome, existing settlements could be recognised as towns by being granted the status of *civitas* capital. Within *colonia* full Roman law applied. Civitas Capitals could retain some aspects of customary law.

Urbanisation created the platform and provided an audience for ostentatious displays of wealth. Roberts argues that ‘the provision of spectacular games was the way for a rich man to bring to bear his wealth to secure political advancement.’77 For those who did not have such wealth, but who could still count themselves as part of the upper class, the other path to success in the imperial service was through legal studies.78

With urban expansion, larger towns could petition Rome to be granted *municipium* or city status. It is where the word municipal derives from. In Celtic Britain it was an artificial institution, introduced by the Romans.79 The size and functionality of a municipium depended upon its administrative purpose. Thomas identifies that Verulamium (St Albans) is the only community in Britain known to have reached that status, but he also suggests that London and probably Leicester also acquired that status.80 By the fourth century CE, London was a well laid out, walled Roman city. It was the financial and administrative centre of Britain, eclipsing Colchester. Coins were minted at the London mint and the city acted as the hub of civil administration, including the sophisticated system of private law which had evolved over centuries.81 Within its walls lived Roman citizens and slaves together with assorted skilled artisans employed in the industrial enterprises serving the city. By this time, these people were living in ordered cities organised around Cathedrals, Courts, markets, industrial enterprises and facilities common to other Roman cities.82 To the north, in Northumbria, York was the centre of

76 Monateri, above n 48, 545. Where patronage prevails as the dominant feature of a governmental system, administrative decision-making becomes a mere cipher for the dispensing of largess.
77 Roberts, above n 73, 68.
78 Previté-Orton, above n 75, 26. Previté-Orton suggests that: ‘a successful pleader might rise in the imperial service and become a governor or a minister. Lawyers still shared with soldiers the government of the Roman world.’
81 Emmett, above n 49, 69.
military organisation for the whole of Britain. Within Roman Britain, smaller cities/towns had emerged over the centuries located along the Roman road system, usually at a distance of about a day's travel from each other. These centres catered for the commerce of the region by being market centres, accommodating travellers in inns, the faithful in churches and the public in civic facilities.  

The urbanisation of Britain then was limited but geographically extensive. Only a small proportion of the overall population lived in a town. Thomas, citing Frere, suggests that only 15% of the population lived in circumstances which exposed them to strong Roman influences. Provincial areas such as Britain were, by the fourth century, largely autonomous economic regions. Britain, unlike other Roman provinces outside of Britain, retained the sense of a military garrison. Celtic society continued within Britain, but the military presence of Rome subdued its tendency to inter-tribal warfare. Instead, commerce flourished between Roman and Celtic people, providing an economic basis for agriculture and trade.

3.4.2 Planning Law in Action

The Roman civilization of the third century accommodated the ‘greatest concentration of humanity ever known in the western world.’ That mass of humanity posed the same sort of questions about urban living posed today, how to regulate the interactions of people within this living organism? In the Roman civilization, these interactions were regulated by property laws.

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83 Ibid, 32.
84 Thomas, above n 50, 581.
85 Previté-Orton, above n 75, 21.
86 Brown and Sherrard, above n 15, 11, suggest that in towns like Chester, the town was the ‘crystallisation’ of the castrum (or defensive position):
   ‘What more natural than that a Roman general, having selected a favourable strategic site for winter quarters, would, in cases where the location demanded permanent settlement, lay out the town on the model of the military camp which first stood on the site, surmounting the fosse with stout defensive walls and replacing the tents with buildings of brick and stone.’
87 Benevolo, above n 38, 176.
   ‘Although they have proven to be humanity’s engines of creativity, wealth creation and economic growth, cities have also been the source of much pollution and disease. Rapid urbanization and accelerating socioeconomic development have generated global problems from climate change and its environmental impacts to incipient crises in food, energy and water availability, public health, financial markets and the global economy.’
In the absence of ‘planning law’, Hall identifies how under the Roman system the ‘initiative’ had to be taken by some ‘interested party.’\(^8^9\) In the example of the action against the municipal authority referred to above,\(^9^0\) the owner of the dwelling in the upper storey had to commence the proceedings to restrain the authority. But the existence of the right of citizens to enforce such legal rights did force municipal authorities to make what we might now term as ‘planning decisions’ under the common law. In Rome, an area of the 14\(^{th}\) region \textit{trans tiberium} was set aside from other residential land and assigned to the tanners to protect up-market dwellings from foul smells associated with that industrial activity.\(^9^1\) City amenity was also protected. \textit{Amoenitis} refers to the embellishment of the townscape. Statues erected for amoenitis, for the adornment of the town, were not allowed to be taken down by anyone. The public had a right to enforce amenity.\(^9^2\) A very early example of the right now recognised in the EP&A Act which allows any person to remedy or restrain a breach of the Act.\(^9^3\)

Just as amenity is important today, it was important in Roman times. Even in rural areas, the reach of the law extended to protect purely aesthetic values. A lessee of land for usufructuary purposes could invoke the law to protect their right to use the land for aesthetic purposes coincidental with the exercise of their property right. Roman law recognised a lessee’s right to relax and recuperate so as to enjoy the land in its natural state. Even though the lessee’s usufructuary right derived no monetary interest in this pursuit of this aesthetic purpose, the law protected the amenity right attaching to the property right flowing from the lease.\(^9^4\) Similarly, the person who had the right of dwelling or \textit{habitation} on an estate enjoyed rights protected by law to go riding and to be carried about on the estate outside the area of the dwelling.\(^9^5\)

3.4.3 Monuments before the Fall

Roberts hypothesises that we cannot imagine ‘just how unprecedentedly splendid much of the empire must have looked.’\(^9^6\) As Rome was an urban civilization, much of this magnificence was expressed in built form in the towns and cities. Millions of people occupied these towns and

\(^8^9\) Hall, above n 37, 627. As Hall notes, from the time of the Republic, Rome did make building regulations. Enforcement was the problem, ‘for there seems to have been no requirement to notify the authorities … Since there was no mechanism to require planning consent, any initiative had to be taken by some interested party.’

\(^9^0\) Above n 55

\(^9^1\) Wacke, above n 43, 9.

\(^9^2\) Ibid 23.

\(^9^3\) See EP&A Act, s123 (the open standing provision).

\(^9^4\) Wacke, above n 43, 21.

\(^9^5\) Ibid.

\(^9^6\) Roberts, above n 73, 68.
cities across the empire, but there was no specific planning law developed either by statute or by the courts. Aside from the law of contract and nuisance, the private property ideology was in full play.

If the future is one that is without planning laws, then we must also consider the potential social consequences. The Roman poor lived in the upper storeys and the wealthy closer to the ground. It is likely that the itinerant and visitors were accommodated in between. In contrast to utopic visions, the urban poor were visible and numerous. As Van Den Bergh suggests:

‘The really destitute lived in shacks, in huts erected on top of or against public buildings, which were regularly demolished by city officials, in tombs and public lavatories. These were often regarded as a fire hazard by the authorities and torn down, but were also sometimes allowed to remain if they were not considered an obstruction. In such cases the inhabitants were even charged rent.’

In a society ruled by Adam Smith’s unconscious invisible hand, there may be a social price to be paid for allowing the market to determine outcomes.

### 3.5 Lessons from Rome

Samuel is of the view that ‘Roman jurisprudence gives an excellent insight into modern political and ideological structures.’ He also makes the point that ‘Roman jurists had provided an ideal conceptual framework for the industrial revolution; and a conceptual framework which had the great advantage of apparently locating the whole of the industrial and economic basis of society beyond the realm of politics.’ Whilst this may be arguable, as a model for analysis, the exercise of comparison is useful.

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97 Van Den Bergh, above n 39, 554.
98 Brown and Sherrard, above n 15, 13 suggest that ‘little attention was paid to the living conditions of the bulk of the citizens.’
99 Van Den Bergh, above n 39, 556.
100 Previté-Orton, above n 75, 20-21, suggests that in Roman Britain:
   ‘The Imperial government was provoked to supervise municipal administration more and more, and to place the towns in leading-strings. Town notables, as town autonomy vanished, found they had become subordinate implements of the imperial bureaucracy, and the life went out of their public functions, which grew disagreeable, more profitless and more oppressive.’
   He also argues (21) that it was the economic decline of the later empire that was a ‘factor in [the] moral paralysis of its citizens.’
101 Samuel, above n 11, 209.
102 Ibid, 193.
Whilst theoretically Roman citizens were entitled to enjoy the peace and order of the Pax Romana, it was only through the aggregation of power and influence that the voice of only some of the people could be heard in civic matters. While Previté-Orton extols the virtues of the system of Roman law saying that it was a ‘common possession of the citizens, binding the Empire together by its civilized excellence,’ it was not so ideal for all citizens. The people were not participants in the civil affairs of governance; they were subjects under the law.

As in Athenian society before it, participation in civil society in Roman times was restricted to Roman citizens. However, unlike Athenian society, Roman citizens, by the time of the fourth century, no longer participated in the affairs of Government. Roman citizens had become, as Hobbes was later to identify, a society under the dominion of a forceful sovereign. Monterari suggests that the government of Rome was in truth an ‘autocracy tempered by legally permanent revolution.’ Even amongst Roman citizens, there was no equality before the law because of the reliance on power and patronage. Citizens in the lower castes: lesser landowners; tradesmen and traders in the towns and cities; peasant free-holder in the regions, had to be ‘chained to their hereditary tasks so as to support the overladen State and provide it with funds and food to carry on.

Roman citizens had no legal mechanism to withdraw their consent to be governed other than the extra-judicial act of revolution or assassination. The public was simply subjugated by the law to the needs of the state. Machiavelli recognised the efficiency of this state of affairs. The Roman republic ended with Augustus in 27 BCE. The Imperium continued afterwards for some four hundred years. Socially, Imperial Rome reflected the structure of England in the late

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103 Previté-Orton, above n 75, 32.
104 De Burgh, above n 8, 272; 282. ‘The city proletariat, it is true, was shorn of its legislative powers, and the assemblies of the people degenerated into a farce’ …[282] ‘For the first and only time in history, civilized mankind was incorporated into a single state, and that state a military despotism.’
105 J. Uhr, Deliberative democracy in Australia: the changing place of parliament (1998), 44, suggests that Hobbes ‘is the philosophical face of modern liberalism,’ as opposed to Locke who is the ‘political face’.
106 Monterari, above n 48, 532.
107 Ibid 543.
108 Previté-Orton, above n 75, 24.
109 In contrast, John Locke, Two Treatises of Government (1821), 355, would suggest that these actions would be lawful as ‘no government can have a right to obedience from people who have not freely consented to it.’
110 Cited in Uhr, above n 105, 42. Machiavelli’s interpretation of ancient civil liberty, suggested that: ‘[l]iberty is maximised where political corruption is minimised and the Roman example shows the importance for a well-ordered republic of a “constitution regulating its government or rather its form of government” through regulation of the due power and authority “of the people, the senate, the Tribunes … the consuls, the method of applying for and of appointing to magisterial posts, and it legislative procedure.”’
medieval period up to the Tudor period. The Roman civilization is therefore a classic example of state tyranny under the rule of law. It demonstrates the lesson that even with civilization, extended peace internally and a market economy, society can still fail of its promise.\textsuperscript{111} Despite ideal market conditions, the ideology of property was not able to deliver an urban environment free from the ills of social distress and degradation. Yntema describes the late Roman period as the epilogue.\textsuperscript{112} As succinctly summarised by Previté-Orton, Roman civilization was at this time the ‘senility of a civilization and its inducements to action.’\textsuperscript{113} Whilst it was a time of ‘private munificence and municipal extravagance … it was largely unproductive expenditure’ by the privileged few.\textsuperscript{114} As Wieacker notes, it was the period of ‘Byzantine absolutism which began with Constantine the Great.’\textsuperscript{115}

In terms of land use planning, Roman Britain enjoyed the benefits that flowed from colonisation. The Empire had a sophisticated urbanised culture that lived in cities and towns, some of which had been established for hundreds of years.\textsuperscript{116} Roman civilization exhibited high culture, art and literature. Roman engineering was brilliant.\textsuperscript{117} It’s built urban form magnificent, though it’s housing standards may not have met the standards of its public buildings.\textsuperscript{118} Rome invented the model of pre-planned towns and exported the concept throughout the Roman Empire.\textsuperscript{119} With the Roman occupation of Britain came roads, towns and civil administration, in short, civilization and urbanization.\textsuperscript{120} But these benefits were not enough to sustain the cities of the Empire.

\textsuperscript{111} J. Keane, \textit{The Life and Death of Democracy} (2009), 865, attributes to Deng Xiaoping the following insightful comment on governance:

‘in a good political system, even men who are evil can be stopped from doing evil. In a bad system, things are worse: evil flourishes and good men are prevented from doing good, and may well be forced to do evil.’

\textsuperscript{112} Yntema, above n 13, 82: ‘the bureaucratic period which extended from Diocletian to Justinian.’

\textsuperscript{113} Previté-Orton, above n 75, 20.

\textsuperscript{114} Ibid.

\textsuperscript{115} Franz Wieacker, 'Importance of Roman Law for Western Civilization and Western Legal Thought,' \textit{(1981) 4 B. C. Int'l & Comp. L. Rev.} 257, 269.

\textsuperscript{116} As Roberts, above n 73, 68, observes, Roman cities ‘stood out like islands of Graeco-Roman culture in the aboriginal countrysides.’

\textsuperscript{117} Brown and Sherrard, above n 15, 12-13:

‘On the engineering side their aqueducts are still unsurpassed, while their roads were famous both for constructions and choice of route … Their large houses and \textit{thermae} show how advanced the Roman heating engineers were, and their town drainage undertakings were formidable, even judged by modern standards. Many fine Roman bridges, spanning turbulent rivers, still stand firm against the ravages of time.’

\textsuperscript{118} Ibid 13. ‘In Rome and other cities, housing congestion was acute and standards were low in other respects.’

\textsuperscript{119} Roberts, above n 73, 68. Roberts suggests that Roman society was a ‘civilization of cities’ of ‘remarkable uniformity. Each had its forum, temples, theatre, baths, whether added to old cities, or built as part of the basic plan of those which Rome refounded.’

\textsuperscript{120} Philip Cox, ‘Is there a uniquely Australian approach to urban design?’ (1995) (17) \textit{Urban Futures (Canberra)} 20. Cox suggests that:
Citizenship alone, without participation in government, does nothing to relieve the burden of subjugation. If citizens are rendered mere consumers, then the exit option is the most attractive one, provided it is available. Free subjects were vacating Roman cities and towns. Thomas notes that ‘a general decline in town life had set in by the middle of the fourth century.’ Market theorists would correctly point to the burdens of bureaucracy and taxation as a root cause. From the third and fourth centuries, successive Emperors had been forced to resort to making law through constitutions to bolster the finances of the empire and to ensure obedience to the state. Under the burden of an unequal system of taxation, which Roberts says made increasing demands on dwindling resources, the utility of citizenship was questioned by the citizenry.

The real point is that even after four hundred years of capitalism, the social outcomes postulated under market theory did not eventuate. The market kept repeating its cycles. What destroyed Roman civilization was the inability of the society to provide a measure of the Aristotelian ‘good life’ for the majority of the people. Perhaps this was because the Romans, unlike the Athenians, left the polis to the operation of the market?

In Roman society, the curiales, the tax collectors, had become a caste ‘as hopeless as any in history.’ Diocletian had been forced to make it a hereditary burden passed down from father to son. By the fourth century, the middle class had disappeared. As will be seen in the next chapter, it is from the middle class that the pressure for rights of participation emerges.

Bodenheimer goes so far as to suggest that by the fourth century ‘private ownership of land and...

‘British town planning can trace its ancestry at least to the Roman castrum and even beyond to early mystical Druid cultures and the placement of geometric architectural form on the landscape for religious practice and ceremony.’

121 Thomas, above n 50, 584.
122 Bodenheimer, above n 56, 11.
123 Roberts, above n 73, 80.
124 Hall, above n 37, 625-632. Hall suggests that:
(625) [I]Indeed, like other glorious imperial cities … it was in effect a sham. Behind the monuments, for the great majority of the city’s inhabitants life was squalid: not only for the poor, but also for a large segment of the middle class.
(628) [A]s time went on, if anything matters got worse: in desperation, the state trusted to contractors to meet the housing problem, allowing them to disregard the laws and to run up flimsy timber blocks of enormous height in narrow streets intended for single storey buildings.’
125 Ibid 37. Hall contrasts Athenian society where ‘no one group could have a monopoly on power.’

Citing Aristotle in Politics, the polis ‘comes into existence for the sake of mere life, but exists for the sake of the good life.’ Even if not all attended the assembly, the citizens had the right to attend and vote.

business enterprises was extensively replaced by governmental ownership.\(^{128}\) As Previté-Orton notes, Roman citizens lived ‘[l]ike beasts at the water-wheel, they plodded a dreary round to haul up the taxes needed by their rulers.’\(^{129}\)

It was in the towns that the impact of this malaise was perhaps the greatest. Without an operative economic function, a town or city was a ‘luxury only maintainable in times of prosperity’.\(^{130}\) The evidence of significant Roman cities and towns throughout Britain is testament to the fact that civil society in Britain was administered by Roman law.\(^{131}\) In Roman Britain, excavations of Roman remains illustrate how towns designed and laid out for growth in the first and second century were never fully occupied.\(^{132}\) Despite two centuries of relative peace and civilization from the second century, there is no evidence of population growth.\(^{133}\)

By the fourth century, the intrusion of the state into the economic affairs of the people had, according to Bodenheimer, created ‘a system resembling state socialism’ in that the economy had been ‘converted into a state-controlled and planned economy’.\(^{134}\) As citizens in these urban areas realised that the demands made of them to pay for the administration of the civilisation ‘grew every decade more disagreeable, more profitless and more oppressive’,\(^{135}\) they chose to flee to the country.\(^{136}\) Churchill describes these clusters as the ‘efflorescence of Rome.’\(^{137}\) It was in the regions of Roman civilization that the beginnings of the medieval polity would be

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129 Previté-Orton, above n 75, 20.

130 Ibid.

131 Thomas, above n 50, 579. Thomas details, in an extensive summary of the military activities of Roman troops in Britain, centuries of conflict suggesting to him that ‘romanization must not have set in as deeply in Britain generally as it did in other provinces;’ due no doubt to the unsettled nature of the occupation of Britain as recorded by him. But there is no doubting that the impact of Roman civilization in Britain was pervasive.

132 Roberts, above n 73, 80: ‘As taxes went up, more and more people left the towns and sought to live self-sufficiently in the country to avoid them.’


134 Bodenheimer, above n 56, 20.

135 Previté-Orton, above n 75, 20.

136 Ibid 22-24. The class of coloni ‘were the descendants of pre-Roman serfs.’ Previté-Orton suggests that to live as a concealed colonus in such an estate with all its uncertainty was preferable to the miseries of being legally tethered to their city/town and caste. The fact that some of these landed estates yielded an income of ‘fabulous proportions’ would explain the attraction of such an exile life.

137 Churchill, above n 133, 31. These landed estates were described by Churchill as extending no further north than Yorkshire or west of the Glamorgan sea-plain. There were an extensive number of Roman villas (over 500), each one virtually taking refuge from Rome. In each villa, the pattern of life would assiduously follow Roman traditions, the epitome of civilization. But the people were disconnected from the general society.
established.\textsuperscript{138} Churchill pictures life in Roman Britain in idyllic terms saying that in Roman Britannia, ‘there was law; there was order; there was peace; there was warmth; there was food, and long-established custom of life.’\textsuperscript{139} The historical evidence suggests to the contrary, in that the general mass of people rejected this utopia. Roman civilization had a functioning system of law, but that was not enough to provide an incentive to participate in the economics of the city.

3.6 Conclusion

Whilst Roman society ultimately failed due to the burden of bureaucracy and taxation, Roman civilization existed for many centuries before that under market conditions. The analysis in this chapter suggests that in order for the people to have the voice option, it requires the creation of a system which allows participation in order that that voice may be expressed.\textsuperscript{140} Participatory mechanisms are necessary to balance the unconscious impacts of the market in operation.

After the fall of Rome in the fifth century there was a new struggle between the Anglo-Saxon common law and the Danelaw. It was during these ‘dark ages’ that the people ideated a form of participation in governance.\textsuperscript{141} Violence had obliterated civilization but tribalism would foster a form of participation in civil affairs. England would be organised into shires and hundreds. The concept of one people, not a subjugated people, began to emerge. It was a necessary step towards the ideation of the people having the sovereign right to govern.

The primary lesson of Roman history is that the law is a function of the power of the state. Rome was a state where there was citizenship without participation. These were the conditions for despotic state rule. The architecture of the classic Roman period suggests that in terms of built form, the private property ideology can produce outstanding results.\textsuperscript{142} Rome is

\begin{itemize}
\item \textsuperscript{138} Cahill, above n 126, 26-27. The signs of which were a lord in the manor, a titled, landed estate, operating as an autonomous economic unit having skilled artisans (freedman), serfs (colonus) bound to the land and slaves.
\item \textsuperscript{139} Churchill, above n 133, 28.
\item \textsuperscript{140} Gleeson and Low, above n 70, 153. As Gleeson and Low note: ‘deliberative planning assumes that there are configurations of interest and voice which should be included in the planning process. But how those configurations are to be found is problematic and the question can only be answered in practical situations.’ As will be seen in the next chapter, to have a voice means a voice with power.
\item \textsuperscript{141} Previté-Orton above n 75, 401. Previté-Orton describes the pre-Norman institution of the Witan, the council the King consulted before passing laws to ensure they had the assent of the representatives of the people.
\item \textsuperscript{142} As Farrelly, above n 42, 177, suggests: the ‘link between beauty and tyranny is not just happenstance. It’s directly causal.’
\end{itemize}
remembered for the magnificence of its built form. On one view, this is how grand our cities could be if we empowered a ‘committee of experts’ to guide the government as to the best urban form for our cities. Under despotic conditions, the state has power to enforce its will on the people. Monuments may be the legacy of such a state.

As will be seen in chapter 4, planning law facilitates the strategy of the state. It legitimates the policy of government. In democratic theory, what legitimates the policy of the government is whether it is a government of the people. By definition, it is suggested that to be a government of the people, the people must have power over the government. By extension of this argument, if land use planning is to subserve the people, then the people will have to have power over decisions about the nature of development in the neighbourhood. The historical analysis in this chapter has shown that the attainment of a functioning system of law, even one which assiduously protects property rights, does not guarantee a functional social system. Where law

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143 The Mayor of Byron Shire council, Jan Barham, made an interesting comment to the Standing Committee, Standing Committee on State Development, 'Report 34: New South Wales Planning Framework' (NSW Legislative Council December 2009), 48:

'It would be a fabulous exercise to get a group of experts to advise on a contemporary planning system that incorporates all the constraints and land use issues into one overarching model and then some subset sort of arrangement ... There are better minds than ours that could address it, particularly some of the legal experts, who have been in court for the last 30 years challenging all this. To send them away with the task of writing the best possible thing for New South Wales would be an interesting exercise.'

However, there is an opposing view. As William M Rohe and Lauren B Gates, Planning with Neighbourhoods (1985), 55 note:

'Roszak (1973) suggests that a reliance on expert knowledge leads to a disintegration of the urban community because it robs citizens of an important reason to come together and work to solve problems in the cooperative spirit that forms community solidarity. Moreover, traditional public planning cannot which relies on experts incorporate the values and spirit of the community.'

144 As Farrelly, above n 42, 26, observes:

'From Mykonos to Paris, beautiful, traditional, towns – beautiful enough to still draw tourists centuries later – were produced under conditions we would consider intolerably oppressive, with little or no personal choice on the part of builder, architect or user as to material style, colour or decoration. Beauty arose not despite the oppression but because of it.'

145 Brown and Sherrard, above n 15, 13:

'These ancient builders demonstrated principles of civic design which often hold good today. Emphasis, however, was laid on architectural magnificence and engineering skill, and little attention was paid to the living conditions of the bulk of the citizens. In Rome and in other cities, housing congestion was acute and standards were low in other respects.'

146 Fran Tonkiss, Space, the City and Social Theory (2005), 60. Tonkiss suggests:

'Power can be a difficult phenomenon to observe but it gives itself away in space. One of the most visible ways of exercising power, after all, is to occupy or to control space; architecture, meanwhile, makes power legible in material forms.'

147 Michael E Smith, 'Form and Meaning in the Earliest Cities: A New Approach to Ancient Urban Planning' (2007) 6(1) Journal of Planning History, 3, 36. Interestingly, Smith points out that modern research is tending to suggest that in relation to monumental building, the labour was, in fact, often voluntary – corvée labour. He suggests that ‘people developed a sense of identity with their city and ruler through their participation’ and that the rulers obtained ‘political legitimation and support from their subjects.’ Perhaps we need to see this sort of participation in a council’s programme of works?
exists for the sole purpose of protecting property rights, McAuslan’s private property ideology, the opportunity for despotic state rule and the subjugation of the people exists.\textsuperscript{148}

Locke was wrong when he suggested that \textit{wherever law ends, tyranny begins}.\textsuperscript{149} As Nelson Mandela notes, the rule of law is not a sword of justice but ‘a tool used by the ruling class to shape society in a way favourable to itself.’\textsuperscript{150} Tyranny begins when those with power to make law abuse the privilege afforded to them.\textsuperscript{151} Democracy begins when the people have the right to participate in their governance. In the next chapter the struggle for that right is examined.

\begin{itemize}
\item \textsuperscript{148} As De Berg, above n 87, 317 notes:
\lq[T]here was that within the empire which foreshadowed its dissolution. A bureaucratic despotism, for all its integrity and its enlightenment, could evoke no living response from the subject-peoples who reaped no benefits. The spirit of man craves not comfort, but liberty, not economic stability or equitable administration, but the right, at the cost of infinite toil and tribulation, to work out its own salvation. Its desire in all ages is not for happiness, but for life. In the colossal structure of Roman government men were conscious of only crushing burden, and awaited in dumb passivity the hour of their deliverance. They were pawns in the hand of Fate, transcendent and inexorable, that brooded over the fortunes of the world. Rome was impotent, for all her majesty and power, to reinvigorate the peoples beneath her sway.’\textsuperscript{1}

\item \textsuperscript{149} Locke, above n 109, 362 (emphasis in original).

\item \textsuperscript{150} Nelson Mandela, \textit{Long Walk to Freedom} (1994), 309.

\item \textsuperscript{151} As William Pitt said in 1770: ‘Unlimited power is apt to corrupt the minds of those who possess it; and this I know, my lords: that where law ends, tyranny begins.’ UK Parliament, \textit{Parliamentary Debates}, House of Lords, 9 January, 1770, Lords Hansard, on the case of John Wilkes, (William Pitt 1st Earl of Chatham).
\end{itemize}
Chapter 4: The Long Struggle for the right of Public Participation

‘Property and law were born together, and would die together. Before the laws property did not exist: take away the laws, and property will be no more.’

Jeremy Bentham¹

‘I went from having an idealistic view of the law as a sword of justice to a perception of the law as a tool used by the ruling class to shape society in a way favourable to itself.

Nelson Mandela²

4.1 Introduction

This Chapter examines the development of participation in the form of parliamentary power in England over the course of the second millennium. In this time England would experience first a religious revolution, then a civil war and then the industrial revolution. English society would move from a traditional social schema based on rigid class distinctions to a cooperative social schema based on democratic principles. The people would rise to take power from the sovereign only to find that the political elite would seek to steadfastly hold onto power.³ Through this process, the ideology of parliament as the instrument of managed social change would emerge.

The political revolutions of the seventeenth century would shift the power of governance from the sovereign to the people, expressed in the will of the House of Commons. McAuslan’s public interest ideology would be born out of the struggle of the people to have a say in the affairs of

³ John Hirst, Looking for Australia (2010), 227-8, references Robert Menzies, the key-note speaker at the Empire Parliamentary Association meeting in 1935, saying of this period of struggle:

‘The growth of parliament is in truth the growth of the British people; self-government here is no academic theory, but the dynamic power moving through 800 years of national history. … It is the one system yet devised which ensures the liberty of the subject by promoting the rule of law which subjects themselves make, and to which everyone, prime minister or tramp, must render allegiance.’
government. The narrative of this chapter charts the evolution of British society from feudalism to capitalism. It would take almost a millennium for a civic culture, a new social compact,⁴ to develop in England to the point where the law could articulate McAuslan’s public interest ideology in the expression of planning laws.

The industrial revolution would be the impetus for parliament to use the law as an instrument to favour the interests of the new landed elite. Laws such as the Enclosure Acts would transform the nature of land ownership; parliament would override common law protections to facilitate economic development.⁵ Through the private bill procedure discussed in this chapter,⁶ parliament would grant new rights over land. Planning law would be born out of the economic imperative of the industrial revolution. Through law, a new civil order would emerge.⁷

4.2 The Norman Invasion

By the seventh century CE, the country of Britain was arranged internally into shires (already administered by an ‘alderman’), which were made up of hundreds comprising the vil or towns, corresponding to a parish.⁸ Larger towns were known as burhs, or as we know them, boroughs.⁹ Isin suggests that only a few English cities had attained the status of liber burgus or free city by

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⁴L. M. Edwards, ‘Ideational social capital and the civic culture: Extricating Putnam's legacy from the social capital debates’ (2009) 23 Social Epistemology 125, 137. Civic engagement is central to the development of a civic compact. As Edwards explains:

‘People come together to address an issue of common concern. They agree to coordinate their behaviour and govern the compact through just rules. The maintenance of cooperation rests on maintaining the legitimacy of the rules.’

⁵Tony Moore, Death or Liberty (2010), 167, suggests that ‘the escalating extraction of rent during and after the Napoleonic Wars exposed enclosure as a ‘plain enough case of class robbery, played according to fair rules of property and law laid down by a Parliament of property-owners and lawyers.’

⁶See Section 4.7 below.

⁷John Sheehan and Garrick Small, 'Aqua Nullius' (Paper presented at the 13th Pacific-Rim Real Estate Society Conference, Freemantle, Western Australia, 21 to 24 January 2007), 4. Sheehan and Garrick argue that:

‘The sovereignty of the state over land within its domain is usually the beginning of civil order. Wars are fought to extend political control over land; they are spatially aligned and the resulting legal system has been poetically referred to as the laws of the land’.

⁸J. Fleming, Barbarism to Verdict (1994), 12. A vil was a township and ‘was close in nature to a parish. Larger towns were called Boroughs where business could be transacted.’

⁹Engin Fahri Isin, Cities without Citizens (1992), 196. Burhs embodied … a stronghold for the king and a place of administration (i.e. the royal court jurisdiction and a jurisdiction of taxation). Burhs, were ‘a new type of institution whose members were not bound together by feudal, proprietary or agricultural ties; in the boroughs a new group of people was formed whose principle of cohesion was a new form of land tenure, which allowed alienable plots.’
the time of the Norman invasion. The regularity of foreign incursions into England during the Dark Ages had probably inhibited the growth of truly independent cities in the European tradition.

Whilst territorial wars might change allegiances, depending upon which force had prevailed, the administrative arrangements within the shires of England became more settled as a commonality of administrative principles across the kingdoms emerged. With this commonality emerged the concept of one people. It would be facilitated by the spread of literacy in the upper classes and the clergy. Unlike developments in the Continent occurring at the same time, ‘laws, documents and the like were written in the native tongue until the Norman conquest.’ Each member of the community had a common but identified right to use unenclosed strips of land. These strips were scattered amongst those used by his neighbour so that all might have a share of the good and the bad land. These plots were clearly marked. The villagers also had rights in common to use the waste lands which surrounded the village. Windeyer reminds us of an ancient warning: ‘cursed is he that removeth his neighbour’s land mark.’

Fleming argues that within the territory of the lord’s manor, the lord presided over his court. The lord would determine disputes between villagers and tenants. In order to eke out a livelihood, the tenant bound themselves to the lord with solemn obligations and was owed in return protection. Within the vil, the tenant had recourse to common land and community assets. Windeyer suggests that by the time of the Norman invasion, many of ‘gentle’ birth and freemen had bound themselves to the lord and they were not at liberty to go outside the vil without leave of the lord. In contrast, those living in boroughs and larger towns enjoyed a measure of greater personal freedom. The trade-off was a life lived in higher spatial density. Towns and cities rarely had large open spaces (except the town square in front of the

10 Ibid 21.
11 WJV Windeyer, Lectures on Legal History (1938), 7. As Windeyer notes: ‘by the year 800 Wessex had gained the hegemony, and the rulers of Wessex were destined to become kings of England.’
12 CW. Previté-Orton, The Shorter Cambridge Medieval History (1955), 179. He notes that ‘Even English poems and lays, religious and secular were written down.’
13 Windeyer, above n 11, 8. Windeyer suggests that the curse had ‘real meaning for English villagers’ for centuries.
14 Flemming, above n 8, 10.
15 Windeyer, above n 11, 22. Windeyer notes (at 7) that there was a distinction, sourced to Germanic traditions, ‘between those of gentle birth and common folk, between the eorl or gesith, on the one hand, and the ceorl, churl, on the other.’
16 Isin, above n 9, 19: ‘the recognition of a city or borough involved the granting of mercantile and jurisdictional privileges to its citizens (burgesses) in return for a certain amount of tax (tallage). … by the end of the twelfth century charters were widespread.’
Cathedral). \(^{17}\) Towns and cities conformed to a regular pattern usually located about a day’s journey along the old Roman highways. As Russell notes, ‘the distribution largely followed Zipf’s theory of the economy of time and movement.’ \(^{18}\)

The Norman invasion would bring feudalism and order through control over land. \(^{19}\) The peace which followed the Norman Conquest was due in no small measure to administrative reforms introduced to the realm by William and his successors. \(^{20}\) The reforms created servile conditions. \(^{21}\) The concept of executive government can be dated back to William’s Curia Regis or Royal Court. Laws or edicts made by the King in Council had universal application within the conquered territory. \(^{22}\) Municipal custom yielded to these laws, but otherwise, so long as local customary laws did not offend against the principle of ultimate Royal rights, the relations between people were in large measure governed by customary law, that is, the common law. \(^{23}\) As Bodenheimer notes, this common law tradition draws upon Roman law. \(^{24}\)

\(^{17}\) JC Russell, 'Population in Europe 500-1500' in CM Cipolla (ed), The Fontana Economic History of Europe (1973) vol 1, 28. ‘The average population density of cities was about 100-200 persons to the hectare.’

\(^{18}\) Ibid, 29-30.

\(^{19}\) Christopher Webster and Lawrence Wai-Chung Lai, Property Rights, planning and markets: managing spontaneous cities (2003), 71-2: ‘The establishment of a new regime is often followed by land surveys to define or redefine landed properties, as in the case of the eleventh century Norman conquest of Britain.’ … ‘Feudalism consolidated rights to land, labour and capital in the hands of feudal lords who supplied protection, shelter and land and made decentralised production decisions on their patch.’

\(^{20}\) Flemming, above n 8, 21: ‘What the Norman Monarchy introduced to England then, was management of a monumental magnitude.’

\(^{21}\) Richard A Posner, 'Blackstone and Bentham' (1976) 19 Journal of Law and Economics 569, 584, cites Blackstone’s Commentaries on the Laws of England, vol 4, 420: ‘so complete and well-concerted a scheme of servility, it has been the work of generations for our ancestors, to redeem themselves and their posterity into that state of liberty which we now enjoy: … a gradual restoration of that ancient constitution, whereof our Saxon forefathers had been unjustly deprived, partly by the policy, and partly by the force of the Norman.’

\(^{22}\) Shael Herman, 'Legacy and Legend: The Continuity of Roman and English Regulation of the Jews Symposium: Relationships Among Roman Law, Common Law, and Civil Law' (1991) 66 Tul. L. Rev. 1781, 1799. Herman notes that from the time of the Norman Conquest ‘much Roman law had reached England in canonical texts, as well as through the contributions of Vacarius and other civilians.’

\(^{23}\) A concept thoughtfully summed up by du Parcq LJ in Smith v Harris (1939) 3 All ER 960: ‘The common law of this country has been built up, not by the writings of logicians or learned jurists, but by the summings-up of Judges of experience to juries of plain men, not usually students of logic not accustomed to subtle reasoning, but endowed.… as a general rule, with a great common sense and if argument has to be put in terms which only a school-man could understand, then I am always very doubtful whether it can possibly be expressing the common law.’

\(^{24}\) Edgar Bodenheimer, 'Influence of Roman Law on Early Medieval Culture, The' (1979) 3 Hastings Int'l & Comp. L. Rev. 9, 26. The subtlety of thought required to understand complex legal concepts was developed in medieval universities gradually working its way into the common law tradition. Bodenheimer suggests that Henry de Bracton, who published the first comprehensive treatise on the English common law in 1250, ‘borrowed extensively from Roman law,’ being influenced by the legal
William, by the fact of conquest in 1066, acquired by operation of law the land of the Saxon Kings who resisted him. No allodial land remained. Power in the territory of Britain was centralised in the King. From this time hence, all land would be held of the King under the legal fiction and doctrine of tenure. Pollock and Maitland explained the principle in their History of English Law in 1898 as follows:

‘The King himself holds the land which is in every sense his own; no one else has any proprietary rights in it; but if we leave out of account this royal demesne, then every acre of land is ‘held of’ the king. The person whom we may call its owner, the person who has the right to use and abuse the land, to cultivate it or leave it uncultivated, to keep all others off it, holds the land of the king either immediately or mediately.’

Until the civil war of the seventeenth century, the King and the Executive Council would control England. Only freemen, those owning land, had power in this system. Land ownership was narrowly held. If you could not exercise control over land, you could not participate. Whilst feudalism held sway its cascading power relationships would deny the people the right to participate in society. But, paradoxically, feudalism would promote the freedom of towns. This freedom would allow a freedom of thought and action. The people participated in trade and commerce. Land ownership was the prerequisite for both enfranchisement and for being elected to parliament. For many centuries, representation in parliament served only self-interested purposes, namely to gain access to power. The function of law was to legitimate this power relationship. In the administration of the law, the private property ideology was the grundnorm which directed the application of the law. The power of the state was directed to the protection of property.

Historians at the Bolognese university. This reception of Roman law occurred at a time when, it is suggested, England had no theory of contracts.

P Butt, Land Law (4 ed, 2001), 59. Allodial land is free of tenures, it is absolutely owned. It was sourced to the lands held under Dane law. It was held by Viking freemen. By virtue of the conquest, no allodial was held because all of the land of England became subject to the doctrine of tenure.


Market theorists justify this arrangement of power on the basis of the allocation of scarce resources, see Webster and Lai, above n 19, 23:

‘The power to regimentalise individual property rights into collective organisations such as legions, firms, cities and even states, lies with the owners of the rights that are most scarce.’
4.3 The legacy of Feudalism

The history of the second millennium highlights the struggle in England by the elite to attain and maintain sovereign power over the people. In that struggle, the law was used as an instrument to maintain the legitimacy of power. This understanding correlates with Nicholson’s view of law as the ‘manipulation of ideology.’ As has already been seen, history plays an important role in this process. Bobbitt contends that history ‘is the distinctive element in the ceaseless, restless dynamic by means of which strategy and law live out their necessary relationship to each other.’

The second millennium would be a period in which England would, in social epistemological terms, move gradually from a traditional identity schema, a *gemeinschaft*, to an ideational schema which Edwards describes as the cooperative social compact, that is, a civic culture. To develop such a culture, the people would first need to understand and believe that they had a right to participate in government.

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28 Bradley J. Nicholson, ‘Reflections on Capitalism, Property, and the Law of Slavery’ (2002) 27 Okla. City U. L. Rev. 151, 153. Nicholson suggests that the Marxian view of law is that it: ‘has a “hegemonic role,” in that ruling classes exercised their power through mastery of political culture; law thus was a method of securing and ensuring political control through the manipulation of ideology.’


30 Fran Tonkiss, *Space, the City and Social Theory* (2005), 12. Tonkiss suggests that Gemeinschaft refers: ‘to a mode of interaction where social ties are based on mutual dependence, and where individual’s relations with others take place within and derive meaning from the larger group.’ This concept is to be contrasted to Gesellschaft, ‘a formal mode of interaction which tends to the impersonal, instrumental and voluntary.’

31 Edwards, above n 4, 139.

32 It would be the Enlightenment of the fifteenth century which first exposed the English to ideas radically different to the feudal notions which had been received into English society as a result of the Norman invasion. The emergence of liberal democratic structures of governance in the nineteenth century was the product of the preceding religious, social and industrial revolutions. These radical changes transformed English society and created an ideational social structure favouring democracy and government based on the rule of law, with power shared between a representative parliament and the courts.
4.3.1 Pre-Feudal relationships

Participation in governance has ancient historical roots. On the eve of the Norman Conquest, the tradition had developed in England that the King of England would act in consultation with the Witan. Previté-Orton describes this body as the council of wise men comprising the Bishops, earls and important thanes, all of whom had extensive land holdings. The Witenagemot was the early form of parliament at which laws that the King intended to promulgate were discussed. Windeyer suggests that whilst the Witan had power to dispense justice, ‘it was a rare and extraordinary jurisdiction.’ Even though its role was advisory, Previté-Orton suggests that ‘its real assent to laws, grants, and policy was essential if they were to be accepted in the provinces and carried out.’ True it is that force (or the threat of force) held this unity of purpose together, but this historical precedent of the sharing of power also reflects the social need for order. This social need arose out of the collective memory of the disorder of the previous centuries after the fall of Rome highlighted in chapter three. It would resurface again in the early nineteenth century.

4.3.2 Arrangements under Feudalism

England became ‘the most outstanding example in history of the systematic, complete and uniform application of feudal theory.’ But to maintain order, William I allowed the hundred

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33 Previté-Orton above n 12, 151-153. The Norman French that invaded and conquered England traced their lineage back to Clovis. Clovis succeeded his father Childeric in 481 and became a king at the age of 15. Previté-Orton suggests that Clovis was: ‘a treacherous barbarian, insatiable with dominion and conquest. Without attributing any uncanny foresight, we may perceive that he displayed a clear insight into the forces at work in his day, a shrewd calculation, faithless diplomacy and a geographical instinct reminiscent of Constantine.’ Yet, in 511 Clovis issued a written Latin codification of the customary law of the Salian Franks. Previté-Orton suggests this was ‘a sign of Episcopal influence’
34 Previté-Orton, above n 12, 401.
35 Windeyer, above n 11, 9.
36 Previté-Orton above n 12, 401.
37 Posner, above n 21, 601, suggests that the contest between ‘order’ and ‘welfare’ would later define the differences between Blackstone and Bentham. As Posner notes: ‘An implicit theme of the Commentaries is maintaining social order, that is, so distributing and organising political power as to avoid the extremes of tyranny and civil war and thus minimise the role of violence and threats in the society. Bentham seems to have had very little interest in this problem. He was concerned with the (analytically at least) distinct problem of welfare or utility.’
38 Windeyer, above n 11, 36.
and shire moots to continue thus preserving the customary law of the English. These moots were regular monthly meetings of the freemen of the community that operated as popular courts; they were an early example of the people sharing governance. The administration of government was exercised by the Curia Regis or the King’s Court. Windeyer notes that the regular members of the court were the ‘great officers of the kingdom.’

Around 1200 a significant change occurred in the administration of the courts; it was a change that disenfranchised the majority of the people. Access to the law was restricted to the landed class. From this time, only those subjects that were ‘free’ (thus freeman) could be heard before the court. According to Gillingham, the villeins, those who did not own land, were classified as servile persons. These people, tenants having no rights to land, had just the right to use land. The genius of the administrative change brought about by the Normans lay in the power relationships which were created between king and subject. Law was a ‘civilizing agent in society.’

Under feudalism, the person to whom the land was granted by the king had the power to grant lesser tenures and to alienate the land by indenture. When consent was given to a villein to

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39 Fleming, above n 8, 21. As Fleming notes:

‘William’s regime did not, however, ride roughshod over local customs and laws. In so far as they did not infringe his golden principle of ultimate royal rights, he respected them.’

40 Ibid, 9. Windeyer, above n 11, suggests (37) that William did not bring the feudalism of the Continent to England because ‘to permit in England the conditions of France and Germany would be to set up rivals for himself.’

41 Ibid, 43. Windeyer suggests that these were ‘the Justiciar, the Chancellor, the Chamberlain, the Constable, the Marshall and certain officials, who from and early date were called ‘Justices’ but whose work was not exclusively judicial. In a rather fanciful sense, the Curia Regis was the successor of the old Witan.’

42 Previté-Orton, above n 12, 587, suggests that in 1069 there were ‘vast confiscations’ which saw ‘the transfer of land and power from English to Norman lords.’ According to the Doomsday book of 1086, the King held directly about one fifth of the land. The barons (mostly Norman) held about half of the land and the church held about a quarter of the land.


44 Previté-Orton, above n 12, 606. Previté-Orton says of this outcome (and despite the exclusion of the majority of the people from access to law), that the result of the changes brought about by the Normans in administration of the law was ‘singular’. Taking a wider view, he says:

‘The gradual suppression of the provincial and customary laws by the English Common law, based on the successive decisions of the king’s judges and developing by precedent from year to year into a national system. Ancient custom, Roman and Cannon Law, might influence it, but growth was independent, a measure of advancing civilization and union.’

Posner, above n 21, 583, observes that by Blackstone’s time, Norman rules were seen as ‘oppressive institutions.’ It was the duty of judges to ‘strip away the Norman incrustations … to restore the common law in its pristine Saxon form.’

45 Flemming, above n 8, 25. Indentures were created as a means of providing proof of title: ‘Two copies of the transaction would appear on the same sheet. You would then cut the document in half along an irregular, wavy line resembling a bite, and the parties to the deal
quit his land holding in the lord’s manor, the lord recorded the transaction and a copy was given to the transferee as proof of their title to the surrendered land.\textsuperscript{46} The documenting of even this lowly transaction maintained the social order. By recording in land transactions fealty to the Sovereign, social order was affirmed. The practice was unique to the English.\textsuperscript{47}

A very different ladder of participation applied. At the lowest level, that of the villein, the peasant tenant had no right to the land but only the right to the use of it. Not only would they never own it, they were also unlikely to acquire sufficient income from working the land to climb the social ladder and become freeman. Freemen could acquire rights to and over land by purchase. However, such rights would not usually be available in respect of manorial land as that was held by the lord. Accordingly, the opportunity to own land arose in the towns which were often free of manorial control. Towns were places where commerce enabled men to become people of means.

The feudal relationship of mutual obligation would evolve into a form of social contract.\textsuperscript{48} This contract bound the classes within society and created a unified system of government divided between the manorial system of internal administration within the lord’s domain, and the national system of administration, exercised through the King’s curia.\textsuperscript{49} This would remain England’s traditional identity schema for centuries.\textsuperscript{50} As Previté-Orton confirms, in feudal society ‘land-tenure determined political rights.’\textsuperscript{51} Those who had land, had power.\textsuperscript{52}

\textsuperscript{46} Butt, above n 25, 65. It is from this practice that the concept of the counterpart deed or indenture arises. The two parts to the document made the whole agreement capable of proof by matching the counterparts along the separation line cut when making the deed.

\textsuperscript{47} Windeyer, above n 11, 37. Windeyer suggests that whereas in the Continent the sovereign ceased to be ‘leader and judge of the people,’ in England ‘[a]ll men there owed allegiance to the king, not merely to their immediate overlords.’

\textsuperscript{48} Rutherford Platt, \textit{Land Use and Society: Geography, Law and Public Policy} (1996), 64. Platt suggests that feudalism worked because it was a ‘socioeconomic institution that would ensure that land would be productively utilized to sustain both the local population and the superstructure of nobility.’

\textsuperscript{49} Later, Jean Jacques Rousseau in \textit{The Social Contract}, 1762, (also cited in Jon E Lewis (ed), \textit{The New Rights of Man} (2003), 302), would write about the Social Contract. Rousseau argued that ‘the social order is a sacred right which is the basis of all other rights.’ Rousseau’s radical thoughts on freedom and liberty would be the clarion call of the American and French Revolutions. Yet, the concept of the social order runs deep in western thought. It would be the breach of the perceived social contract by Charles I that would be the justification for the overthrow of the crown at the time of England’s own revolution in the seventeenth century.

\textsuperscript{50} Edwards, above n 4, 139. Edwards describes the schema as gemeinschaft:

‘Tradition divides people into categories. These are often organised hierarchically. Tradition decrees appropriate behaviour of people in each category and relationships between categories. Social cohesion centres on maintaining the categories and their norms of behaviour.’

\textsuperscript{51} Previté-Orton, above n 12, 418.
4.3.3 The role of Towns

There was greater scope for personal freedom in the towns. Historically, towns and cities had a functionality which correlated to a specific purpose, for instance, maritime port, manufacturing or mining centre, defence, education administration or market trade. Towns were connected functionally to nearby regional areas that supplied necessary inputs which could not be sourced locally. Originally, the function of the town was to operate as a market. As Roberts points out, as the population of towns grew, towns came to perform a more significant role as ‘cultural and economic engines.’

Towns became a centre for civil society and education. Thrupp suggests that up until the late medieval times in England, industry was largely confined to rural areas. It would be in the cities and towns that new ways of thinking would be nurtured. Le Goff argues that the ‘mental attitudes of the medieval town were indispensable to the growth of capitalism and to the industrial revolution.’ Indeed, Roberts suggests that from the thirteenth century, the word urbanitis came into use to describe city life in a way ‘which carried more meaning than that of simple physical residence in a town.’ Economic freedom could be obtained in a town, and with it, personal freedom from economic enslavement under feudalism.

52 Patrick O’Farrell, *Ireland’s English Question* (1971), 116. O’Farrell argues that it could be said that the English had a ‘religion of property, to which England’s political classes were firm devotees – firmer than they were devotees to religion as such.’
53 Walter Minchinton, ‘Patterns and Structure of Demand 1500-1700’ in Carlo M Cipolla (ed), *Fontana Economic History of Europe - The Emergence of Industrial Societies* (1973) vol 4(1), 101. However, Gillingham, above n 43, 161, argues that even as early as 1300 new towns and villages ‘were founded by local lords who expected to make a profit out of the money rents and tolls they planned to collect.’
54 Isin, above n 9, 17. Although Isin suggests that the city was created ‘as a means of seeking relief from surrounding feudal lordships, kingdoms and other jurisdictions of all sorts.’
57 Alister McGrath, *In the Beginning, the Story of the King James Bible* (2002), 38, attributes to Jacob Burckhardt (1818-97) the comment that it was during the Renaissance period of the fourteenth century that ‘human beings first began to think of themselves as individuals’ (emphasis in original).
59 Roberts, above n 55, 155.
60 Isin, above n 9, 21. As Isin notes: ‘During the twelfth century some English cities gained the status of liber burgus (free city), which meant the possession of autonomous law-making, taxing and trading, in short, governing powers.’
61 Le Goff, above n 58, 81, suggests that by the late middle ages ‘towns had recovered the great monetary role that had been theirs in antiquity.’
Towns were either of historical origin with established rights or they were ‘new’ towns, laid out by the lord who created it.\textsuperscript{62} Within the town, custom regulated the relations of its people. Socially and legally, unless the freedom of the town had been purchased by charter, feudalism dictated the limits of the rights, duties and freedom enjoyed by people.\textsuperscript{63} The King’s law enforced the laws of the kingdom.\textsuperscript{64} Generally, the common law of contract and property governed exchanges of goods and market forces determined the allocation of resources. There were laws regulating public health issues and building regulations. Roberts argues that the forerunner to zoning laws is the late medieval town’s practice of restricting foreigners to specific areas of the town ‘to provide for the management by segregation of strangers.’\textsuperscript{65} In London, this was ‘in the area of Whitechapel near Mark Lane.’\textsuperscript{66}

But what was especially relevant in towns was the economic imperative. To facilitate commerce it was possible for towns to petition the King for charters of independence. In effect, the right of freedom of action from the lord was purchased from the crown.\textsuperscript{67} The wealth generated in towns inspired the growth of a middle class of people.\textsuperscript{68}

4.3.4 The Role of Law

The private property ideology, protected by law dispensed in courts of justice under the authority of the King, sustained the economic interests of both the land holders and the state. According to Blackstone, under the common law, ownership of land conferred significant rights

\textsuperscript{62} Thrupp, above n 56, 242. Thrupp identifies that in these new towns, the right to develop the land was exploited by merchants and craftsmen, thus ‘the enterprise of speculative building’ was undertaken by the landless as a means of economic advancement, the Nobles who owned the land being prepared to have the benefit of long ground leases.

\textsuperscript{63} Platt, above n 48, 72. A charter generally secured the right to hold a market; the right to organise a merchant guild; freedom from feudal tribute and the right to coin money and regulate weights and measures. ‘Even serfs who fled their manors and resided in towns for a year and a day were legally released from their feudal bonds and gained the status of freemen.’


\begin{quote}
(at 34): ‘when one has a right one has the expectation in both law and in practice that their claims will be respected by those with the duty’ to do so. … (at 42) ‘Private property would be nothing without the requisite authority system that makes certain the rights and duties are adhered to’.
\end{quote}

\textsuperscript{65} Roberts, above n 55, 155.

\textsuperscript{66} Le Goff, above n 58, 77.

\textsuperscript{67} Previté-Orton, above n 12, 720. Previté-Orton suggests that in the years shortly before the Magna Carta, King John sold charters to some 50-60 towns as a means of raising revenue.

\textsuperscript{68} Ibid, 1062. Over time, this class became, as Previté-Orton notes, ‘a hard and money-seeking generation, little inclined to chivalry or scruples.’
to exploit it almost without restraint.\(^{69}\) As the economic basis of the economy remained agrarian, it was initially the landed aristocracy that retained the power to make decisions about the exploitation of land.\(^{70}\) The law, the use of legal discretion as a concomitant right of social power, patronage and rigid class distinctions were all features of the feudal societal landscape reflecting a social order reminiscent of the Roman civilization. Commoners were subjects under the law and subject to the law. Major offences, and there were many to choose from, were capital crimes. Mercy was the prerogative of the crown.

Yet the system of law was local and functioned at the community level.\(^{71}\) There was participation by the people in their local governance.\(^{72}\) In the shires and towns, the initial prosecution of an offender was the responsibility of the victim. The magistrates relied on the community to arrest and then guard prisoners on the way to the gaol or to court.\(^{73}\) To climb the social ladder of participation in governance, what was required was the luck of birth or the steady accumulation of money to enable a person to buy land. Those unlucky in birth had to have a strategy to achieve upward mobility. Owning land gave a person the entrée to participate in civil society, which meant being seen at the court. That gave a person access to power because historical circumstance had forced sovereign power to be shared. The first serious check to absolute monarchical power had occurred at the making of the *Magna Carta* in 1215. The right to participate in government was claimed and won at Runnymede, albeit even if it was

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\(^{69}\) John G Sprankling, ‘Owning the Centre of the Earth’ (2008) 55 *UCLA Law Review* 979, 982-3, argues that the doctrine was first formulated by Blackstone in his 1766 work *Commentaries on the Laws of England*. Under the *cujus est soleum* doctrine, the owner of land enjoyed rights not just over the land, but both above and below it. As Sprankling notes ‘[i]t is not a principle of Roman Law.’ For its time, it was revolutionary. It was a view based on religion: “The earth therefore and all the things therein, are the general property of all mankind … from the immediate gift of the creator.” Sprankling argues (1005) persuasively that an analysis of decisions ‘reveal a picture of subsurface ownership that is inconsistent with the centre of the earth theory.’ Peter Butt, *Land Law* (6th ed, 2010), 8 argues that there is reference to the doctrine in a 1285 contract for sale of land in Norwich. He also suggests that ‘by the time of Lord Coke’s Commentary of Littleton (1628) the maxim was well established’ (even if it was –citing Sir Percy Winfield, Winfield on Torts 1st Ed 1937 – ‘an “unfortunate scrap of latin” that had clogged the law’s development’).

\(^{70}\) Platt, above n 48, 66-7. Platt argues to the contrary suggesting that the manorial system was only ‘symbolically subject to the power of the lord, overlord and crown.’ This was because feudalism was a finely balanced system – the best example in all history of a land management system that was self-perpetuating and sustainable.’ Platt’s argument ignores the fact of the legal power held by the lord in this dependent and servile relationship.

\(^{71}\) Windeyer, above n 11, 9: ‘The outstanding characteristic of both the hundred moot and the shire moot was that they were popular courts. That is to say they drew their authority from the customary law of the people. They were the meetings of the representatives of the freemen of the community.’

\(^{72}\) Isin, above n 9, 21. Isin, citing S Reynolds, *An introduction to the history of English Medieval Towns*, (Oxford, 1977), 121, indicates that: ‘although the methods by which the mayor, officers and councils were chosen are usually obscure, it is clear that they were chosen in a congregation of the whole city.’

by a ‘well to do class of self-interested people.’ The sovereign was forced to accept that the people had rights. Fleming suggests that the event at Runnymede ‘was a powerful symbol of the rising of a society against the whim and spasm of the ruling conscience.’ Power was, however, shared amongst only a small class of people. They held tightly to their rights. It would only be the accumulated wealth from trade and commerce in the sixteenth century that would ultimately challenge this position of power.

A century after Runnymede, some of the people were able to participate in governance. Griffiths notes that the House of Commons achieved a permanent status as part of the parliament from 1337. The innovation did not just happen, it was a manoeuvre designed by the sovereign to tap into the wealth of townsmen and smaller landowners. Unsurprisingly, it was driven by the nascent recognition of the political reality (taken up with gusto by the American revolutionaries in the eighteenth century) that there should be no taxation without representation. The king recognised that there was ‘advisability [in] having the weight of a representative assembly behind controversial or novel changes in the law or in economic and social arrangements.’ By making law with the assent of the people, the basis of the concept of political participation, it would guarantee or assure acceptance of the measures passed by parliament.

4.4 The impact of the Tudor period

The Tudor period would be seen as the time when the power paradigm in England based on a supreme sovereign dispensing patronage and clientage was at its zenith. As Churchill glibly notes, it was not an ‘age of party politics.’ Rather, the king came to fully represent the law.
Coke would frame it thus: ‘a King’s crown is an hieroglyphic of the laws.’ The king became the personification of the law.

4.4.1 The Role of Patronage

Participation in government in the sixteenth century meant being at court where power resided. Patronage was, according to Guy, the ‘principle weapon of political control.’ The focus of politics remained the attainment and maintenance of power; the law was a tool to be used by the executive to achieve its aims. Parliament sat only when the sovereign summoned it to convene. When assembled, the king would consult parliament, but he expected that the sovereign’s will would be respected in Bills submitted. Parliament, at least the commons, had not yet found its voice. Webb suggests that membership in the House of Commons became popular at this time for the landed gentry and aristocracy for the practical reason that it put one at the centre of things. Webb goes so far as to suggest that this was the time when ‘the country gentleman and his cousin, the lawyer … captured the House of Commons.’

It is here suggested that Henry VIII’s decision to divorce his wife Catherine of Aragon without the dispensation of Rome marked a turning point in the power relationships between the sovereign and parliament. By usurping the primacy of Rome, Henry was able to achieve a redistribution of land the like of which would not be repeated until the Whig taxation reforms of the late nineteenth century. But the execution of this land policy would make the sovereign dependent on the law making power of parliament. To achieve his personal aims, the King needed to secure the consent of parliament to legislation that would become known as the Act of Appeals. Henry VIII later professed that the Act made him ‘King and Sovereign,

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82 John Guy, The Tudor Age (1485-1603) in Kenneth O Morgan (ed), The Illustrated History of Britain (2000), 233. Guy suggests that the wealth of the monasteries saved the Crown from bankruptcy. Henry VIII was forced politically to buy the loyalty of the nation by massive injections of new patronage. Even though the lands surrendered to the crown were alienated for value, it would be the ‘constant dissipation of the monarchy’s resources that made it difficult for Henry’s successors to govern England.’
83 Geoffrey Robertson, The Tyrannicide Brief (2005), 31. Quoting Charles I: ‘Parliaments are altogether in my power for their calling, sitting and dissolution.’
84 Previté-Orton, above n 12, 1061. Previté-Orton suggests that at this time ‘borough members were now often lesser gentry, lawyers, or officials as well as trading townsmen.’
86 See section 4.7.4 below.
87 Ecclesiastical Appeals Act 1532 (Eng) 24 Henry VIII. c. 12
recognising no superior in earth but only God, and not subject to any laws of any earthly creature." Yet, because this supreme authority was conferred by parliament, the precedent created would be the source of trouble for the monarchy in the future. Religious reformation may have been the motif used by Henry to achieve his aims, but the realpolitik of the reformation laws passed by parliament was to ensure that Henry had, as Bobbitt argues, ‘the monopoly on the legitimate use of violence’ within the state. Henry achieved this aim by manipulating religious ideology. He successfully made Catholicism ‘a conspiracy against the State, a political enemy.’

4.4.2 A New Role for Parliament

The effect of Henry VIII’s reforms was that Henry, by law, was free to dispossess himself of a Queen, and the Roman church of its lands. By patronage, Henry was then able to legitimately alienate confiscated lands to his ‘favourites’. The constitutional impact of Henry’s reformation legislation was significant. It institutionalised limits to the legislative prerogative of the king. As Roberts notes, Henry’s reliance on parliament would make ‘it more difficult for later kings to act without parliament’s support on major issues.’

Raffield suggests that the sixteenth century saw the end of feudalism and the emergence of ‘a strong centralised executive within a recognisable nation-state.’ These reforms included the ‘standardisation and systematisation of common law and the legal profession’ (although not even being the First Minister would be a protection from the capricious use of the law by the

88 Churchill, above n 80, 49. As Churchill notes, the Act vested in Archbishop of Canterbury ‘the power, formerly possessed by the Pope, to hear and determine all appeals from the Ecclesiastical courts in England.’
89 Bobbitt, above n 29, 6.
90 O’Farrell, above n 52, 42. Sir Thomas More would not be the only martyr to the cause of justice. Many hundreds of opponents to the reforms paid the extreme price with many of lesser birth be not just hung, but drawn and quartered.
91 John Seed, ‘The Spectre of Puritanism: Forgetting the Seventeenth Century in David Hume's History of England’ (2005) 30 Social History 444, 456: ‘The people were assured that the income from monastic lands would relieve taxation and was for the public good. But, as Hume remarks, the king was “impelled by his avarice, or more properly speaking, his rapacity, the consequence of his profusion.” Moreover it was, by and large, the nobility and gentry who profited, not the people: “he either made a gift of the revenues of convents to his favourites and courtiers, or exchanged them for other lands on very disadvantageous terms.”’
92 Roberts, above n 55, 292.
93 Raffield, above n 81, 143.
However, the ideation of the concept of the rule of law as a separate monolithic concept would germinate in the minds of lawyers. The Chief Justice Sir Edward Coke would later be so bold as to suggest to King James (in 1608) that:

‘The law is the golden metewand and measure to try the causes of your majesty’s subjects, and it is by the law that your majesty is protected in safety and peace.’

The precedent set by Henry of seeking the consent of parliament to difficult constitutional changes, coupled with the rising independence of the mercantile class (which had begun to infiltrate the House of Commons), would combine to strike at the institution of the monarchy. Following the death of Elizabeth I, the reluctance of parliament to grant the sovereign the funds required to conduct foreign and domestic policy would culminate, in the seventeenth century, in a constitutional crisis. It would foment the notion that ‘a free man may not make themselves subject to any mortal man,’ This radical idea would ultimately result in the trial, conviction and sentencing to death of Charles I for crimes against the people of England, including the allegation that the king was a ‘tyrant, traitor and murderer.’

4.5 The Impact of Mercantilism:

The sixteenth and early seventeenth centuries are described as the mercantile period. At an ideological level, the issue that came to be violently agitated in England during the later part of the mercantile period was the constitutional basis for government. The centrality of parliament to the processes of government would become the focus of struggle over the coming century. By the close of the Mercantile period, England would have fought a civil war with its sovereign, rejected republican rule under Cromwell and consented to being ruled by a foreign King, William III, invited to the throne by a sovereign parliament intent on ensuring that the king’s rule over the people would be subject to a constitutional settlement.

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94 Churchill, above n 80, 64. For example, Thomas Cromwell was appointed by Henry as First Minister in 1529 and managed parliament on behalf of the Crown. He was arraigned under a bill of attainder in 1540 having fallen out of favour. In implementing Henry’s reforms, he had previously required the reading of the English bible in English churches. Yet ironically, he was subsequently charged with ‘heresy and “broadcasting” erroneous books and implicitly with treason.’ He was convicted and duly executed.

95 Robertson, above n 83, 26. Windeyer, above n 11, 174, also notes that because of Coke’s opposition to ‘royal policy and wishes,’ James I sent Coke to the Tower of London for nine months.

96 John Cooke, Monarchy No Creature of God’s Making Wherein is Proved, by Scripture and Reason, That Monarchical Government is Against the Mind of God (Waterford, 1651), 115. Cited in Robertson, above n 83, 126.

97 4 State Trials, 995. Reference cited in Robertson, above n 83, 155.
4.5.1 Trade brings Wealth, Land and Power

The sixteenth century was a period of great social change. Herrup suggests that the century was marked by ‘exceptionally sharp social stratification as well as challenges to authority both within and outside the ruling classes.’\(^{98}\) Glamann describes this period as the beginning of the Mercantile Era, which extended until the eighteenth century. During this time trade was the ‘great wheel driving the whole engine of society.’\(^{99}\) On the land, an agricultural revolution was occurring. In the towns and cities, mercantilism was making the prosperous middle class as wealthy at times as landed aristocracy.\(^{100}\) Indeed, wealth was the door through which the prosperous business person could acquire status by purchase, including titles, to become landed aristocracy in their own right.

The seventeenth century would start with England being ruled by Elizabeth I, a protestant queen but head of a state recognised in the established international order as ‘a first class power.’\(^{101}\) The mercantile period would ultimately see the creation of the British Empire. Ferguson colourfully describes the period as marking ‘a transition from piracy to political power that would change the world forever.’\(^{102}\) The British Empire would rival the Roman Empire in terms of its reach and dominance over world affairs. De Maddalena notes that during the mercantile period, ‘business methods were introduced into farm management; constant efforts were made to adjust production to market conditions, considerable capital was expended on improvements to farm property such as irrigation channels, better byres and stabling, etc.’\(^{103}\) Elton argues, unsurprisingly, that ‘it was the aristocracy not the urban middle class, who made the most out of the changed circumstances.’\(^{104}\)

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98 Herrup, above n 73, 104.
100 Adam Smith, *The Wealth of Nations* (2010), 199, would note:

‘Merchants are commonly ambitious of becoming country gentleman, and, when they do, they are generally the best of all improvers. A merchant is accustomed to employ his money in profitable projects; whereas a mere country gentleman is accustomed to employ it chiefly in expense. …

Whoever has had the fortune to live in a mercantile town, situated in an unimproved country, must have frequently observed how much more spirited the operation of merchants were in this way than those of mere country gentleman.’

101 Churchill, above n 80, 106.
Mercantilism would concentrate on overseas trade and the establishment of joint stock companies to defray risk. Elton is of the view that it was an age ‘naturally constructed for entrepreneurial success.’\textsuperscript{105} England’s agricultural economy was well placed to take advantage of the opportunities. As Glamann observes, ‘the chief function of English foreign trade was to sell English cloth and to export English wool.’\textsuperscript{106} The trade was assisted by the fact of it being superior to continental product whilst being cheap and competitive. The foreign demand for English goods drove mercantile adventurers to find new markets and fuelled the English pirateering and privateering traditions. What began with the stealing of Spanish gold,\textsuperscript{107} led to the creation of an overseas empire based on trade.\textsuperscript{108} Whilst the sale of the produce would benefit the landowning aristocracy, the export profits benefited the mercantile class. The crown benefited from the sale of the licence to participate in the trade. The class which suffered the most was the peasantry and workers in towns.

4.5.2 The Struggle for Sovereignty

At the beginning of the seventeenth century, the landed mercantile class saw the opportunity of power and social advancement through participation in the House of Commons. With the death of Elizabeth I in 1603, the uncertainties of succession and the struggle for power would see the rule of law subsumed into the bitterest struggle for power over the next century.\textsuperscript{109} Participation in government became visceral. One’s life and property depended upon the choice that was made.

Whilst historically, the town ‘oligarchies’ would oblige the local peer, Bushman suggests that there was at this time an ‘awakening’ to the opportunities associated with controlling borough seats.\textsuperscript{110} The merchants and tradesmen of property were not as pliable as the established clique.

\textsuperscript{105} Ibid, 321.
\textsuperscript{106} Glamann, above n 99, 501.
\textsuperscript{107} Ferguson, above n 102, 9. Ferguson suggests that until the death of Elizabeth, ‘between 100-200 ships a year set off to harass Spanish vessels in the Caribbean.’
\textsuperscript{108} Moore, above n 5, 31. Moore suggests that trade in commodities and labour was the ‘glue’ that bound the. ‘The children of England traversed the globe in sailing ships, as traders, sailors and soldiers, as administrators and free settlers and as slaves and convicts chained below decks.’
\textsuperscript{109} Windeyer, above n 11, 167. Windeyer suggests that ‘[e]very law student, and every man who values liberty, should know the stirring story of that struggle.’
\textsuperscript{110} Richard Bushman, ‘English Franchise Reform in the Seventeenth Century’ (1963) 3 The Journal of British Studies 36, 40.
In the towns, the lesser gentry and merchants were prepared to press for their charter rights. Bushman notes that those who ‘most often spoke against the crown’ served on committees and believed in the popular right to election, thus setting up a tension between the ‘court party’ and the rising mercantile class. The historical device to secure power in the hands of the few had been ownership of property. However, as more of the mercantile class acquired land, it posed a political threat to the established elite. Even Oliver Cromwell was aware of the threat of ‘democracy’ noting that:

‘The ‘multitude of burgesses from decayed or inconsiderable towns doth give too much … opportunity for men of power to frame parties in Parliament to serve particular interest[s], and thereby the common interest of the whole is not minded…’

The mercantile period is therefore marked by a growing ideation in many of the people, especially the mercantile class, that the people (but understood as meaning themselves) had a legitimate right to a say in the electoral process. In the period between 1621 and 1679, ten different bills proposing electoral reform of the commons would be brought forward for debate in the House of Commons, with none proceeding. Essentially, the mercantile class were pressing for change, for a sharing of political power. They did not want others to speak for them. At the same time, there was growing social unrest because of enclosures, rising rents and changing economic conditions, creating an atmosphere for radical reform.

Instead of reform through parliamentary processes, more dramatic events would unfold.

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112 John Barratt, ‘Public Trusts’ (2006) 69(4) *Modern Law Review* 514, 515. As Barratt notes: ‘The boroughs were targeted by the national political parties, anxious to secure election of their parliamentary candidates’

113 Bushman, above n 110, 44-45. Without a voice in the commons, the towns had no way of influencing decisions made affecting trade. The landed gentry in Towns had the right to stand for election where charters allowed for open election. Bushman cites the 1620 election in Sandwich as an example of a town interested in ‘recovering’ its voice in the commons. The electoral result was against a candidate nominated by the mercantile class because of ‘mayoral manipulation’ of the electoral process. There was an established procedure in the commons of an appeal to the House of Commons committee on privileges. In that committee, a ‘corrupted’ result could be overturned, returning a non aristocratic candidate to the House of Commons overturning the electoral result.

114 Ibid, 48.

115 Ibid, 45-8. Following the elections of 1621, a bill to reforming abuses at elections was presented to the Commons by the anti-court party. It was not passed, Bushman suggests because many members of parliament, even if they agreed with the reform, could not risk a popular election because they relied at the time on the support of town oligarchies. The bill had support including from Edward Coke, later to become Chief Justice. There was sufficient impetus for reform for the bill to be submitted for debate in the 1640s upon the resumption of Parliament after the years of personal rule. Bushman also suggests that both Oliver Cromwell and Ireton ‘feared property and settled class order would fall if the unenfranchised multitudes were given political power.’ They were conscious of the threat of democratic sentiment expressed by the levellers believing ‘that a popularly elected parliament might diverge sharply from the comparatively moderate course favoured by most of the [landed] gentry.’
Political circumstances dictated that James I, and later his son Charles I, in the absence of parliamentary support, had little choice during their reign but to exploit traditional prerogatives to raise the funds necessary to pursue domestic and foreign agenda. This further provoked the anger of the mercantile class by extending taxes such as ship money to inland regions (never before taxed), and by granting for reward trading licences and monopolies. At a time when the ideology of liberalism was nascent, the constant interference with the market by the crown without the consent of the parliament caused deep unrest. It is also perhaps an early example of the motivational force of the user pays principle.

4.5.3 The uprising of the Landed Gentry

As Seed notes, ‘[w]hat matters in terms of any political practice is the present.’ The mercantile landed class had wealth, they had ideas and they were aware of notions from abroad about government. Taylor suggests that ‘it was always the gentry who took the lead’ in organising petitions sent either to King or Parliament. They knew that reforms of government had to be fought for. As a class, they were more likely to be puritan. The mercantile class started to find voice in the Commons as more and more puritans were elected to Westminster. Dixon argues that Puritans had, by this time, become so essential to the economics of the nation that ‘to purge the nation of this people, may be to purge out more of its vitals then the strength of the State can bear.’ Religious convictions would lead Puritans, as a class, to the view that the King had broken his social contract with the people. Hume would later assert that the puritans were of a religious class that was possessed of an:

\[\text{\footnotesize 116 Windeyer, above n 11, 169. As Windeyer observes:} \]
\[\text{\footnotesize ‘While James was selling patents and peerages and demanding ancient feudal dues, long uncalled, and thus postponing summoning Parliament, the warfare over the prerogatives shifted to the courts. There the advocates of the prerogative met the resistance of Sir Edward Coke.’} \]
\[\text{\footnotesize 117 Jeremy Black, \textit{A New History of England} (2000), 136-7.} \]
\[\text{\footnotesize 118 Seed, above n 91, 447.} \]
\[\text{\footnotesize 119 Fletcher, above n 1119, 153.} \]
\[\text{\footnotesize 120 J. Keane, \textit{The Life and Death of Democracy} (2009), 194-5. Keane suggests that cities functioned as laboratories of power:} \]
\[\text{\footnotesize ‘They were places where experiments were conducted in matters as diverse as architecture and theatre, scientific invention and family life, and the production and consumption of new market commodities. Cities were also places where much energy was expended in creating new forms of self-government.’} \]
\[\text{\footnotesize 121 Donald F. Dixon, ‘Changing concepts of the virtue of merchants in seventeenth century England’ (1999) 28(2) \textit{Business & Economic History} 155, 163.} \]
‘inflexible intrepidity, with which they braved dangers, torments, and even death itself; while they preached the doctrine of peace, and carried the tumults of war, thro’ every part of Christendom.’¹²²

When Charles I interfered in the religious affairs of Scotland he brought about a civil war.¹²³ The new model army under Cromwell defeated the forces of Charles I and in 1646 Charles, in a tactical manoeuvre, gave himself up to the Scottish army to allow negotiations to follow.¹²⁴ Fearing the release of Charles, the army (led by Cromwell), purged parliament in December 1648 to stop the negotiations. At the beginning of the following year the king was tried for treason by the parliament known as ‘the rump.’ In January 1649 it declared that ‘the commons of England assembled in Parliament, being chosen by and representing the people, have the supreme authority of this nation.’¹²⁵ Exercising its assumed authority, the rump of the House of Commons, in the name of the people, put the sovereign to trial under the common law upon a charge of being ‘a tyrant, traitor, murderer and a public and implacable enemy to the Commonwealth of England.’¹²⁶ Where Henry VIII would use the law to rid himself of an inconvenient queen in the sixteenth century, parliament would now use the law to rid itself of an obdurate sovereign.¹²⁷

The century therefore marks an epoch change. The people had begun to identify with the concept of popular power.¹²⁸ They began to conceive a logic or schema about a new social order

¹²² Hume, *History of Great Britain*, (1754-62), 71-72. Cited in Seed, above n 89, 449. Hume would also argue that ‘it was to this sect, whose principles appear so frivolous, and habits so ridiculous, that the English owe the whole freedom of their constitution.’

¹²³ AC Grayling, *Towards the Light: The Story of the Struggles for Liberty and Rights that made the Modern West* (2007), 65. ‘The prelates of the Church of England wished to impose uniformity of observance and Church structure on Scotland; the Presbyterians wished to impose their alternative on England.’

¹²⁴ Black, above n 117, 140.


¹²⁶ Ibid, 149.

¹²⁷ Windeyer, above n 11, 184. Windeyer notes: ‘English law had made the king of England its subject. And Parliament was now the acknowledged overlord of the law. Charles II, not wishing to go on his travels again, was wise enough to recognise this.’

¹²⁸ James Gray Pope, ‘Republican Moments: The Role of Direct Popular Power in the American Constitutional Order’ (1990) 139(2) *University of Pennsylvania Law Review* 289, 293: ‘A form of political participation is popular if it is not limited to elites. Again, the example in pure form would be an assembly of the whole people. And again, less pure but more common examples include demonstrating, withholding patronage, and refusing to obey just laws. Here, however, the defining characteristic is not directness, but inclusiveness. A form of participation may be popular but not direct – as in the case of voting for representatives, or direct but not popular – as in the case of bribing public officials.’
based on representation and the sharing of power to make law. The seventeenth century represents the period when there was an ideological struggle between the executive and parliamentary branches of government as to which branch would speak for the public interest. Parliament exercised its Hirschman voice. There would be no exit option taken. Keane sees the change as being significant in democratic terms:

‘But despite all the setbacks and degradations, and the unfair gains made by a rising propertied middle class and a gentry that dominated local government, the fundamental change that came over England was the permanent humbling of the Crown and its Church, in favour of the visible appearance of the common man and common woman on the stage of political history.’

In the context of participation, as formulated by Arnstein, at Runnymede it was the Barons who had risen up and taken power. At Westminster in 1649, the Commons, comprising the landed gentry, rose up and took power. The sovereign power would no longer be wielded exclusively by the landed aristocracy. The soldiers of the parliamentary army had wanted democracy. Instead, Cromwell would wrest power from both the commons and the army. Black suggests that Cromwell and the army leaders ‘sought control as well as responsibility’ for government. But, after only a decade of bureaucratic rule under major generals, who were intent on delivering ‘a godly and efficient kingdom,’ the protestant ‘cultural revolution’ failed.

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129 Grayling, above n 123, 116-7. Grayling notes that even before the civil war, the independents and levellers had ‘called for adult suffrage and frequent parliaments’, in short, democracy.
130 Keane, above n 120, 270. In contrast, Isin, above n 9, 32-33 suggests that: ‘Between the fifteenth and the late seventeenth centuries the general strategy of the English State administration was to force corporations to surrender their old charters and [autonomous] liberties and accept new charters of incorporation.’ Isin argues that this period was the ‘beginning of the subjugation of cities within the nascent modern State’ (emphasis in original).
131 Grayling, above n 123, 137. In 1647 the Army Council drafted a pamphlet entitled An Agreement of the People for a Firme and Present Peace, upon the Grounds of Common-right and Freedome. As Grayling notes, the agreement sought parliamentary reform ‘with a proper distribution of seats by population, … the franchise being complete adult male suffrage, that elections be held every two years.’
132 Moore, above n 5, 98. In 1654, Cromwell installed an unpopular religious theocracy. Moore argues that it was Oliver Cromwell that introduced the practice of transportation as a punishment. The measure was first used to transport Irish (and therefore Catholic) prisoners to the British plantations in the West Indies. Later, the Transportation Act of 1717 (UK) would institutionalise the practice of transportation to the American colonies ‘to deter criminals and supply the colonies with labour.’
133 Black, above n 117, 142.
134 Ibid, 143.
4.5.4 Constitutional Monarchy

It was the rule of Charles II after the Restoration that crystallised opposition within parliament once and for all against absolutism and popery.\textsuperscript{135} The ideology of absolutism was repugnant to the ideology of representative government. The Triennial Act 1641 (Eng),\textsuperscript{136} had already compelled the crown to convene parliament regularly. By 1680, according to Churchill, ‘the sombre warfare of creeds and sects’ had been succeeded ‘by the squalid but far less irrational or uncontrollable strife of parties.’\textsuperscript{137} When Charles II died in 1688 leaving a Catholic heir, parliament once again revolted. It is described as the Glorious Revolution but Langford describes it in the following terms:

‘it seem[ed] to resemble a coup [rather] than a genuine shift of social or political power’… ‘a conservative reaction of a selfish oligarchy.’\textsuperscript{138}

When the crown was offered to William of Orange he accepted it together with the Bill of Rights 1689 (Eng).\textsuperscript{139} By the Toleration Act 1689 (Eng)\textsuperscript{140} dissenters were allowed to again practice their own religion and to participate in society.\textsuperscript{141} After the glorious revolution there followed two decades of parliamentary struggle between the newly formed Whig and the Tory parties. Langford describes this period as ‘the most intense and unremitting electoral conflict’ in which time there were twenty elections.\textsuperscript{142} Participation in and through parliamentary processes was being practised by more of the people.

\textsuperscript{135} Platt, above n 48, 82. Rutherford Platt notes that after the fire of London in 1666 Wren planned ‘to transform the city into a monumental, baroque style imperial capital.’ The plan came to nought as Charles II ‘lacked the despotic powers that cost his father his head.’ Instead, the Act for the Rebuilding of London of 1666 was passed. Platt described the Act as the first ‘complete code of building regulations.’ Under this Act, ‘the class of home that could be built on a site depended on the location and importance of the street or square on which it faced.’ The uniformity of building style now apparent in London was achieved ‘through private agreements between aristocratic owners and occupants of the land in question as expressed in a deed with covenants and lease restrictions.’ In this regard, the later decision in Tulk v Moxhay (1848) 41 ER 1143 is an early example of the court’s identifying the principle that such covenants run with the land.

\textsuperscript{136} 16 Cha. I c.1.

\textsuperscript{137} Churchill, above n 80, 292.


\textsuperscript{139} 1 Wm. & M, Sess. 2, c 2.

\textsuperscript{140} 1 Wm. & M, c.18.

\textsuperscript{141} But not to participate in local government – see section 4.6.4 below. The Municipal Corporations Act of 1661 (Eng) excluded dissenters from election to municipal corporations.

\textsuperscript{142} Langford, above n 138, 361.
As Langford suggests, after this time, the crown ‘owed their title to the determination of the propertied class.’\(^{143}\) The prerogatives of the sovereign were now constrained,\(^{144}\) the control of the army and the power to tax were both now subject to parliamentary authorisation.\(^{145}\) It was the time of the supremacy of Walpole who, ‘through the skilful use of influence and even bribery,’ brought an apparent stability to government in contrast to the chaos of preceding years – the ‘natural culmination of forces working in favour of the executive’ branch of government.\(^{146}\) As Black notes, ‘[i]f this political system maintained social inequality, that was very much what those with power expected.’\(^{147}\) The social imperative gave Parliament the legitimacy to do so and the rule of law would enforce it. The citizens of the towns once again became the subjects of the sovereign. No longer a republic under law, England was now a constitutional monarchy. As Roberts notes, ‘[t]he legislative sovereign, the Crown in Parliament, could do anything by statute.’\(^{148}\) That power would initially be effectively controlled by the landowning aristocracy. But, that too would change. As Phillips and Wetherell note, a distinguishing feature of British politics of this time was the early emergence of enfranchisement of greater numbers of voters and regular elections enabled by the Triennial Act of 1641.\(^{149}\)

### 4.5.5 Rotten Boroughs

An extension of the right to vote did not mean that there was a flowering of democracy. It was, in fact, a corrupt system which was subject to many abuses including ‘constituencies open to the highest bidder, undue influence exercised by local magnates or borough mongers and generally unprincipled political behaviour.’\(^{150}\) Spigelman seeks to balance this view by suggesting that what was occurring, while corrupt by modern standards, was ‘then regarded as normal

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\(^{143}\)Ibid, 353.

\(^{144}\) Posner, above n 21, 580. Posner suggests that Blackstone, writing after the regicide, ‘realized that the decline in royal prerogative did not tell the full story of the king’s political power, and alluded to the system of “influence” by which the king and his aristocratic allies kept their hands firmly on the levers of power.’

\(^{145}\) Webb, above n 85, 48.

\(^{146}\) Langford, above n 138, 369.

\(^{147}\) Black, above n 117, 159.

\(^{148}\) Roberts, above n 55, 293.


\(^{150}\) Ibid, 414.
conduct.’ Whilst this may be correct, it still suggests that the ideology of the ruling elite was focused on narrow self-interest, rather than any broader concept of public interest.

What had changed was the ideology of government in the minds of many people. The political gemeinschaft had changed. With the trial and death of Charles I, the spell of tradition was broken. Keane aptly describes the change:

‘From that day forward, and not only in England, symbolic regicide, carried out in public, with or without masked executioners, promised that humble folk who had been subject of a Crown were transformed into citizens with straightened spines, who lived in a country as Albert Camus later famously put it in The Rebel, in which the throne of sovereign power forever remained empty.’

In the eighteenth century there would be a significant change in the administration of government. Phillips and Wetherell argue that there is a body of work which identifies that in the Hanoverian eighteenth century, ‘the quality of political relationships in the constituencies was public, participatory, and partisan.’ A social conscience would emerge in the nineteenth century as the impact of the industrial revolution manifested itself in profound social dislocation. Parliament, however, would only enact social legislation when the threat of political revolution forced its hand. The ideology of power would remain paramount, but it would be tempered by the emergence of the public interest ideology, as defined by parliament.

4.6 The impact of the Industrial Revolution:

The historian Macaulay (1800-1859), when a member of parliament in 1832, argued that government ought not to be based on the arbitrary exercise of power but upon its principled exercise. His position was that ‘[p]eople crushed by law have no hopes but from power. If laws are their enemies, they will be enemies to laws.’ This ideology of the rule of law is the

152 Keane, above n 117, 272.
154 Windeyer, above n 11, 247. Windeyer suggests that 1865 marks the beginning of the period Dicey described as the collectivist period. Its outstanding characteristic ‘was its faith in the efficacy of state interference and state regulation to promote the welfare of the mass of the people.’
155 Christopher Harvie, ‘Revolution and The Rule of Law’ in Kenneth O Morgan (ed), The Oxford Illustrated History of Britain (2000), 421. As Posner, above n 21, notes (597), each form of governance, monarchy, aristocracy and democracy have ‘tyrannical potential.’ The mistake that can be made, he
predominant ideology of government in Australia today. It is an ideology which is patronising in its elements because of its exclusionary dynamic. It masks the threat it poses to the people if the power which is wielded by parliament is not done so justly or equably. The law is an amorphous concept; it has no form outside that which the government gives it. It is not possible to strip law of its semantic nature so as to give it an independent existence outside the function of the law making power of government. The rule of law thus means different things to different lawmakers, a point not lost on McAuslan when he formulated his ideologies of planning law.

The tumults of the seventeenth century had resulted in a significant change in the demographic of the landowning classes. In the aftermath of the restoration, there was, according to Hobsbawm, a ‘concentration of landownership in the hands of a limited class of very wealthy landlords, at the expense both of the lesser gentry and the peasants. Churchill suggests that by the time of the restoration of the monarchy in 1688 there had been such large scale land sales due to the previous conflict that:

‘there came about a lasting redistribution of landed property, which, though carried out within the same class, provided a core of self-interest among the new proprietors round which in after years the Whigs and their doctrines gradually gathered. The dualism of English life after the restoration found its secular counterpart in two kinds of gentry, divided in interest, traditions and ideas, but each based on landed property. Here was one of the enduring foundations of the long-lived party system.

suggests (at 606 with specific reference to Bentham), is not to worry about ‘the most dangerous [monopoly], the monopoly of power.’  

John Hirst, 'Empire, State, Nation' in Deryck Schreuder and Stuart Ward (eds), Australia's Empire (2009), 145. Hirst makes a significant point in contrasting the colonial experience of government to the British system. He says:

'The early Australian governments were actually better than the British. The government of Pitt the Younger, which sent the convicts to New South Wales, began the process of administrative reform which ended the practice of office under the Crown being considered a form of private property. The new rules operated in Australia from the beginning, so that there were no sinecures; the work could not be done by a deputy; the reward was a fixed salary rather than fees. The Australian colonists had no experience of government as a system of placemen, pensions, fees, and private enrichment.'

J. Stone, Legal System and Lawyers' Reasonings (1968), 34. Stone essays the semantic framework of law and argues that it is not possible to fix the referent of law:

'[T]he word “law” would still go its semantic way in the flux of men’s purposes and understandings’. As Stone says, ‘Austin could properly fix the meaning of ‘law’ properly so-called for his own purposes; but this ex hypothesi would be only Austin’s meaning’ (emphasis in original).

P McAuslan, The Ideologies of Planning Law, Urban and Regional Planning Series (1980), 1. The law does not ‘provide a neutral framework for the exercise of power.’

This new landed class was ready to exploit the economic opportunities of the mercantile age. Feudal notions of mutual obligation meant little to this new landed class. For this new propertied class, property ownership and the rights attaching to ownership of land gave access to power and profit.\footnote{Smith, above n 100, 211. This was obvious to Adam Smith who said of the opportunity of colonials in the Americas (and true also of Australia): 'The purchase and improvement of uncultivated land is there the most profitable employment of the smallest as well as the of the greatest capitals, and the most direct road to all the fortune and illustration which can be required in that country.'} The pursuit of profit would be an ideology of its own. As Hume would later state: "Nothing is more certain than that men are, in great measure, governed by interest".\footnote{David Hume, \textit{Theory of Politics}, (Nelson, 1951), 81, cited John Ralston Saul, \textit{The Unconscious Civilization} (1997), 80.}

4.6.1 Economic Transformation

The significance of the economic transformation of the English economy in the late seventeenth and early eighteenth century is that it was facilitated by laws made by parliament. The Acts passed by parliament gave the promoter the legal legitimacy to exploit opportunities which the common law would otherwise not sanction. Through statutes made by the people's representatives, feudal social notions yielded to a new economic imperative.\footnote{Platt, above n 48, 67. Rutherford Platt argues that the: 'Stifling conformity of feudalism discouraged innovation and creativity both in the use of land and intellectually. Beginning with the depopulation of the rural manors due to the Black Death in the 14th Century, changing demographic and technological conditions placed increasing pressure on the ancient ways of using land.'} The invention of the steam engine, the macadamising of roads and the growth of markets all created economic opportunities which, to exploit them to the full, the means of production and of access to resources had to be rationalised. Exploitation of inventions like steam engine railways, canals and macadamised roads necessitated linear routes which, unfortunately for those in the way of progress, had not been the pattern that the pre-industrial landscape had evolved into.\footnote{Transport and the Regions Department of Environment, UK 'Environmental Court Project Final Report' (2000) (UK Court Project Report), Section 9.2.1: 'The linear character of the canal, railway and road networks that were developed required inevitably the exercise of coercive powers. The land owners could not be expected to co-operate unconditionally in surrendering land to the greater commercial enterprise of the railway companies or the turnpike trust, and the only mechanism available to the promoter of such a scheme was to secure the necessary powers under Parliamentary legislation to acquire land compulsorily subject to an obligation to pay compensation to the owner, and to construct and operate a railway, without being liable to action for nuisance from those with land alongside the route. For the previous two centuries it had been local authorities who alone had the willingness or ability to promote improvement works such as harbour or river improvements and who sough}
use planning context, the only way to enable the exploitation of the opportunities was through the law making power of parliament. The real impact of the industrial revolution in England would therefore lie in the social consequences of that rationalisation and the central place of parliament in facilitating change.

The commons had provided a means for the people to produce food. However, a process of land enclosure had begun in the previous centuries as a means of ‘buttressing unsteady rent-rolls.’ Webb suggests that enclosures had always entailed a degree of coercion. Enclosures had been ongoing ‘as the landowners of a village agreed to it or as dominant men forced their smaller neighbours to give in.’ By the late seventeenth century, the willingness of the people in the villages to agree to such proposals had been sapped by the impact of change. Deane notes that it was the rising corn price that stiffened the resistance to enclosures. This fact is likely to suggest the explanation for the push by landowners to pursue enclosures to exploit the opportunity culminating in the Passage of The Inclosure (Consolidation) Act 1801 (UK) (the Enclosure Act).

Those who owned the land took the opportunity to enclose it, drain it and thus to reduce the common land (and therefore the means of common production) into their legal possession. Others used the land to build the factories to make the goods for export by means of mechanised industrial processes. Hobsbawm asserts that in Britain, ‘resistance to capitalist development ceased to be effective by the seventeenth century.’ The modern age had arrived. Deane goes so far as to suggest that in England, the economic system under the industrial revolution ‘was as near being the proto-type of a free-market, labour-abundant economy as there has ever been.’

The owners of land, who now controlled parliament, could take advantage of the opportunity of new improvements in agricultural methods, industrial process, means of production and export opportunities by exploiting the law making power of parliament to coerce the social change

Parliamentary powers not only for the works themselves but also to levy a special rate on ships to meet the costs.’
165 Griffiths, above n 78, 189. Depopulation of rural areas through war famine and disease had lead to many areas being enclosed.
166 Webb, above n 85, 109.
168 41 George III, c. 109.
169 Moore, above n 5, 32:
170 ‘The British commons was effectively privatised, and the customary rights of the common people to grow crops and vegetables, travel pathways and fish and hunt game made way for new rights of private property.’
171 Hobsbawm, above n 159, 16.
deemed necessary. As is explained in the next section, law made by parliament became a fundamental driver of social change. But it was legislative change that advanced the interest of private property, based on McAuslan’s private property ideology. It would be laws enacted by parliament facilitating economic change that led directly to the need for social legislation brought about by the social conditions caused by that process. What began as the mechanism to facilitate private interest outcomes, morphed, by the nineteenth century, into the use of parliament to legislate social change deemed by it to be in the public interest. Ultimately, this led to the enactment of planning laws.

Arguably, the industrial revolution created an ‘explosive’ climate where both at the micro and macro levels of society, private bills were needed for a multiplicity of projects in a diversity of areas. The exploitation of opportunities in the agricultural economy precipitated an acceleration of the drift of population to the towns and cities where scientific revolutions had initiated the industrial revolution in manufacturing creating a demand for labour. Deane argues that ‘there is no doubt that the English economy had been transformed out of all recognition between 1740 and 1840.’

4.6.2 Social Transformation

English society, which had already been transformed by the strife of the Civil War, the Restoration and the Glorious Revolution, now suffered a further transformation. Black amplifies this point suggesting that ‘[t]echnology was like a freed genie, bringing ever more changes.’

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171 Deane, above n 167, 223.
172 Langford, above n 138, 410. Langford suggests that Blackstone’s *Commentaries on the Laws of England*, published in 1765, and was the publication that: ‘had announced with uncompromising clarity the unbounded legal authority of the Crown-in-Parliament.’ This view was strongly contested by Bentham who wrote his Fragment on Government denouncing Blackstone in the strongest of terms – accusing him, amongst other things, of being a ‘shameless apologist of the status quo’ - see the discussion in Posner, above n 21, 570.
173 Platt, above n 48, 67. Rutherford Platt notes that as early as 1235 ‘Parliament adopted a series of special acts authorising specific tracts of land to be enclosed or “privatised” to the exclusion of commoners, who were forced to choose between working as hired labourers or seeking employment elsewhere.’
174 Deane, above n 167, 166-170. See also UK Court Project Report, above n 164, Section 9.2.1. Legislation authorised the construction of Canals from as early as the eighteenth century. The UK Parliament passed the *Inclosure (Consolidation) Act (UK)* and *Railway Act (UK)* in 1801; the *Gas Light Act (UK)* and *Coke Companies Act (UK)* were enacted in 1810 and the *Tramways Act(UK)* was passed in 1870. All were necessary to facilitate the infrastructure to enable economic development. Each Act overrode private and common rights.
175 Deane, above n 167, 166. Langford, above n 138, 378, puts the period of significant change as the decades between 1760 – 1870.
176 Black, above n 117, 221.
Globalisation and the technological revolution would follow. In truth, society is still experiencing the flux of change deriving from the industrial revolution. Those that had income and wealth had already taken the opportunity to purchase housing.\textsuperscript{177} By the end of the seventeenth century they were joined by the rural poor who had migrated en masse to the towns where they were barely able to be accommodated in rented housing.\textsuperscript{178} As Deane also notes, the distinguishing feature of the industrial revolution in England was that: ‘the changes concerned developed together, and on a scale that was sufficiently far-reaching and persuasive to set off a continuing and cumulative process of change and growth. It was the sheer scale and persistence of economic change that was new.’\textsuperscript{179}

The cost of the English having to fund the war and embargo against the American colonists, the French and the Dutch led to increasing government debt and to a financial crisis and social unrest in England in the late eighteenth century. Pressure built for parliament to reform itself under threat of reform being imposed by social revolution.\textsuperscript{180} Langford suggests that the emergence of the Association movement of 1779-80 ‘brought reform nearer than at any time in the ensuing fifty years, and at its height in 1780 it achieved an extraordinary degree of national consensus.’\textsuperscript{181} The association movement is the best example of the emerging voice of the disenfranchised people under conditions which in many ways oppressed the people.\textsuperscript{182} The association movement was broad in its interests ultimately extending to include the garden city association.\textsuperscript{183} The vitality of the association movement confirms the observation noted by Putnam, affirmed by Edwards, that the development of a vibrant associational life in a society is

\begin{itemize}
  \item \textsuperscript{177} Harvie, above n 155, 474. Harvie notes that owner-occupiers were becoming more common by the end of the seventeenth century.
  \item \textsuperscript{178} Platt, above n 48, 157. Rutherford Platt comments that the population of towns exceeding 20,000 ‘grew tenfold from 1.5 million to 15.5 million between 1801 and 1891.’ Whilst all towns and cities grew, the principal cities attracted the majority of the population growth.
  \item \textsuperscript{179} Deane, above n 167, 163.
  \item \textsuperscript{180} It is the pressure of agitation that causes change. As Sir Peter Hall, Cities in Civilization (2001), 936, suggests: ‘even revolutions are marked by furious disagreement.’
  \item \textsuperscript{181} Langford, above n 138, 412. Langford also suggests that there was a significant impediment to the association movement gaining momentum and support among members of parliament, namely its ‘lunatic fringe’ which wanted to challenge not just the government but the ‘constitutional framework which supported it,’ that is, to introduce democracy.
  \item \textsuperscript{182} Moore, above n 5, ‘According to Thomas Hardy – the tradesman made good who founded the reform group, the London Corresponding Society, in which Margarot was a leading figure – the majority of members in the House of Commons were chosen by only 12,000 voters.’ Margarot was one of the five martyrs to liberty transported as political prisoners to NSW in 1793-4.
  \item \textsuperscript{183} Andrew Kelly and Christopher Smith, The Capriciousness of Australian Planning Law: Zoning Objectives in NSW as a Case Study’ (2008) 26(1) Urban Policy and Research 83, 84. Indeed, in the context of land use planning, the establishment of the Garden Cities Association in 1899 and its successor the Garden Cities and Town Planning Association in 1907 (which led directly to the passage of the Town and Country Planning Act in 1909), demonstrates this point well.
\end{itemize}
central to the development of a civic culture.\textsuperscript{184} Hobsbawm recognises that at this time the British parliament was controlled by ‘an oligarchy of landowning aristocrats.’\textsuperscript{185} Yet it would be France and not Britain that would experience violent revolution as the voice of the people rose to overthrow the government in 1789. In response, the English ruling class, being fearful of the path France took, quickly developed a new ideation. Edwards describes it as a ‘cooperative compact’ and suggests that it is the ideation that ‘underpins and is implicit in classical democratic ideology.’\textsuperscript{186} Whilst both the English and French models of social revolution would involve devolution of power to the people, it was achieved by very different means.

At the end of the seventeenth century only five English towns had a population of ten thousand people. By the start of the nineteenth century there were twenty seven, with London increasing in size from half a million people to one million people over the same period.\textsuperscript{187} By the 1830s industrialisation had drawn thirty percent of the population into towns.\textsuperscript{188} This was the greatest concentration of people in urban areas in Europe at that time.\textsuperscript{189} Forty percent of this population was employed in manufacturing.\textsuperscript{190} One attraction of urban living was that when wives and children were working, the household income could be robust.\textsuperscript{191} But with urban growth, fear of the mob intensified.\textsuperscript{192} Parliament was intent on control. Its actions were not about creating what Webb describes as ‘a better life to the people of England.’\textsuperscript{193}

\textsuperscript{184} Edwards, above n 4, 138. Edwards critiques Robert Putnam’s work including the original study by Putnam, Leonardi and Nanetti, \textit{Making democracy work: Civic traditions in modern Italy}, (Princeton University Press, 1993) and his later work, \textit{Bowling Alone: The collapse and revival of American community}, (Simon & Schuster, 1999). Edwards suggests, at 126, that Putnam may have made ‘a theoretical mis-step confusing this rational choice explanation of civic culture with Coleman’s concept of social capital.’ But Edwards ultimately affirms Putnam’s approach by suggesting the findings of the work is consistent with the concept of ‘ideational social capital.’

\textsuperscript{185} Hobsbawm, above n 159, 26.

\textsuperscript{186} Ibid, 140.

\textsuperscript{187} Black, above n 117, 165-167.

\textsuperscript{188} Platt, above n 48, 158. Dwelling construction significantly lagged behind demand. As Platt notes, ‘[u]nfettered by any public regulations, … dwellings were minute in size and packed together with space left unbuilt only to the minimum extent necessary to provide physical access to each unit.’

\textsuperscript{189} Harvie, above n 155, 426. By 1901, eighty percent of the population would live in towns.

\textsuperscript{190} Webb, above n 85, 237.

\textsuperscript{191} Harvie, above n 155, 516. Harvie relies on Roundtree’s, \textit{Poverty: a study of town life} (1901). That study reveals that twenty seven percent of the population in York was living in what he describes as primary or secondary poverty.

\textsuperscript{192} Grayling, above n 123, 178. Grayling makes the following point: ‘The thought of mob violence engendered special horror. Given that there was no police force, and that the army was a cumbersome instrument when used in place of one, there was good reason for people to feel afraid if they had something to lose.’

\textsuperscript{193} Moore, above n 5, 34, suggests that the propertied class, ‘being blind to the connection between economic transformation and social deviance,’ … ‘took alarm at the growth of an underclass out of control in both town and country that seemed to have forsaken honest toil and customary deference for sloth, gin and crime.’
4.6.3 The Rise of the Middle Class

Langford notes that the lifestyle of the upper and middle classes ‘made the inequalities of a highly commercial, cash-based economy glaringly plain.’ Deane acknowledges that eighteenth century entrepreneurs depended heavily on family and friends for capital, thus keeping economic power within the landed wealthy. Langford describes early attempts of the English poor to ‘fight back’ against the tide of change, but he acknowledges that it was a losing battle. When power is centralised in the hands of a few, it is often difficult to achieve balance in the social context. Examples of the benevolent oligarchy are few. Usually the result is, as Pope suggests, the ‘forceful political intervention of the citizenry.’

The events in France in 1789 would focus the minds of both Whigs and Tories. Both sides of parliament rallied to the Crown. The government became very wary of the people. Advocates of people’s rights and liberties such as Thomas Paine were tainted as ‘dangerous radicals’. Moore suggests that to those within parliament, people ‘supporting the goals of the [French] revolution were supporting terror, mob rule, even regicide.’ Despite the strict measures adopted by the government to control society, some continued to gamble with their liberty to

strengthening the powers of magistrates and local law officers to quell gatherings of more than twelve people. Once the proclamation in the Act was read, those who had not dispersed could be charged with a felony offence.

Langford, above n 138, 381.
Deane, above n 167, 203.
Langford, above n 138, 382. As an example, he cites attempts to utilise existing apprenticeship laws to protect rights but notes they were ‘ineffective against the joint efforts of capitalist manufacturers and unskilled labourers to cheat them’.
Pope, above n 128, 327-8:

‘The American founders saw popular resistance not as a means of pressing for change, but as a defense against tyrannical government. Republican moments, on the other hand, have brought wrenching transformations in political, social, and economic life. Both constructs are, however, concerned with the same underlying problem: the natural tendency of government to become estranged from the people and to diverge from the pursuit of the public interest. And both prescribe the same remedy: massive and forceful political intervention by the citizenry.’

Moore, above n 5, 151. Moore references George Rudé, Protest and Punishment: The Story of Social and Political Protesters Transported to Australia 1788-1868, (Clarendon Press 1978), 58 as his authority for asserting that there was a ‘forty year continuum’ of social protest in England beginning with the machine breaking of the Luddites in 1812 and ‘concluding with the last mass demonstrations of the Chartists in 1848.’

Keane, above n 120, 500. Keane notes that Paine’s book The Rights of Man ‘outsold any book ever published, including the bible, and earned him an honorary French citizenship and a seat at the National Assembly.’ J. Uhr, Deliberative democracy in Australia: the changing place of parliament (1998), 36, recounts an episode in early colonial times when a rebellious convict with outspoken republican sentiments was forced to wear a sign with the words ‘Thomas Paine’ sewn to his shirt as an additional punishment. Uhr suggests that ‘conservative Australian advocates of a restricted parliamentary franchise targeted Paine as the baneful source of ideas of democratic representation.’

Moore, above n 5, 45.
bring about social change. Harvie cites Pitt’s ‘reign of terror’ in the early years of the nineteenth century as an example of parliament’s intent to suppress democratic thinkers. Moore identifies Margarot, one of the ‘Martyrs to Liberty’ transported to New South Wales on the Surprize in 1794, as an example of the people parliament had in mind. As Moore notes, Margarot had argued (before his transportation):

‘with precision in the London Corresponding Society that “unequal”, “partial” and “inadequate” representation resulted in oppressive taxes, unjust laws, profligacy with public money and limitations on liberty.’

The surprise is that social change occurred in Britain without violent revolution. Harvie suggests that revolution was avoided because of the efforts of the Clapham Sect, headed by Wilberforce, to convert the elite. Moore similarly identifies this time as a period when the Christian evangelicals ‘found vindication for social justice and the equality of all in the Gospels.’ The justification of the political elite in support of the denial of liberty and resultant social inequities was, as Deane suggests, that the system had its ‘economic advantages.’ Langford describes the change that occurred as the English ruling class manifesting ‘a serious minded, Evangelical enthusiasm’ for reform. Once again, religion would play its part in the movements for social reform.

It can be easily demonstrated that in the nineteenth century, the landed rich became much wealthier. In fact, it was the deliberate investment of the landed class in productive capital formation in the nineteenth century that drove the industrial revolution. As Deane suggests

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201 Ibid, 26. Moore argues:
‘Fearing the export of Jacobinism across the channel via home-grown supporters and publicists, Britain’s leaders surrendered traditional liberties to fight revolution abroad and at home, erecting a regime of spies, censors, unfair trials and offshore imprisonment in a distant colonial outpost where the customary rights of free Englishmen did not apply.’ Many, like the ‘Scottish Martyrs’, the Todpudle Martys and many Irish rebels would be convicted and transported to the colony of New South Wales.

202 Harvie, above n 155, 436.

203 Moore, above n 5, 46.

204 Harvie, above n 155, 436. Harvie argues that by the early decades of the nineteenth century ‘the relentless practical approach of the governing elite, and the role of repression in exalting state power over contractual ideas of politics, conjured up its own radical rival,’ namely an evangelical fervour aimed at converting the elite through the efforts of Wilberforce and the Clapham Sect.

205 Moore, above n 5, 47.

206 Deane, above n 167, 201-2. Deane argues:
‘[H]owever undesirable it might have been socially, the fact that incomes were very unequally distributed in mid eighteenth century England had its economic advantages’

207 Langford, above n 138, 418.

208 Elton, above n 104, 279. Whilst Elton stresses the need for caution against generalisations, he accepts that as a result of the individualism sparked by the protestant revolution:
without irony, ‘if this surplus had gone to the poor it would have been difficult to get it out of current consumption and into capital formation.’

This new middle class had the ear of power, and it sought to exploit its position to the exclusion of workers. As only the landowning classes could stand for parliament before 1832, power was concentrated in their hands. But pressure to listen to the needs of the middle class had been rising. Langford’s view is that the ‘sovereign power of cash’ meant that there was a ‘steady assimilation of small professional and business families [which] altered the precise make-up of the landed class without significantly affecting its overall character.’

Black is of the view that the nineteenth century saw the middle-class setting the legislative agenda. The objective of the reforms of this period was ‘the consolidation of an urban middle-class [political] base.’ It is here suggested that the parliamentary elite devised the means to hold onto power by enacting successive social reforms which benefited the middle-class more so than working class people. The middle class had champions in parliament. Harvie argues that the purpose of the reforms of this period was ‘to concede enough … to stave off political explosions.’ This is exemplified by the passage of the ‘Catholic emancipation Act’ in

‘there is some truth in the traditional view which associates movements of political freedom and social change with the protestant religion.’

Deane, above n 167, 202.

Adam Smith, above n 100, 210-12. Writing in 1776 he noted that:

‘To purchase land, is, everywhere in Europe, a most unprofitable employment of small capital. …From the beginning of the reign of Elizabeth, too, the English legislature has been peculiarly attentive to the interests of commerce and manufacturers, and in reality there is no country in Europe, Holland itself not excepted, of which the law is, upon the whole, more favourable to this sort of industry.’

As Mark Pennington, ‘Hayekian Political Economy and the Limits of Deliberative Democracy’ (2003) 51(4) Political Studies 722, 733, notes:

‘Markets are characterised by an unequal distribution of power, but this inequality is fundamentally dynamic, … the principal sources of “social exclusion” are regulatory barriers to market entry, which prevent people from accumulating capital and responding to opportunities before them.’

Hirst, above n 3, 102. Quoting Sir Robert Peel in 1833:

‘If the influence of property in elections were destroyed, the security of all property and the stability of all government would be destroyed with it. It was surely absurd to say, that a man with ten thousand pounds a year should not have more influence over the legislature of the country, than a man of ten thousand pounds.’

Kenneth O Morgan, The Oxford History of Britain (2001), 470. Morgan argues that the power ebbed from the pre-industrial elite slowly. As Morgan notes:

‘Only around 1830 were people conscious of substantial and permanent industrial change; it took another twenty years to convince even the middle class that it had all been for the better.’

Langford, above n 138, 389.

Black, above n 117, 203.

Harvie, above n 155, 499.

Ibid, 458.
1829.218 O’Farrell suggests that this Act was a ‘grudging concession’ granted under threat by O’Connell to unleash Catholic mob violence both in Ireland and England.219

The impact of the industrial revolution is hard to overstate. It caused a transformation in the social conditions of English society. This is the market theory position. The social conditions created by economic development were the subject of spontaneous market readjustment. Webster and Lai suggest that this spontaneity led to the emergence of the garden city movement.220 But even if that be correct, it was the resultant social conditions caused by unrestrained market conditions that created the problems the association sought to address. Saul, in his book Unconscious Civilisation, references the appalling social conditions caused by the impact of the Industrial Revolution. He posits the question whether what he describes were ‘temporary conditions’ being ‘the unfortunate, inevitable disorder of revolutionary change’?221 Saul goes on to advance the argument that it was a series of people-led reforms enacted through Parliament that brought social change. This argument is supported by Berveling and Taylor.222

218 *Roman Catholic Relief Act 1829 (UK) (10 Geo IV, c.7)*


220 Webster and Lai, above n 19, 92-3. The social costs generated wealth. Wealth, over time: ‘has a habit of fostering new systems of property rights that reduce some of the excesses of earlier stages of development. … The garden city of Ebenezer Howard (1902) that inspired a wave of new forms of settlement and urban governance during the twentieth century started as a spontaneous private entrepreneurial search for alternative institutional, organisational and spatial order (privately owned and managed free-standing industrial towns built on low-value agricultural land).’

221 Saul, above n 162, 119. He then states: ‘Well, actually, these conditions could not be called temporary. They persisted until the second half of the 19th Century and then only began to ease gradually. There wasn't any serious spreading of prosperity throughout the population until the 20th Century. In many ways things got far worse for a very long time. For example, the development of the mechanised cotton mills created much of the market for slaves to pick American cotton. … the sugar and cotton field slaves represented a major revolution - the enslaving of a race purely for economic reasons … The long term pattern of the Industrial Revolution was to institute a lower financial standard of living and declining conditions of life. The result was a full century of unimpeded social decline and disorder. At life expectancy levels then common, this represented many generations, a long term pattern, not a temporary adjustment. What's more, during this long, unimpeded run, the economic forces were unable to establish a stable balance. The market simple repeated, repeatedly and mechanically, the cycle of slow build to a boom followed by bust. ‘The market did not and does not learn because being devoid of disinterest, it has no memory. There can be no such thing as a natural market equilibrium.’

222 S Berveling and L Taylor, ‘Land Use Planning, Development & Building Control ’ in P Stein QC AM et al (eds), *Butterworths, Local Government Planning and Environment Service NSW* (2004) vol C Commentary, [450,011], C60,153: ‘The first main statute dealing with building regulation was the Public Health Act 1848 (UK), introduced in response to the urban aftermath of the Industrial Revolution. This gave rise to a series of enactments each dealing with separate issues such as building layouts and external space requirements. The various mechanisms were consolidated into the Public Health Act 1875’.
4.6.4 Social Reform through Parliamentary Reform

Until the ‘Great Reform Act’ the King and the Aristocracy had ‘indirect control’ over many votes of those electing members to parliament.\textsuperscript{223} Absent a champion in parliament, the people were left to more traditional forms of protest in order to raise their voice. The Gordon riots of 1780, led by Lord George Gordon of the Protestant Association, ‘held London at its mercy for nearly a week and engaged in an orgy of murder and destruction.’\textsuperscript{224} Langford argues that the conservative reaction ‘so marked in England during the following years’ can be dated to this episode of some of the people rising against exclusion from parliamentary power.\textsuperscript{225}

Parliament’s response to the rising voice of the people was typical. As Harvie notes, ‘what ever the governing elite thought about economic doctrines, as magistrates and landowners their watchword was stability, their values still pre-industrial.’\textsuperscript{226} Langford makes the point that that Burke pushed through a ‘handful of reforms abolishing some of the more notorious sinecure places and providing for a more intensive scrutiny of crown finances,’\textsuperscript{227} as a means of putting off the need to effect real reforms. The expansion of institutions ‘with a meritocratic ethos’, particularly in the civil service, the universities, schools and the army were implemented as a means to forestall more radical solutions.\textsuperscript{228} Keane observes that these measures were as if ‘the Westminster model vaccinated itself against the French disease.’\textsuperscript{229}

But the mood for reform would not be stifled.\textsuperscript{230} Tolstoy’s comment in \textit{War and Peace} (published in 1869) that ‘great movements stem from millions of individual decisions reached by ordinary people’ captures the sentiment of the time.\textsuperscript{231} The combination of economic change,

\textsuperscript{223} As Posner, above n 21, 580 confirms,
‘the votes for the members of the House of Commons were indirectly controlled by the king and a few of the more powerful aristocrats. English government of the period appears to have been far more oligarchic than Blackstone lets on.’

\textsuperscript{224} Langford, above n 138, 415. The August 2011 riots in London (and other cities) can perhaps be seen in this light as a continuation of history – except that unlike the early nineteenth century, transportation to the colony of New South Wales is not an option for the British government

\textsuperscript{225} Ibid..

\textsuperscript{226} Harvie, above n 155, 420.

\textsuperscript{227} Langford, above n 138, 412.

\textsuperscript{228} Black, above n 117, 217.

\textsuperscript{229} Keane, above n 120, 554.


\textsuperscript{231} Cited in Harvie, above n 155, 420.
food shortages following the Napoleonic wars and the passage of the *Corn Laws Act* of 1815 led to great social unrest. Moore suggests that ‘[t]he army had to protect parliament from angry mobs unable to afford bread.’ Citing Hobsbawn and Rudé, Moore identifies these protests as ‘primitive egalitarianism.’ As Keane explains:

‘Until the end of the eighteenth century the commoners knew nothing of the language of democracy. But they did know about bargaining by collective riot: satire and mockery, violence directed against people and calculated damage to things.’

The social unrest led to parliamentary interventions and the passage of ‘illiberal legislation.’ Moore identifies that this period saw parliament enact legislation in 1820 that ‘greatly enhanced the state’s power to suppress drilling [marching], meetings and seditious libel.’ Yet there were also voices for reform. Elements in the English parliament recognised that what was needed was not so much as radical reform but rather societal reform. It was the time of the ‘philosophical radicals.’ Utilitarianism became the catchcry. Langford sources the enthusiasm of this group to ‘the business classes of the new industrial England.’

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232 *Importation Act 1815* (UK) (55 Geo. 3 c. 26) (Corn Laws)
233 Moore, above n 5, 159. Moore also notes that the government declared a state of emergency, suspended *Habeas Corpus* and sent troops to York and Leicester. Forty two of the rioters were transported to Australia. 1819 was the year of the St Peter’s Field massacre (later known as the Peterloo Massacre) when the Lancashire Yeomanry killed eleven people and injured over four hundred more in an assemblage of workers protesting for improved wages.
234 Moore, above n 5, 163.
235 Keane, above n 120, 459.
236 Grayling, above n 123, 154. Grayling suggests that:

‘These were not the last repressive measures introduced. Having got into the habit of illiberal legislation, successive governments (other than that of Charles James Fox and his companions in the short-lived Ministry of All the Talents, 1806-7) continued to introduce reactionary measures right into the 1820s. They brought in a bill to extend the death penalty to Luddites in the economic hardships of the last years of the Napoleonic Wars, again suspending habeas corpus in 1817, and then passing the infamous Six Acts following the Peterloo massacre of 1819.’

237 Moore, above n 5, 164. Moore suggests that the ‘Six Acts’ in 1820 was the state’s backlash to the social unrest and that they were a measure to maintain control in society. Without the pressure created by the social unrest it is arguable that the reforms of the evangelicals may not have triumphed.
238 Hirst, above n 3, 102. Hirst identifies that it was the reform movement known as the philosophical radicals that applied the intellectual pressure within parliament: ‘[f]or the philosophical radicals it was crucial that parliament truly represent the interests and wishes of all the people, for otherwise how would the laws contribute to the greatest happiness of the greatest number?’
239 Windeyer, above n 11, 236. As Windeyer notes:

‘Bentham was the founder of English utilitarianism, the political theory which tried all social institutions and arrangements by the test of expediency. What useful purpose did they serve? This challenge came as an alarming challenge to the antiquated formalities, the obsolete rules of law, the barbarous penalties, the fictitious procedures, the sinecure offices which bulked so largely in the English legal system in 1800.’
240 Langford, above n 138, 418.
movement for the abolition of slavery spearheaded by Wilberforce, with the support of Pitt the younger, is the prime example.\textsuperscript{241}

And it would be in the parishes and boroughs of England, the place where the civil administration of the locality occurred, that the ideation would form in peoples minds as to how they could attain a role in government.\textsuperscript{242} In the counties, the crown appointed the Lord Lieutenant. This appointment gave the person who held the position the right to bestow patronage such as in the appointment of justices of the peace. The significance was that these local administrators, for which no salary or payment other than the honour of appointment was received, had the status of crown officials. They had power to make bylaws. In combination with the vestry (or parish) council, they served as a ‘virtual legislature for their locality.’\textsuperscript{243}

The administration of towns was more complex. Webb suggests that by the eighteenth century municipal government had ‘declined into self-serving and unresponsive oligarchies.’\textsuperscript{244} The \textit{Municipal Corporations Act} of 1661 had excluded dissenters from being entitled to take a position in a municipal corporation. Given that this Act excluded many in the mercantile class who would not profess to being Anglican, it is not surprising that Webb notes that few corporations were active by the nineteenth century.\textsuperscript{245}

Benthamite theory merged with the aspirations of those people that had democratic intent.\textsuperscript{246} Throughout the nineteenth century, reformist (Whig) and loyalist (Tory) ideologues would agitate for control both in municipal affairs and in parliament.\textsuperscript{247} Harvie correctly suggests that

\begin{itemize}
  \item \textsuperscript{241} Grayling, above n 123, 180. Grayling suggests:  
  \begin{quote}
  ‘Agitation for parliamentary reform in the country at large was not merely continuing, but growing. In 1830 a series of events brought the matter to a head. One was the death of George IV and the succession of his brother William IV. … As was customary following a change of monarch, a general election was called, and in the constituencies where the result gave some indications of public feeling it was clear that there was a majority for reform.’
  \end{quote}

  \item \textsuperscript{242} DiGaetano, above n 230, 440. DiGaetano suggests that the widening of the franchise by the Municipal Corporations Act led to tension between Whig and Tory protagonists. He notes:  
  \begin{quote}
  ‘[T]he emerging local public domain had become much more politically contentious, with political reformers agitating for local state expansion while Tory “economisers” doggedly resisted these modernizing efforts.
  \end{quote}

  \item \textsuperscript{243} Webb, above n 85, 59.
  \item \textsuperscript{244} Ibid, 59.
  \item \textsuperscript{245} Ibid, 59.
  \item \textsuperscript{246} Hirst, above n 3, 103:  
  \begin{quote}
  ‘Government, said Bentham, did not exist just to protect property or preserve rights or punish the wicked; its true aim was to create the greatest happiness of the greatest number of the people.’
  \end{quote}

  \item \textsuperscript{247} Moore, above n 5, 204. Moore argues that:  
  \begin{quote}
  ‘Often working men and women were enlisted by liberal middle-class reformers to help push for the political reform of the old aristocratic-controlled constitution, culminating in the passing of the Great Reform Bill of 1832.’
  \end{quote}
\end{itemize}
identifying protagonists at this time as ‘left’ or ‘right’ is to impose a ‘criteria of a later age.’ Identifying protagonists at this time as ‘left’ or ‘right’ is to impose a ‘criteria of a later age.’ But it is possible to date the emergence of the ideology of parliament as an instrument of managed social change to this period. This is evident in the passage of the Reform Act 1832 (UK) and in social legislation such as the Factory Act 1833 (UK) and the Poor Law Amendment Act 1834 (UK). That the passage of these reforms was a means of preserving the power of the state in the hands of the landed and mercantile elite does not detract from observation that the people began to see the role of parliament in different terms. It is perhaps, for present purposes, particularly significant that the period saw the passage of the Municipal Corporations Act 1835 (UK).

4.6.5 UK Municipal Reform

By the reforms introduced by the Municipal Corporations Act of 1835, municipal affairs became subject to a rate-payer franchise. Following the report of the English Royal Commission conducted under Lord Parkes, one hundred and eighty four municipal corporations in England were replaced by elected councils ‘chosen by rate-paying householders that had been in residence for three years.’ Forty one large towns, many being industrial towns including Manchester, Bradford and Birmingham, obtained representation for the first time. As Webb notes, ‘by mid [nineteenth] century the corporations themselves were requesting private acts of parliament granting very broad powers, for, among other things, housing, slum clearance, and the operation of gas and water works.’ Accordingly, it is possible to see this time as the beginning of the ideation of a different ideology, the emergence of a cooperative compact.

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248 Harvie, above n 155, 456.
249 Stone, above n 157, 64. Stone notes that by the end of the eighteenth century:
‘In form and substance, [the law of England] was the product of centuries of law-making activities by lawyers and judges from the twelfth century onwards, with only sporadic and unsystematic legislation.’
250 Moore, above n 5, 178. Moore suggests that the swing riots ‘discredited the moral authority of the rural gentry, and encouraged middle – and working class people in the cities to agitate to lessen the aristocracy’s hold on parliament.’
251 Windeyer, above n 11, 246. Windeyer suggests that:
‘no one, who views the development of English law as a whole during the nineteenth century can fail to notice how it has been directly and indirectly affected by the giving of political power to new sections of the community. The reform of the municipalities and of local government was also an event of great importance.’
252 (5 & 6 Wm. IV., c.76).
253 Webb, above n 85, 226.
254 DiGaetano, above n 230, 443. DiGaetano’ view is that:
‘The 1835 act, with the stroke of a pen, converted these essentially private organizations for the protection and enrichment of local economic elites into representative forms of government with elected councils. Municipal governments became truly public institutions.’
amongst some members of the political elite to create a more representative state. The early legislative reforms did not bring equality. On one view it was easy for the landed classes to hold onto power. As Harvie notes, the aristocracy supplied:

‘much of the membership of both political parties at Westminster, occupying almost all of the upper posts in the empire, running local government in the counties, and officering the army – the navy was less socially exclusive.’

The unpaid nature of parliamentarian service naturally excluded from participation all but those who could afford to not to work. This, in part, guaranteed that the established elite would continue to dominate parliament ‘for almost a further half century.’ Up until this time, the dominant ideology was the attainment and maintenance of power through control of the franchise. Despite the working-class protest movement of Chartism and the publication of the people’s charter in 1838, little progress towards equality was made. There was little enthusiasm in parliament for the Chartist principles of universal male suffrage, abolition of property qualifications and annual elections.

It would be the Municipal Corporations Act that first gave political voice to the people (in the capacity of the middle-class) by giving them a measure of control over their own affairs. The act fostered participation by ‘encourag[ing] the party politicization of corporations.’ As Webb suggests: ‘If one is looking in England of the [eighteen] thirties for a striking expansion of the

256 Harvie, above n 155, 493.
257 K Mannheim, Freedom, Power and Democratic Planning (1951), 99. Mannheim suggests that:

‘[s]ociologically speaking England has been a political democracy run by an oligarchy which has gradually expanded its basis of selection.’

Mannheim cites the work of A J Jones, The Education of Youth for Leadership, (1938), 74, whose investigation found that ‘[b]etween 1800 and 1924 60% of the Cabinet came from the ruling class.’

258 Harvie, above n 155, 441.

259 Hirst, above n 3, 101:

‘In England, open voting was one of the ways the great landowners kept power in their hands. Before election day, the landowner’s agent or bailiff – the man who would collect the rent – would make clear to all the tenant farmers of his master how they should vote.’

260 This included the power to decide not to spend on public infrastructure. The economic analysis undertaken by Toke S Aidt, Martin Daunton and Jayasri Dutta, The Retrenchment Hypothesis and the Extension of the Franchise in England and Wales (2010) 120(547) The Economic Journal 990, suggests that where the extension of the franchise was forced by central government, the middle class control of councils sometimes resulted in a contraction of public spending due to the fact that the rate impost associated with funding public infrastructure fell more heavily on that class. They suggest (at 992 ) that their analysis:

’show[s] that local democratic institutions, even when they operate well and provide accountability and voice as intended, can be a force of retrenchment when the power falls into the hands of groups that do not wish to spend on public goods. In fact, this can be seen as a counter-example to Director’s law, as expansion of local government spending was driven mainly by the urban elite, not by the middle class.’

261 Black, above n 117, 183.
political power of the middle classes, one must look not to the reformed parliament but to the
towns. The Second Reform Act 1867 (UK), extended the franchise to males living in
towns. The process was effectively completed by 1884-5, when the same limited suffrage
was extended to adult males in the counties. This reform led to almost two thirds of the male
population in the counties being enfranchised. This, in turn, led to a nationalisation of
political choices. As Phillips notes, ‘many of the holders of both franchises [municipal and
national] viewed all political choices in essentially national terms.’

4.6.6 The Impact of the Reform Acts

The Reform Act of 1832 was a defining moment when politics shifted from being ‘local
factional and idiosyncratic’ to reflect modern politics where ‘political principle defined in
national terms by the parties at Westminster’ administered by party apparatus in each electorate
determines the outcomes. As Lord Nelson ruefully commented in 1833 ‘[t]he mischief of the
reform is that whereas democracy prevailed heretofore only in some places, it now prevails
everywhere.’ Windeyer expressed the view that the Reform Act led to democracy. It is
equally arguable, as Clark contends, that the Reform Act was just another manoeuvre, ‘a classic
example of the British state conceding token political representation to excluded classes in order
to forestall more radical challenges to the dominant system.’ Phillips and Wetherill go so far
as to suggest that the change was ‘accidental.’ But it is undeniable that the reforms of this
period introduced a fundamental change in the dynamic of parliament. Phillips and Wetherell

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262 Webb, above n 85, 228.
263 The Representation of the People Act 1867 (UK), 30 & 31 Vict. c. 102.
264 Richard Ackland, ‘Cut the big parties down to size and reform can blossom’, Sydney Morning Herald
(Sydney), 27 August 2010, 15. Ackland notes that the ‘Second Reform Act of 1867, which enfranchised
the urban working class, was only passed as a result of an alliance between the conservative and reformist
liberals.’
265 Black, above n 117, 205. However, as Grayling, above n 123, 190-194, notes, the paradox was that
legislation in the late eighteenth century had made associations illegal. This confusion ultimately led to
events such as the Todpuddle Martyrs case.
266 John A. Phillips, ‘England's Other Ballot Question: The Unnoticed Political Revolution of 1835’
(2008) 24(S1) Parliamentary History 139, 151.
267 Ibid, above n 117, 205, 415.
268 Citing Nelson’s letter to Croker March 6 1833, ‘the Croker Papers’.
269 Windeyer, above n 11, 246. Windeyer argues that the Reform Act ‘and later extensions of the
franchise made the kingdom a democracy.’
270 Anna Clark, ‘Review: Changing Concepts of Citizenship: Gender, Empire, and Class’ (2003) 42(2) The
Journal of British Studies 263, 266. In a similar vein, O’Farrell, above n 52, 87, argues, in the context of
Ireland, that the 1829 Emancipation Act had a similar purpose. That Act gave Catholics ‘access to
parliament and officers, but [they] were deprived of the voting basis for political power.’
analysed voting behaviour pre and post the Reform Act of 1832. Their work shows that in the eighteenth and extending into the nineteenth century, the electorate was very changeable. That is, before the Reform Act, of those that could vote they were loyal not to parties but to themselves – their vote could be bought. But after the passage of the Reform Act in 1832 (which occurred only after the King threatened to swamp the House of Lords), this changed. Statistical analysis of voting patterns demonstrates that the Reform Act had a ‘powerfully politicizing impact’ on the electorate with ‘an initial Whig or Tory vote locked electors into virtually lifelong patterns.’

Similarly to the impact of the industrial revolution, the political reforms of this period led to greater change. Over the course of the century, beginning with the middle class, the needs of the people became relevant. Harvie suggests that:

‘[t]he great surge of middle-class political awareness exemplified in the Anti-Corn Law League in the 1840s had made it clear to politicians that the old political structure could be maintained only if it came to terms with middle class expectations.’

But urbanisation also led to the rise of collectivism. The working classes expressed their voice through participation in organised trade unions; their frustrations were expressed through support for organised sport like association football. From as early as the eighteen twenties, labour had been organised in Lancashire with the formation of the National Association for the protection of Labour. This was followed closely, in 1833, by the formation of the Builders’ Union, which spread throughout the industrial regions. Owen formed the Grand National Consolidated Trades Union in 1834 only to see the government respond by transporting to New South Wales six agricultural labourers, the ‘Todpuddle Martyrs’ from Dorchester, for forming a union. The government’s initial response would lead to the failure of the attempt to create a national union. But the arrest and mass movement that arose to secure the freedom of the Todpuddle six represents, according to Moore, ‘a moment of symbolic transition.’ It marked the

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271 Phillips and Wetherell, above n 266, 434. Phillips and Wetherell suggest that the reform process reshaped politics ‘unintentionally; it introduced a new political system by accidentally altering the relationship between elections, voters, and the parliamentary parties.’

272 Ibid, 413. Phillips and Wetherell note that:

‘The king’s reluctant threat to pack the House of Lords with enough supporters to ensure the bill’s passage finally forced the issue to a successful conclusion, and the Reform Bill became the Reform Act with the king’s unhappy assent, in absentia, on June 7, 1832.’

273 Ibid, 432.

274 Harvie, above n 155, 466. ‘“Free trade” or laissez-faire were shorthand terms exemplifying a whole philosophy of political, social and economic organization.’

275 Ibid, 484 -6. ‘Football was the product of a highly-organized urban society.’… ‘Religion, in the sense of church-going, played little direct part in the life of most working people.’

276 Webb, above n 85, 241.
beginning of a drive for a different type of liberty, namely ‘the freedom from the unequal power of employers.’

The abolition of various taxes on advertisements (1853), Newspapers (1855) and paper (1861) opened the way for the explosion of the dissemination of information to the masses via newspapers led by the penny and then half-penny press. The number of morning papers rose from 8 in 1856 to 21 in 1900. By the close of the nineteenth century, the emergence of a new ideology of socialism would also test the established order. The Fabians would articulate the aim of attaining ‘a centrally planned economy and labour market, administered by an elite of trained professionals, who would eliminate inefficiency, the trade cycle, and its by-products such as unemployment and poverty.’

Democracy, in the sense of universal adult suffrage, would not occur until the twentieth century. But the pressure for the right of the people to participate in their governance was the focus of political struggle in England during the nineteenth century. Over this period the people would be ‘democratised.’ Arguably, McAuslan’s public interest ideology was therefore born out of the contest of ideas as to who was to govern. It can be seen that the right to participate was so important that it turned ‘liberals into radical republicans.’ In contrast (as will be seen in chapter 5), in the colony of New South Wales a different social compact, one that was antagonistic to participation, would be created.

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277 Moore, above n 5, 183.  
278 Keane, above n 120, 737: ‘Representative democracy sprang up in the era of print culture.’  
279 Black, above n 117, 197. According to Black (at 200) newspapers played ‘a major role in orchestrating opinion in favour of reform.’  
280 Harvie, above n 155, 512. This agenda was to be achieved ‘gradually through legislation and not by revolution.’  
281 It could be argued that even the passage of the Municipal Corporations Act of 1835 was evidence of the desire of parliament to bring local governance under parliamentary control by requiring all municipal corporations, regardless of historical circumstance, to operate under the one governance model and to be subject to the control of parliament.  
282 Moore, above n 5, 392. Moore argues that: ‘the triumph of capitalism called forth liberal reformers and radical idealists from the ranks of the rising bourgeoisie, who wanted greater participation in government … The old rural-based oligarchy’s implacable opposition to reform turned some liberals into radical republicans.’ And into criminals for which they were transported. Yet the reforms came – under rising pressure from below.
4.6.7 Land Reform

By the mid nineteenth century the ideology of liberalism and laissez faire principles dominated English political thought and practice. The application of market theory had led to some towns being well planned. Civic-minded local councils could establish parks, libraries, concert halls, and baths.\(^{283}\) As Morgan notes, ‘[n]o town with civic self-respect neglected to obtain parliamentary authority for an improvement commission, equipped with extensive powers of rebuilding.’\(^{284}\) London, with the obvious exception of its slums,\(^{285}\) was restored and adorned.\(^{286}\) The Georgian architectural influence was evident not just in London, but through out the United Kingdom in places like Edinburgh’s New Town and Bath.\(^{287}\) But this was not the normative outcome of the application of market forces. Many areas were left ‘to the mercy of the speculative builder.’\(^{288}\) These were the places where the land-owner was unlikely to live personally. This suggests that what made a difference in land use planning terms were both land ownership and the quality of civic participation by land owners in matters concerning a locality.

In 1876 the survey of land ownership established that at that time eighty percent of the land of England was owned by a few as seven thousand people.\(^{289}\) It was the land owners of this period who decided the quality of built form outcomes in a locality in Victorian England. As Brown and Sherrard note:

‘Never has the art of town building sunk lower than in the Victorian period. Vast aggregations of people were herded together in narrow courts and alleys devoid of sunlight, ventilation, sanitation and open spaces.’\(^{290}\)

\(^{283}\) Philip Cox, 'Is there a uniquely Australian approach to urban design?' (1995) (17) Urban Futures (Canberra) 20. Cox argues that:
‘Eighteenth century British planning was at the zenith of understanding urban order and function, where streets squares, avenues, crescents, rows and malls became an easy vocabulary within a city structure.’

\(^{284}\) Langford, above n 138, 379.

‘Building had been the unfettered right of every property owner, unless it committed a nuisance.’

\(^{286}\) Platt, above n 48, 86. Platt attributes the building of Georgian London to a quirk of history. As tenure was customarily in fee tail and not fee simple, the land was leased on long term leases rather than sold, keeping the title in a single family. ‘This permitted the careful planning and uniform execution of the neo-classic squares and residential terraces that characterise upper-class London to the present day.’

\(^{287}\) Langford, above n 138, 395, suggests that spa towns were a ‘national phenomenon’ each offering a ‘fair imitation’ along the model of Bath.

\(^{288}\) Harvie, above n 155, 474.

\(^{289}\) Webb, above n 85, 381.

\(^{290}\) AJ Brown and HM Sherrard, Town and Country Planning (1959), 5. Hobsbawm, above n 159, expands on this theme:
To complicate matters, the market failed at a time when the population in cities had boomed. The period between 1873 and 1896 is described ‘the great depression in trade and industry.’ Local authorities were delegated important powers by parliament to combat social problems both in towns and in rural areas. The measures aimed to attract people back to areas depopulated by earlier relocation to the towns or emigration to the colonies. As will be discussed in the next section (at 4.7.3 & 4.7.4), market failure would lead to pressure for social reform. This is best illustrated by the 1894 Whig reforms that introduced graduated death duties. This legislation had a devastating effect on the land owning classes. Webb suggests that in the period between 1909 and 1921, a quarter of English land was sold, a redistribution of wealth ‘not seen since the sixteenth century’ (at the time of the dissolution of the monasteries).

Step by step, power was also being redistributed. The emergence of planning laws at the beginning of the twentieth century would follow the period described by Tocqueville (1805-59) as the ‘great democratic revolution.’ It would be a revolution which allowed participation by representation; it fell well short of participatory democracy.

4.7 Planning Laws out of Private Bills

The historical source for the exercise of state power to interfere with the market in relation to the development of land is the private bill mechanism. It was the first time that legislation was

“If the British city nevertheless remained an appalling place to live in, exceeded only by the grimly rectilinear streets of low cottages in the British industrial and mining village, it was because urban and industrial expansion still outstripped the spontaneous or planned attempts at urban improvement.”

Webb, above n 85, 381. And see Hobsbwarm, above n 159, 159.


‘In 1887, an act was passed giving local authorities the power to buy or rent land, even compulsorily, for letting in allotment plots of one acre. Three years later, allotment provision was further improved by an amending act, and this was followed by smallholdings legislation in 1892. This latter measure gave county councils the power to acquire land to sell as smallholdings of up to fifty acres in size, with loans being provided to assist purchasers.

Webb, above n 85, 381. Webb suggests that whether ‘consciously or incidentally,’ these taxes were used as a means of redistributing the nation’s wealth. To pay for these taxes, much of the land redistributed was sold to the tenants of these landed estates.

Ackland, above n 264, 15. Ackland suggests that because a single party majority existed in the UK parliament ‘for just 10 of the 60 years between 1885 and 1945’ reform was made possible because parliament and not the executive was in control.

Keane, above n 120, 168.
used for the purpose of regulating the land use ‘in order to achieve strategic policy objectives.’\textsuperscript{297} The private bill mechanism was created by UK parliament in the early eighteenth century. However, the initial use of legislation in the eighteenth and nineteenth centuries was for the purpose of facilitating the ideology of private property. Yet by the early twentieth century in Britain, it is undeniable that the legislative mechanism was being utilized to facilitate the ideology of the public interest.\textsuperscript{298}

Faced with having to deal with the multiplicity of petitions for site specific legislation, parliament devised an administrative means to facilitate development. That mechanism retained to parliament an absolute discretion over whether or not the bill was to become law. As Webb explains, through the private bill mechanism, parliament could deliver the means to rationalise the economic landscape of the country.\textsuperscript{299} Formerly, the dispensing of such discretionary largesse had been the prerogative of the crown.\textsuperscript{300} However, the Sovereign did not dispossess the people of their rights to enjoy the land (whether as individuals or, by custom, in common with others).\textsuperscript{301}

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\item \textsuperscript{296} Uhr, above n 199, 56: ‘The Liberal agenda is one of popular government rather than popular rule, establishing institutions which allow for popular control over government but falling well short of participatory democracy.’
\item \textsuperscript{297} This is Gurran’s definition of planning. See Nicole Gurran, \textit{Australian Urban Land Use Planning} (2007), 16 (also referred to in chapter 2 above).
\item \textsuperscript{298} David Farrier, \textit{The Environmental Law Handbook} (2nd ed, 1993), 7-8. Farrier contended that the ideology of private property is thrown up by those arguing against governments ‘interfering with “private property”.’ Arguing in support of the public interest ideology, Farrier suggests that land owners ‘are the mere custodians of land, and as such, their wishes must yield to those of the community as a whole, as represented by government.’ The history of the private bills passed before parliament was seized of a need to consider the public interest demonstrates the difficulty which confronts society when confidence is placed solely in parliamentary institutions to both define and protect that public interest.
\item \textsuperscript{299} Webb, above n 85, 61. Webb says that ‘the private bill was the only way to accomplish certain things now done by routine administrative or judicial action.’
\item \textsuperscript{300} Until 1689 and the enactment of the Bill of Rights, the Sovereign could and did interfere with the market by conferring favours and granting monopoly rights. Generally, the grant of a trading or monopoly right usually created an additional right. Churchill, above n 80, 113, suggests that: ‘For some time the crown had eked out its slender income by various devices, including the granting of patents and monopolies to courtiers and others in return for payment. Some of these grants could be justified as protecting and encouraging inventions, but frequently they amounted merely to unjustified privileges, involving high prices that placed a burden upon every citizen.’
\item \textsuperscript{301} Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority [2008] HCA 5, [29]. The High Court cites with approval the observations of Viscount Radcliffe in the Privy Council decision of \textit{Burmah Oil Co Ltd v Lord Advocate} [1965] AC 75, 115. The High Court held that ‘in the United Kingdom the Crown never claimed or sought to exercise in time of peace a right to take land, except by agreement or under statutory powers, even if it was required for the defence of the realm.’
\end{itemize}
\end{footnotesize}
By the seventeenth century, the English parliament was a sovereign parliament. Just as is the case in modern Australia, parliament’s laws override the common law. \(^{303}\) It had always been possible in England to petition parliament through a private bill to seek legislative intervention to create a right or entitlement that did not otherwise exist. Traditionally, legislation such as that petitioned by local authorities in respect of infrastructure improvement (wharves, harbour or river works) generally benefited directly the local communities. It could readily be anticipated that changes sought by such legislation were generally supported by the local community. Hume’s self interest was at play at the local level.\(^{304}\)

However, in respect of legislation petitioned by promoters of economic development in the late seventeenth and eighteenth centuries, the inhabitants of local communities had to be coerced into accepting the benefits of industrialisation. \(^{305}\) The landed parliamentarians recognised that it was unlikely, in the absence of such legislation, that communities which would be directly (and often adversely) affected by infrastructure projects such as swamp drainage, commons enclosures, railways and roads would willingly give up their private and common rights to enjoy the use of such land. \(^{306}\) For the good of the people, we are asked to accept, parliament facilitated the exploitation of economic opportunities. \(^{307}\)

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\(^{302}\) UK Court Project Report, above n 164, section 9.2. A clauses Act was a template procedure that created the statutory framework for a Bill ‘to which subsequent private bills could refer thereby reducing their length and complexity.’

\(^{303}\) Churchill, above n 80, 262. Churchill advances the argument that:

‘Parliament had not striven to make itself omnipotent, nor to destroy the traditional powers of the Crown, but to control their exercise so that the liberties of parliament and of the individual were safeguarded and protected.’

However, he also recognises that Coke’s dream of a ‘Supreme Court of Common Law declaring what was or what was not legal had been extinguished’ by the restoration.

\(^{304}\) David Hume, above n 162, 81.

\(^{305}\) Windeyer, above n 11, 8. The resultant decision to enclose land was seen to be in the public interest, as defined by parliament. Windeyer might correctly suggest that the pre-industrial agricultural system was a ‘wasteful system of agriculture’, but it provided a means for the villager to participate in the cash economy. Similarly, legislation to facilitate railway development would be beneficial to a wider section of the community; but to those directly affected by the route of the railway, the fact of being able to be heard amounted to little: the railway still came. The interests that were directly benefited from these acts were private interests. Social policy was being outsourced to the private sector.

\(^{306}\) Deane, above note 167, 191. Indeed, Dean suggests that rising corn prices in the second half of the Eighteenth Century provided an incentive for small farmers to resist dispossession.

\(^{307}\) UK Court Project Report, above n 164, section 9.2.1:

‘The linear character of the canal, railway and road networks that were developed required inevitably the exercise of coercive powers. The land owners could not be expected to co-operate unconditionally in surrendering land to the greater commercial enterprise of the railway companies or the turnpike trust, and the only mechanism available to the promoter of such a scheme was to secure the necessary powers under Parliamentary legislation to acquire land...’
This point is illustrated by a consideration of the Enclosure Acts. There were as many as 3,360 enclosures authorised by separate private bills passed by parliament under the reign of George III (1760-1820). Culp-Davis argues that ‘the exercise of discretion may mean either beneficence or tyranny.’ This descriptor applies equally to these early planning laws. Enclosure facilitated economic development, a benefit to the petitioner. The dispossessed, having no recourse to law, were in the hands of the politicians. They were tyrannised.

Much as was the case in Ancient Rome (discussed in chapter 3), the function of the law was to protect those who could successfully assert that they had rights to or in relation to property. In a jurisprudential sense, as Stone notes, there would only be utility in going to court if there existed a legal lacuna, ‘a space devoid of law,’ which needed filling by the decision of a compulsorily subject to an obligation to pay compensation to the owner, and to construct and operate a railway, without being liable to action for nuisance from those with land alongside the route.’ ‘For the previous two centuries it had been local authorities who alone had the willingness or ability to promote improvement works such as harbour or river improvements and who sought Parliamentary powers not only for the works themselves but also to levy a special rate on ships to meet the costs.’

Kenneth Culp-Davis, Discretionary justice: a preliminary inquiry (1969), 3. Arguably, when the minister exercises discretion such as that allowed under Part 3A of the EP&A Act, a similar situation pertains.

Langford, above n 138, 380. Langford suggests that the economic impact of the parliamentary enclosures can be exaggerated, mainly because they were in number ‘less significant than the relatively silent non-parliamentary enclosure which had been proceeding for decades and even centuries.’ This observation merely confirms the pervasiveness of the displacement. As the commons were enclosed, the capacity of the villagers to make a living was curtailed, whilst many of the villagers accepted being reduced to the status of tenant labourers, many also found their way to the towns in search of employment.

Moore, above n 5, 32. As Moore notes:

‘The precursor to the creation of the English working class was the application of capitalist and scientific principles to farming – an agricultural revolution that greatly increased yield, profits and population, but disposposes tenant farmers who were evicted from their smallholdings.’

UK Court Project Report, above n 164, section 9.2.1. The report notes that the right of the villager was to lodge a petition against the proposal. The petition was then debated in parliament and referred to a select committee to ‘take evidence on the Bill.’

Black, above n 117, 165. Thus, through the enclosure of land, it became easier, as Black suggests, to control both the land and the people working it to the profit of the landowner. The fact that there were public hearings did not lead to the retention of common land. The process that had been created was designed to enable enclosures to occur over the complaints of those directly affected

Ibid 180. Black cites Robert Sharp, a Yorkshire village schoolmaster as saying: ‘I have seen long and said often that the rage for enclosing open fields and commons was one great cause of the Ruin or poverty of the rural population.’ At a societal level, the surface level of discourse, enclosures dispossessed the people from access to common or shared resources and made the yeoman farmers labourers.

As McAuslan, above n 158, 3 suggests:

‘Property owners turned to the courts not just because they were institutions provided for the resolution of conflicts, but because lawyers and the common law they had fashioned over the centuries were very much concerned with the protection and preservation of rights of property.’

Stone, above n 157, 188.
The enclosure of common land did not give rise to any such novel legal issues. The right of the community to use common land was an ancient right. Resort to the common law or equity for authority to dispossess a person of such a right would not result in the court sanctioning the action because of common law authority. The promoter of an enclosure proposal therefore could not appeal to the common law to sanction such an enclosure. Whilst the common law admitted of growth and change, this being Stone’s conception of the achievement of the common law, reliance on judicial creativity under the common law would not, by itself, promote economic growth as quickly as the change occurring in society. Put simply, it was not the function of the common law to devise a means to enable or facilitate economic growth. As land owners became aware of the opportunities of new agricultural and industrial methods and opportunities emerging in the late seventeenth and eighteenth centuries, they vigorously petitioned parliament for what could be said to be planning permission (as we understand the concept today) to enclose and develop land.

The novelty of the Enclosure Act was that it was a ‘clauses Act.’ Later private bills could refer to the Enclosure Act and its provisions to facilitate the administration of the process of

316 J Spigelman, 'Lord Mansfield and the Culture of Improvement' (Paper presented at the Big Ideas Forum, Sydney, 2008), 8. Spigelman suggests that there was such an emergent need in the area of commercial law, which Mansfield filled by the creative use of the law applied in commercial disputes. Mansfield’s overriding principle was ‘if there was no existing rule, the law would adopt the customs of the particular trade.’

317 Windeyer above n 11, 8. Windeyer notes that the use of commons dates to the period ‘when the kings of Wessex were rulers of England.’ It persisted in many English parishes until the eighteenth century.

318 Walker v Commonwealth, above n 301. As Previté-Orton, above n 12, 606, notes, under Henry II reforms, ‘no man should be disseised of his free tenement unjustly and without judgment’. These rights were protected by the king’s writs of Novel Dissesin and Mort d’Ancestor.

319 Stone, above n 157, 211. As Stone notes: ‘Certainly, in the homeland of the common law, the English judicial achievement in maintaining the process of continuing self-renewal of precedent law, needs to be seen against the general English background. We mean the oft-noted capacity of Englishmen, both at the top and at the grass roots, to achieve a consensus in the prevailing moral and political ideas, that is, their capacity not only to build moral and political traditions, but also to keep modifying these without disastrously shattering consensus.’

320 Spigelman, above n 316, 9. Spigelman may disagree in that he suggests that Mansfield achieved such an outcome during his tenure as Chief Justice. Spigelman argues that in Mansfield’s 32 years of presiding, ‘the flexibility and resilience of English commercial law was established’ through judge made law. This reflects Posner’s view of Blackstonian theory, see Posner, above n 21, 584. Posner suggests that in Blackstone’s model, there was ‘heavy reliance on legal fictions as the agency of reform.’ He cites the development of the law of real property which, while affected by the rubric of feudal concepts, was adapted to facilitate the ‘creation of a free market in real estate.’

321 Samantha Hepburn, ‘Carbon Rights as New Property: The Benefits of Statutory Verification’ (2009) 31 Sydney Law Review 239, 240-1. As Hepburn observes: ‘Common law courts are not indulgent in the recognition of new or novel land interests…’ However, ‘new forms of property rights can be recognised by statute.’

322 See above n 302. The Enclosure Act (41 George III, c. 109) set the general ‘planning’ framework.
land enclosure. Parliament created, for the first time, an administrative mechanism to facilitate a volume of work. Whilst each Bill had to be separately presented to parliament (for the particular area of concern), by reason of the volume of these separate Bills, the Enclosure Act facilitated the administrative processes. The bills presented to parliament were not confined to enclosures. A wide variety of projects could be the subject of a private bill. Often the subject matter of the Bill, whilst relating to a specific parcel, had elements common to other petitions for similar types of development. However, a specific Bill was required in respect of each project. The volume of work dictated that some administrative system be established to enable parliament to process the volume of work. Functionally, what parliament was endeavouring to achieve was a system that created both the right and also the administrative process pursuant to which the right would to be exercised.

4.7.2 Departmental Supervision

In the mid-nineteenth century parliament devolved administrative control over the private bill process to the executive arm of government. However, the topical focus of Private Bills meant that little co-ordination or supervision of the outcome occurred. What would later be recognised as distinctly separate functions, namely the plan making function and the development approval function, was yet little understood. Parliament directly retained the power to ‘grant’ the approval. Before 1846, evidence on private bills was heard at the bar of the House of Commons. After 1846, the work of determining and reporting on the factual matrix of the petition was undertaken by the department. The departmental review became a Ministerial recommendation to the house. If the Parliamentary committee dissented from the recommendation, reasons had to be stated. To facilitate parliament being informed, a public enquiry was held. As departments reported to Ministers, this was the beginning of executive review over parliamentary actions in matters of development. Nonetheless, the mechanism created to obtain the legislative imprimatur to a scheme was cumbersome and unwieldy.

323 UK Court Project Report, above n 164, Section 9.2.1. Each subsequent bill was specific to a locality and required its own passage through parliament.
324 Ibid, section 9.2.2. ‘From 1846-51, the House of Commons reviewed a number of different ways in which the load of private and local legislation might be reduced.’
325 Windeyer, above n 11, 248. Windeyer notes that the complaint about this development is that it led to ‘government by regulation.’
326 UK Court Project Report, above n 164, section 9.2.1.
327 Ibid. The procedure for private bills was complex, as the report notes: ‘The promoter of private of local legislation was required to lodge a petition, in either the House of Commons or House of Lords, and those who objected to the scheme could then lodge a petition against it. After a debate on the floor of the House, the petition would be referred to a
Public inquiries performed neither an administrative nor judicial function. The purpose of public inquiries was to gather information locally, hearing objections and taking the evidence which would otherwise have been given at the bar of the House. An exclusionary dynamic is manifested. The precedent created was the manner in which the public would be heard. In terms of Arnstein’s ladder discussed in chapter 2, the mechanism was clearly in the non-participation zone, at the rung of therapy. This tradition continues to be paid lip service to today.

4.7.3 Empowering Local Government

As is discussed above, the industrial revolution generated significant social change. Coincidental with the year of the 1848 revolutions in Europe, the UK parliament would move, for the first time, to address the social conditions which had been eroding the fabric of social order. Heine, writing in 1842, elegantly captured the mood of the times when he wrote:

‘In the silence one can hear a soft monotonous dripping. It is the dividends of the capitalist continually trickling in, continually mounting up. One can literally hear them multiply, the profits of the rich. And one can hear too, in between, the low sobs of the destitute; and now and then a harder sound, like a knife being sharpened.’

Parliament acted to forestall a greater evil; revolution. The Public Health Act 1848 (UK), was the forerunner to legislation designed to facilitate and give effect to the regulation of urban space. The Public Health Act allowed the community to petition for the creation of a Board of Health. Local councils became responsible to provide clean water, sewers and clean streets. The select committee, which would take evidence on the Bill. Upon the conclusion of the proceedings in one House, the matter would move to the other House and the process would commence all over again.

Cited in Geoffrey Bruun, Revolution and Reaction: 1848-1852 A Mid-Century Watershed (1958), 85. Bruun suggests that in 1848 ‘the proletarians who manned the barricades in 1848 were more interested in the right to work than in the right to vote. Their slogan was not “Liberty, Equality, Fraternity,” it was the more desperate and defiant cry, “Bread or Lead.”’

Keane, above n 120, 487. As Keane explains, the period of the 1840s was a time of famine, inflation and unemployment in Europe (including England), ‘caused by sudden industrialisation and the rapid spread of market economics into the heartlands of country and city life.’ In short, Keane suggests that ‘the child of social democracy was born of hard times.’

11 & 12 Vict. c 63.
Local Government Act 1858 (UK),\textsuperscript{332} authorised local authorities to bring water and sewerage infrastructure to their areas with power ‘to promote a draft [provisional] order to carry through their objectives.’\textsuperscript{333} Urban areas were thus brought under management by local authorities, bodies which had a measure of community control through direct participation in the political process. However, Benevolo describes the authorities as attacking the various problems ‘without taking into account their interrelationship and without having an overall vision of the town as a single organism.’\textsuperscript{334}

That this legislation was pre-empted by deteriorating social conditions is not without its own significance. The fact that the response of the government was bureaucratic and paternalistic demonstrates parliament’s desire to maintain control. The manner in which this control was achieved was by ‘regulation.’\textsuperscript{335} It is also arguable that a set of social conditions had been created by the industrial revolution which required parliament to respond in order to maintain its position of power.\textsuperscript{336} The social legislation enacted by the UK parliament at this time can therefore be seen to be a manifestation of the ideology of parliament as the instrument of managed social change.\textsuperscript{337} That is, the impetus for the emergence of the public interest ideology was the desire of the parliamentary elite to maintain power. Viewed in that context, the

\textsuperscript{332} 21 & 22 Vict. c.98.
\textsuperscript{333} UK Court Project Report, above n 164, section 9.2.3. Provisional orders would replace the private bill procedure. As the Departmental report notes:

‘Provisional Orders … provided for objections to be made, originally to the local justices, but in due course to the Local Government Board, which was formed in 1871. A Provisional Order requires, first, the giving of public notice in two successive weeks in local newspapers. Where an objection was made, the Board was required to hold a local inquiry, and to permit all persons interested to attend and to make objections. Their inspectors had wide ranging powers. They could administer oaths, and require the attendance and examination of witnesses, and the production of papers and accounts. … the character of the provisional order procedure was that it was conducted on behalf of Parliament, rather than as a separate procedure.’


\textsuperscript{335} Anne Bottomley and Nathan Moore, 'From Walls to Membranes: Fortress Polis and the Governance of Urban Public Space in 21st Century Britain' (2007) 18 \textit{Law and Critique} 171, 196. As Bottomley suggests:

‘Regulation is concerned with ‘what’ is in need of control (or ‘why’ or ‘how’ attempts are made to control it), as well as ‘with whom’ alliances are forged so as to (at least seemingly) try to achieve control over ‘it’.

\textsuperscript{336} Moore, above n 5, 196. As Moore notes:

‘By 1831 Lord Gray’s Whigs, as the traditional liberal-leaning party, decided that parliamentary reform could be delayed no longer, and had better be led from the top, than seized by revolution from below.’

\textsuperscript{337} Hall, above n 180, 704. As Hall suggests:

‘around 1900 there was a major shift in social policy … Benthamism lost its primacy to new concepts of state intervention, developed especially by social democrats who formed the Fabian society in 1884, and who were instrumental in shaping London County Council policies after the Progressive victory of 1894.’
government sought to interfere in the operation of the market to refashion the social contract (thereby changing the role of the state) but only for the unarticulated purpose of maintaining power.\textsuperscript{338} Sheail argues that the turning point was 1875.\textsuperscript{339} The state would facilitate the delivery of public benefits, but its vision of the public interest was the dominant (and arguably only) vision.\textsuperscript{340} If parliament reflected (and not just represented) the people, there would be a mutuality of interest. The difficulty was that this was not always the case.\textsuperscript{341}

4.7.4 Parliament as the Instrument of Managed Change

During the nineteenth century the polity of England had been gradually democratised through social reforms initiated by parliament beginning with the widening of the franchise in local government elections.\textsuperscript{342} The reform movement in England would continue over the balance of the century to press for social change leading to a suite of other social legislation in the second half of the nineteenth century.\textsuperscript{343} It is here suggested that the Acts passed by parliament were directed to alleviating the disquiet of the lesser classes, not the absence of a sharing of power.\textsuperscript{344}

\begin{quote}
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\item Platt, above n 48, 162. By way of example, Platt suggests that the poor laws reforms were motivated by a desire to ‘centralise relief not to make the poor more comfortable, but rather to centralise relief to the poor and to ensure that the system promoted rather than discouraged working for a living.’\textsuperscript{338}
\item John Sheail, ‘Interwar Planning in Britain’ (1985) 11(3) \textit{Journal of Urban History} 335, 342. Sheail cites a 1928 study of Justice and Administrative law by Robson as the basis for Sheail’s conclusion that the \textit{Public Health Act} 1875 (UK) marked a ‘turning point,’ a ‘fundamental and permanent shift in society.’ He notes that this Act instituted the practice of allowing an administrative appeal to the minister (whose decision was final) rather than to the Courts. The procedure soon ‘became commonplace for all social legislation.’ He suggests that ‘trial by Whitehall’ was not a ‘temporary or accidental intrusion into the mellowed sanctity of the British constitution.’\textsuperscript{339}
\item Uhr, above n 199, 66. Uhr notes that Burke’s justification was that: ‘Established parliamentary government must learn to sift out the “real rights” from the “pretended rights” advanced on behalf of the people. Parliament thus understood has a responsibility to attend to the wants as distinct from the claims of the people (Burke 1883, II, 301-8, 332-6, 359)’\textsuperscript{340}
\item Moore, above n 5, 196. The pressure for change continued after the passing of the Reform Act. Moore suggests that ‘Chartism emerged from the failure of the Great Reform Act of 1832 to enfranchise working-class Britons who had played their part in the reform cause.’\textsuperscript{341}
\item Harvie, above n 155, 458. As is indicated in chapter 3.5, by the 1880s, up to two thirds of adult males had been enfranchised for local government elections, mainly as a means to stave off political explosions.\textsuperscript{342}
\item The legislation included the following Acts: \textit{Second Reform Act} (1867); \textit{Elementary Education Act} (1870); (secret) \textit{Ballot Act} (1872); \textit{Factories Act} (1874); \textit{Public Health Act} (1875); \textit{Food Act} (1875); \textit{Third Reform Act} (1884); \textit{ Redistribution of Seats Act} (1885) and the \textit{Workers Compensation Act} (1897). Keane, above n 120, 556, goes so far as to suggest that the reforms were introduced ‘to widen participation within the actually existing civil society, and to reduce or at least eliminate some of its many incivilities.’\textsuperscript{343}
\item Phillip Bobbitt, \textit{The Shield of Achilles, War Peace and the Course of History} (2002), 233. Bobbitt argues that because industrialisation had created large corporations, it became ‘feasible for the State, through regulation, to temper the profit motive with concern for social welfare.’\textsuperscript{344}
\end{itemize}
\end{quote}
Utopian ideals were a feature of the late Victorian period. The work of the Garden City promoters assisted the ideation of the city as a single organism. By 1899, just a year after Ebenezer Howard published *Tomorrow, a Peaceful Path to Real Reform*, a Garden Cities Association had been formed. The *Garden City* movement quickly became ‘an establishment, a movement without opposition.’ Town planning would emerge to become the next focus of government activity. When the Liberals, with the support of the new Labour party, took office in 1906 there was a decisive shift in the ideology of parliament. Black suggests that the new government was ‘determined to undermine the power and possessions of the old landed elite, and keen to woo Labour and the trade unions.’ This was a government that wanted to have a role in devising solutions to problems of social welfare. State intervention in the functioning of the market became a popular and possible solution.

The Whig government had intervened in the market in a most radical way by imposing graduated death duties which, as indicated in the previous section, had had the effect of redistributing land ownership in the early twentieth century. It was only at the end of this reform period that planning legislation of 1909 was introduced into the English parliament. Through law, urban planning would become ‘an instrument of the welfare state.’ War and economic depression in the twentieth century would give parliament the impetus to refashion the social contract again. Mannheim would urge the adoption of ‘democratic planning’ principles, to rebuild society by planning for freedom. Viewed through this historical lens, it seems that it was only once the people, metaphorically, had some ‘skin in the game’ (by having access to land ownership and the franchise), that there was an impetus to introduce urban planning.

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345 R. Home, 'Land readjustment as a method of development land assembly: A comparative overview' (2007) 78(4) *Town Planning Review* 459, 476. Home cites comments made in the early meetings of the Town Planning Institute in London of the period 1905-1920 and the comment ‘as the object of the Town Planning scheme was to benefit the community, private ownership of land should be plastic in the hands of the Town Planner.’


347 Black, above n 117, 214.


349 Mannheim, above n 257, 29: ‘planning, but not restrictionist so as to favour group monopolies either of entrepreneurs or workers’ associations; … planning for social justice rather than absolute equality, … planning not for a classless society but for one which abolishes the extremes of wealth and poverty, … planning that counteracts the dangers of mass society by co-ordination of the means of social control but interfering only in cases of institutional or moral deterioration defined by collective criteria,…’ (emphasis in original).

350 Here used in the sense of having something at stake. The etymological roots of this phrase are opaque. Quoteland.com identifies an early reference to this phrase in ‘Town Talk,’ *The Oakland Tribune*, April 20 1912 but notes that this cannot be the source of the phrase. It also notes the relationship of the phrase to
legislation. Significantly, this new legislation would not have a socially inclusive mechanism to facilitate public participation in the policy or decision-making processes, the people would be ‘planned for’ by government.

4.7.5 UK Planning Legislation

The Housing, Town Planning etc Act 1909 (UK), Town & Country Planning Act 1932 (UK) and the The New Towns Act 1946 (UK), were part of a social legislation moment. Wilcox notes that slum clearance, not town planning, was the main purpose of the 1909 legislation. For the reasons advanced in this chapter, it could not be reasonably argued that parliament acted simply because it perceived that the market had failed. But for the pressure applied to government through the various reform movements and trade unions, the private property ideology would have prevailed. As Black notes, late Victorian society ‘did not seem beneficent to the growing numbers who were becoming both emancipated and politicized.’

In enacting The Housing, Town Planning etc Act of 1909, parliament drew upon the historical experience of the clauses Acts. The legislation empowered the Minister to delegate functions to the department. Through the Office of the Planning Inspectorate public inquiries were held into planning matters. Municipal authorities were also given power to create what were called, for the first time, planning schemes. Local authorities were given power, sanctioned by law, to acquire land for the purpose of the scheme. The scheme did not take effect until after the Provisional Order was notified and laid before both houses of parliament. The Local Government Board retained power to conduct enquiries into a scheme with the Board having the final say. The grand ideal of the Act reflects parliament’s intention to define the public interest. The Minister, when presenting the bill to the House said its intent was to secure ‘the

the verb ‘to skin’ and the connection as far back as 1812 to swindling and cheating someone. 
351 9 Edw. VII. c. 44.
352 22 & 23 Geo. V. c. 48.
353 9 & 10 Geo. VI. c.46.
354 M Wilcox, The Law of Land Development in New South Wales (1967), 177; ‘the main purpose was to amend and extend the Housing of the Working Classes Act, 1890-1903 which enabled local authorities to effect some slum-clearance and provide some accommodation for members of the working classes within their areas.’
355 Black, above n 117, 208.
356 UK Court Project Report, above n 164, s.9.2.3. The Planning Inspectorate was created in 1909.

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home healthy, the house beautiful, the town pleasant, the city dignified and the suburb salubrious."  

4.7.6 Early growth of the Ideology of Public Interest

The *Town and Country Planning Act* 1932 (UK) extended the provisions of the 1909 Act so that ‘schemes might be made with respect to any land, whether urban or rural, with the general object of controlling the development of the land.’ Where a scheme would divest local landowners, they had a right of appeal to the Board which had power to conduct a public local inquiry. Whilst mediated through the office of the Local Government Board, the Provisional Orders Scheme retained to parliament the power to make the ultimate decision, a nexus first created in the eighteenth century pursuant to the private bill procedure.

Over time, administrative necessity would erode the nexus. The separate powers of local authorities would be centralised into the central executive government. This process was accelerated by the Second World War. Kelly notes that ‘scheme preparation became compulsory in 1943,’ perhaps suggesting that there was resistance by the people to the initiatives of parliament. Whereas under the 1909 Act a local planning scheme went to parliament, under the 1947 Act it went to the Minister for approval. Gradually, power would coalesce in the executive. By 1948 the UK Department of Local Government had assumed the powers of local authorities and of parliament in that the power to initiate strategic planning issues had devolved to the department. Instead of a private bill procedure, the department only had to submit to parliament a draft statutory instrument for approval under the negative or affirmative resolution procedure. The executive arm of government now had the necessary

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357 Kelly, above n 334, 200, citing the comments of the President of the Local Government Board when presenting the Bill to the UK Parliament. It seems that the achievement of the legislation was muted, mainly because of the voluntary nature of the schemes. Property owners simply did not vote for councillors intent on radical reform.


359 M Cole, 'Local Government Reform in Britain 1997-2001' (2003) 38(2) *Government and Opposition* 181, 190. In fact, Cole suggests that since the middle of the nineteenth century ‘[t]he autonomy of local government has been eroded by a succession of national governments.’ However, Cole accepts that ‘local authorities … retained substantial autonomy and the capacity to frustrate central government policy initiatives.’

360 Kelly, above n 334, 201.
powers to implement a national policy at the local scale. As a result of these administrative reforms, and as the UK Court Project Report notes:

‘Parliament had transferred to the Minister all of its functions in relation to overseeing the use and development of land, and was left with relatively slender power of supervision of the Ministerial exercise of those functions.’

The process of centralisation also impacted upon the process to obtain development approval. Under the 1947 Act, applicants for planning permission who were aggrieved of the decision by the authority had a right of appeal to the Minister (Secretary of State). In the majority of cases, the appeal was referred to the planning inspectorate for resolution. The inspectorate was not independent of the government; it was an agency of the executive. It operated under the direction of the minister. The role and function of the planning inspectorate was to act as the primary organ of government to administer and determine development appeals. The public had no formal role at all in the decision-review process. The public could only make submissions and seek to be heard at a public hearing if it were convened. It was not a socially inclusive model. If a public hearing was convened, the applicant had the right to have the inspector conduct a hearing locally, usually at the council premises. Inquiry proceedings usually included a site inspection. Unless an appeal was made to the High Court by either the

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361 Cole, above n 359, 198-9, intimates that this control has continued as the reforms of local government of the late twentieth century were being stymied ‘by continuing adherence of central government to traditional British notions of the strong state,’ and a lack of ‘real commitment to reinvigorating local democracy’ by ministers.

362 UK Court Project Report, above n 164, s.9.2.4. As the report notes: ‘The 1946 Act transferred significant powers to the Executive, and removed entirely the former power of Parliamentary investigation and approval.’ The role of the public in the processes created by the Act is delightfully described in the following exchange between the Minister of Town and Country Planning addressing a public meeting in 1946:

‘I want to carry out a daring exercise in town planning – (jeers). It is no good you jeering: it is going to be done – (applause and boos). (Cries of “Dictator”)… the project will go forward. It will do so more smoothly and more successfully with your co-operation. Stevenage will in a short time become world famous – (laughter) … while I will consult as far as possible all the local authorities, at the end, if people are fractious and unreasonable, I shall have to carry out my duty – (voice: Gestapo!).’

363 Town and Country Planning Act 1946 (UK), s16(1). Halsbury, above n 358, 332. The Act stopped short of compensation for loss of view. ‘An owner of adjacent land whose amenities may be spoilt and the value whose land may be diminished by the proposed development is not a person aggrieved.’

364 Victor Moore, A practical approach to planning law (9th ed, 2005), 176.

365 UK Court Project Report, above n 164, s.9.2.5.8. As an administrative body, the exercise of its powers was scrutinised by lawyers utilising traditional administrative law tools to determine if its processes were lawful, tending to judicialise the process. The Courts required the inspectorate ‘to demonstrate, in its written reasons, that they have properly applied and understood current policy or given valid or adequate reasons as to why that policy should not apply in the particular case’.

366 Town and Country Planning Act (UK) 1947, s104.
applicant or the local authority, the decision of the Minister (or delegate) was ‘final’ and beyond legal challenge.367

4.7.7 Judicial Review

As the reach of parliament grew, ultimately developing into the welfare state, the role of the courts as agencies of review also grew. The 1846 Select Committee identified that administrative law had become an area fit for inclusion in university studies.368 Land use planning decisions were early recognised as being administrative decision. As a matter of law, land use decisions were decisions of the minister. The right to challenge the exercise of administrative discretion was wholly dependent on the statute that created the administrative function. In relation to planning decisions, the only person given an administrative right to appeal was the person who made the application.369

Britain developed an extensive jurisprudence in the area of planning law. In the *Coin Street Case*,370 the UK High Court reiterated the approach of the court to its powers when exercising judicial review over the minister’s decision:

‘Cases like Sainsbury Ltd v Secretary of State for Environment and Colchester Borough Council show that the tendency of the Court is to scrutinise the decision of Ministers in greater detail than formerly and with increasing reference to the rules of natural justice. Even so, the underlying principle remains in tact, namely, that the controlling process of town and country planning over development of land is an administrative (and not a justiciable) process and that the Secretary of State is to have the last word because, in the ultimate analysis, it is Government policy which is being placed in issue when an appeal to the Secretary of State is lodged….. the planning merits are not for the courts.’

In *R v London Borough of Harringay*,371 the UK court of appeal reinforced the principle that the court was not a ‘court of appeal from the planning committee’ with power to ‘substitute’ its
view over that of the planning committee. This principle would be followed in the leading Australian High Court decision in *Peko Wallsend*.\(^{372}\) This classic legal reasoning obscures the impact of the ideology of the public interest on the capacity of the people to participate in land use decision-making. As McAuslan notes:

‘No strain is involved therefore in seeing the debate on open government as being an extension of the debate on public participation in planning, for public participation can only be meaningful if there is full disclosure of information prior to the public participation and conversely, full disclosure will almost always inevitably stimulate public debate and discussion even if it was not made with that end in mind.’\(^{373}\)

Thus from the outset the people were not given a procedural voice, in semantic terms, which could resonate in the mind of the decision-maker. Both at the level of policy (or plan making) and at the level of project assessment (decision-making), the people remained at Arnstein’s tokenism rungs in the ladder of citizen participation. The long struggle for the right to participate in governance had been won. But in this victory, the people lost the right to have a say in the nature of development occurring in the neighbourhood. An analysis of the early UK planning legislation reveals that by the mid twentieth century in England, the public interest ideology was an entrenched feature of its processes. It would be this scheme that the New South Wales government would turn to when it determined to enact planning laws.\(^{374}\) The development of Australian planning law from its colonial origins is considered in the next chapter.

\(^{372}\) *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, (1986) 162 CLR 24, 40-41. Australia followed English principles of administrative law and distinguished between reviewing the merits of the decision under challenge and the manner in which the decision was arrived at. It is only the latter that is reviewable in judicial review proceedings in Australia.

\(^{373}\) McAuslan, above n 158, 215.

\(^{374}\) Kelly and Smith, above n 183, 84. Kelly and Smith argue that ‘Australian planning systems slavishly followed the UK model.’ They also note that ‘[w]hilst the British System underwent major change to a more policy-based approach after the Second World War … all Australian systems clung to a strict “zones and standards” approach.’
Chapter 5: Participation – The Australian Experience

'The NSW Government’s powers that permit one person to decide what is suitable development for approval by that same person – notwithstanding conflict of interest – and without any meaningful public participation and with limited judicial review, have no place in any democratic State.'

Phillip Ruddock former federal Attorney-General

'In most cases where power has come to be shared it was taken by the citizens, not given by the city. There is nothing new about that process. Since those who have power normally want to hang onto it, historically it has to be wrested by the powerless rather than proffered by the powerful.'

Sherry Arnstein

5.1 Introduction:

The struggle of the people in Britain to participate in their governance was not reflective of the Australian experience. A very different social dynamic applied because the people sent to New South Wales were not the vanguard of a conquering army. Rather, they were the detritus of England. At its inception in 1788, New South Wales was a prison; that was its functional social

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1 Quoted, presumably with permission, in the advertisement ‘Stop the Plunder of Sydney Harbour’ frequently published in 2010 by the Banangaroo Action Group, Sydney.


3 John Hirst, 'Empire, State, Nation' in Deryck Schreuder and Stuart Ward (eds), Australia's Empire (2009), 146-7. Hirst notes: ‘In Britain, government was closely linked to the social order. … In Australia, … Government was both more singular and more abstract. A government that plants a new society will always be different from a government ruling an established order. The particular form taken by the state in Australia reflected the time of its foundation. It was liberal in its orientation, because its controllers at Whitehall and on the spot were influenced by the growing authority of liberal ideas in the imperial metropole. The acceptance of responsibility for the well-being of convicts and free migrants came from the new humanitarianism. The commitment to economic advancement, and the means to achieve it, was inspired by the spectacular growth in the British economy.’

4 WJV Windeyer, Lectures on Legal History (1938), 252. In fact, the first fleet that arrived in Botany Bay consisted of 299 ‘free’ persons (Windeyer says mostly officers and marines) and 717 convicts.

5 Tony Moore, Death or Liberty (2010), 34. Moore suggests that the social conditions caused by the industrial revolution caused a break down in social order. ‘Whilst not political in the sense of organised agitation, the delinquency and criminality of the lower classes was framed as a social problem that required governmental action.’ Transportation was the answer. As Moore also notes (at 36):
schema. But British traditions were incorporated into the colony of New South Wales. Law was still the instrument to maintain the legitimacy of power.

The superabundance of land in the colony meant that it was necessary, for the survival of the colony, that land be granted to, acquired and/or occupied by lesser classes, including emancipated convicts. Emancipists would, until the gold rush of the 1850s, outnumber the free settlers. This sharing of the land would lead to the creation of a different social relationship between the people inter se and between the government and the people.

In this chapter the history of local governance and the development of land use planning law in New South Wales are examined. The participatory mechanisms incorporated into the Local Government Act 1919 (NSW) and the EP&A Act is considered in detail. To assist in understanding whether the mechanisms are inclusive, a brief assessment is undertaken in section 5.5 of the semantics of the legislative scheme in accordance with the methodology adopted by Bora and Hausendorf.

5.2 Uncharted Territory: Law Land and Control

Upon colonisation in 1788, the laws of England, as far as was practicable, were received into New South Wales. As Brennan J pointed out in Mabo v The State of Queensland [No 2] (1992) (Mabo):

‘The tender concern of the common law of England for British settlers in foreign parts led to the recognition that such settlers should be regarded as living under the law of England if the local law was unsuitable for Christian Europeans.’

10 The vast majority of convicts over the eighty-year period of transportation were indeed incorrigible recidivists, earning a living as criminal professionals and habituated to dishonesty and casual viciousness.’

6 Ibid 396: ‘Australia was bequeathed an inspiring legacy. Liberalism, republicanism, trade unionism, working-class politics, democracy, responsible government and post-colonial nationalism all arrived in the colony in chains.’

7 John Hirst, Looking for Australia (2010), 201. Hirst says that:

‘The founding population was composed of three ethnic groups – English, Scots and Irish - … who still bore much antagonism towards each other. … The Irish in Australia were potentially an out-group, Catholic in religion and generally poorer and less educated than the rest of the population. Relations between the two groups were always uneasy.’

8 This can be dated to the early governorships of Phillip and Macquarie. Windeyer, above n 4, 257, suggests that Macquarie believed that ‘emancipation when united with rectitude and long tried good conduct, should lead a man back to that rank in society which he had forfeited.’ This belief would become his bane.
It is not without significance that New South Wales was uncharted territory. There would be over eighty thousand of convicts arrive up until 1840. They had neither rights nor expectation to participate in the affairs of government. They were administered by a governor who had received a commission from the crown. The governor was accountable to the colonial office in London. His powers were express, being limited to the commission he had received. Yet in New South Wales the governor, by virtue of circumstance, assumed the authority of the sovereign, dispensing justice and allocating land. Atkinson reminds us that the ‘conquest of Australia involved both cartographic and legal innovation.’ The Mabo decision has refined our understanding of radical title. But regardless of whether or not the land of New South Wales was ‘owned’ by the crown upon colonization, as a matter of pragmatic reality it was the governor that had the power to alienate land. To do this it was important that the land of the new colony was mapped for the purpose of fractionalising the land. Mapping facilitated the land of

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9 Ibid 250. Windeyer says that the colonists ‘carried with them that law in force in the homeland at the time of the original colonization, except such parts of it as are not applicable to their new situation.’

10 Mabo v Queensland [No 2] (1991-2) 175 CLR 1, 35.

11 Douglas Pike, Australia: The Quiet Continent (1962), 45.

12 Mabo, above n 10, 37. As Brennan J notes, this created an immediate practical problem in that there were doubts about the nature and extent of the authority of the governor to apply English law within the settlement because there was no local legislative authority to make law.

13 Windeyer, above n 4, 251. Windeyer confirms that ‘[s]ome curious questions were raised because of the uncertain limits of the governor’s authority.’ It was put to rest only in 1828 with the passage of what has become known as the Imperial Acts Application Act (Act 9 Geo. IV c. 83).

14 RM Younger, Australia and the Australians: A Concise History (1982), 54. Younger suggests that the governor ‘possessed extraordinary powers and the individual who opposed him, no matter how wealthy or powerful, had no legal way of securing redress within the colony.’ Windeyer, above n 4, 255, supports this view. He suggests that the powers made the governor ‘an absolute autocrat.’ Yet the issuance of orders and proclamations by the governors was the basis of civil governance until 1824.

15 Hirst, above n 3, 147. More significantly, Hirst notes that the social character of government in the colony was different. He says:

‘In Australia the government was one person, the Governor, who was detached from, and superior to, all groups in the local society. Yet government was much more than the person of the Governor; he embodied the full authority of the British government … Government was both more singular and more abstract.’


17 Mabo, above n 10, 48:

‘As the sovereign enjoys supreme legal authority in and over a territory, the sovereign has power to prescribe what parcels of land and what interests in those parcels should be enjoyed by others and what parcels of land should be kept as the sovereign’s beneficial demise.’

18 Ibid 43. In particular, see the discussion: Crown title to colonies and Crown ownership of colonial land distinguished. Brennan CJ disagreed with the earlier view expressed by Isaacs J in Williams v Attorney General (NSW) (1913) 16 CLR 404, that when Governor Phillip received his commission in 1786 the ‘whole of the lands of Australia were already in law the property of the King of England,’ as being ‘wholly unsupported.’ Brennan’s view was that the acquisition of territory is the province of international law whereas the acquisition of property is the province of the common law. Applying the feudal doctrine of tenure, Brennan CJ (at 48) attributed to the Crown the ‘radical title to all land in the territory over
the colony being reduced into possession so that it could be alienated, by grant or sale.\textsuperscript{19} The grace and favour of the Governor meant the difference between owning land or not.

Individual parcels of land have no utility unless they are related to other parcels, to infrastructure such as roads and to a legal frame of reference to secure the benefits of ownership. Aggregations of separate parcels, linked to community infrastructure, create neighbourhoods. Without neighbourhoods, the formation of community becomes problematic. It is in community, as Tocqueville observed of the Americans, that civic culture develops.\textsuperscript{20} The problem in the colony was that the English free settlers who came to New South Wales encountered, in the context of their perceptions, virgin territory in so many ways. The ordered agricultural society, culture and patterns of settlement with which they were familiar did not exist. There were no settled parishes, boroughs, pastures, towns, roads or infrastructure. There were none of the legal traditions familiar to them in this new land. None of the indicia of the civilization they had left behind existed. In New South Wales a new history,\textsuperscript{21} a new \textit{gemeinschaft},\textsuperscript{22} would be created.\textsuperscript{23}

Convict transportation would cease in 1840.\textsuperscript{24} The Imperial government would be swayed by Wakefieldian ideas.\textsuperscript{25} The colony would be left to the market but its governance would

which the Crown acquired sovereignty,’ this enabled the crown to grant land in the exercise of its sovereign power.

\textsuperscript{19} As Robert Freestone, \textit{Urban Nation: Australia's Planning Heritage} (2010), 48 notes, the gridiron plan ‘dominated town design’ because ‘it was an efficient means of carving up land to attractive dimensions for rapid sale and resale.’

\textsuperscript{20} J. Keane, \textit{The Life and Death of Democracy} (2009), 306-311. As Keane explains: ‘[Tocqueville] noted that these civil associations were small-scale affairs, and yet, within their confines, individual citizens regularly “socialise” themselves by raising their concerns beyond their selfish, tetchy, narrowly private goals. Through their participation in civil associations, they come to feel that they are citizens. They draw the conclusion that in order to obtain others’ support, they must lend them their cooperation, as equals.’

\textsuperscript{21} Phillip Bobbitt, \textit{The Shield of Achilles, War, Peace and the Course of History} (2002), 6. Bobbitt argues that ‘without its own history, its self-understanding, no society can have either law or strategy, because it cannot be constituted as an independent entity.’

\textsuperscript{22} L. M. Edwards, ‘Ideational social capital and the civic culture: Extricating Putnam’s legacy from the social capital debates’ (2009) 23 \textit{Social Epistemology} 125, 139. In a Traditional Identity Schema ‘social cohesion centres on maintaining the categories [of social relationship] and their norms of behaviour.’

\textsuperscript{23} Hirst, above n 7, 134. Hirst argues that Captain Arthur Phillip began the process by instituting a colonial police force staffed with convicts. As Hirst notes, Phillip ‘established the pattern of making convict status as unimportant as possible, which was the key to the easy escape Australia had from its convict origins.’

\textsuperscript{24} Windeyer, above n 4, 194. Windeyer cites the observation of Governor King that ‘three-quarters of the population of New South Wales in his time consisted of persons “spared from an ignominious death by the humanity of the laws of England.”’

\textsuperscript{25} Hirst, above n 3, 165-6: ‘The plan proposed in 1829 by Edward Gibbon Wakefield (and its variants) created a device which effectively employed a tax on land (by way of land sales) to subsidize and control labour migration (by generously assisted passages). This solution yielded a general social return which attracted capital and
eventually be structured along a libertarian representative model. However, participation in
government would not be about Tocqueville’s self-interest properly understood (as described by
Putnam). The colony of New South Wales would pursue a different path.

5.2.1 Early Governance

The Imperial Parliament gave legislative governance to New South Wales by the New South
Wales Act 1823 (UK). This Act established a nominated Legislative Council with power to
make laws for the colony and created a Supreme Court to administer the law. Government by
decree of the governor was replaced with government by a nominated elite. This was a
structure of governance familiar to the British people at the time. It was a structure that did not
countenance democracy, let alone participation. Its ideology was about power and control of
the levers of power. By the time of the colonisation of New South Wales, the free market

enterprise. … The Wakefieldian specifications ensured an ideal balance between the sexes, a particular
occupational profile, and some monitoring of age, character, and origins.

26 Edwards, above n 22, 129 (Tocqueville’s self-interest is discussed in chapter 2.4 above).
27 Peter Hartcher, 'Enough porkies, it’s time for a few home truths', Sydney Morning Herald (Sydney), 18-20 December 2009, 11. Hartcher suggests that:
Australia ‘is a bloody miracle. … Australia’s white settlement set it up for failure. … Charles
Darwin was confident that our convict genes were our destiny – “it can hardly fail to
degenerate”’ Darwin wrote in 1836. From these beginnings, he notes that ‘the country developed
into a law-abiding, harmonious, tolerant society.’ We shrugged off the ruinous British class
system, developing an aristocracy of merit rather than rule by an entitled idiocy. Egalitarianism
is a deep well of national strength.’

Hirst, above note 7, 137, suggests, that what developed was the ‘odd Australian conjunction: a social
democracy willing to accept paternal authority.’ Philip Cox, ‘Is there a uniquely Australian approach to
urban design?’ (1995) (17) Urban Futures (Canberra) 20, 23, cites J M Freeland’s essay, Peoples in
Cities, where Freeland suggested that: ‘The Australian character and culture are epitomised in the suburb
– a compulsive gregariousness combined with an aggressive individualism’.

28 4 Geo. IV, c.96.
29 Windeyer, above n 4, 258. As Windeyer notes, pursuant to the Act, ‘letters patent, known as the
Charter of Justice, were issued’ creating the Supreme Court. In a development similar to the practice of
ancient Rome which transplanted its legal system, Windeyer goes on to observe (at 261) that the court
‘became one of the king’s ordinary courts of justice with jurisdiction and procedure similar to the courts
of Westminster.’
30 Younger, above n 14, 190. Younger suggests that the nominated members of the Legislative Council
were all from the exclusives group, that is:
‘the wealthy landowners, ex-officers or capitalist immigrants, or merchants-turned-landowner.
All the effective leadership came from the Macarthur family, while most of the civil service
members had the same general view point.’

31 P McAuslan, The Ideologies of Planning Law, Urban and Regional Planning Series (1980) McAuslan,
above n 3, 2. Ideology being the ‘disguised or hidden values’ motivating the law.
32 Moore, above n 5, 394, suggests that in Britain:
'[A] government dedicated to the gospel of free trade in property resisted freedom to write and
speak, imposing onerous licences, and when that failed laws of sedition that allowed writers,
journalists, poets and pamphleteers to be dragged off to gaol in the dead of night. These illiberal
laws lasted well into the mid-nineteenth century and ensured that many of the political prisoners
transported to Australia were some of the finest orators, wordsmiths and propagandists of their
age.'
ideology dominated social and economic thought in Britain. The ideological struggles of the
seventeenth and eighteenth century had resulted in the capitalist laissez faire ideology of the
industrial era. It would be the dominant social ethos in Australia from its inception. Liberalism,
as the principal of governance, would be adopted earlier than in Britain.31

But liberalism and access to land would create social tension. Manning Clark observes that in
the colony there was a ‘career’ to be made for the industrious.34 Land was, until the 1830s,
given away by grant of the governor to encourage development; although after Macquarie it was
more difficult for emancipists to enjoy this opportunity.35 As early as 1828 Governor Darling
proclaimed the layout of country towns before there were populations to occupy them.36 From
the outset in NSW, the government also set about to create the necessary local infrastructure
such as road, ports, bridges and administration.37 The landed free settlers became worried that

A good early example in New South Wales is the attempt by Governor Darling in 1827 to censor the
press. Bills introduced by him into the Legislative Council were refused the necessary certificate by the
newly appointed Supreme Court Justice Francis Forbes. His role under the 1823 constitution was to
declare whether laws were ‘repugnant’ to the laws of England. See in this regard the discussion in
33 Hirst, above n 3, 144-147. As Hirst explains (146-7), Liberal principles were applied in Australia in
advance of the reception of these ideas in Britain:

The British government which sent the Governors did none of these things in its own country.
The function of government had changed in Australia. It was not primarily to keep order within
and defeat enemies without. Rather, it was an etatist instrument to develop the country, and a
resource on which settlers could draw to make a success of their own pioneering.
The social character of the government also changed; or rather it did not have a social character.
In Britain, government was closely linked to the social order, since it was constituted by the
aristocracy and gentry and their connections. In Australia the government was one person, the
Governor who was detached from, and superior to, all groups in the local society. Yet the
government was much more than the person of the Governor; he embodied the full authority of
the British government … Government was both more singular and more abstract.

34 Manning Clark, above n 32, 49. Clark notes (at 51) that by 1810 ‘a few ex-convicts by the exercise of
industry and cultivation had raised themselves to a state of affluence.’
35 Ibid 99. Manning Clark suggests that after Macquarie was replaced by Brisbane in 1823:
‘All those elements in the old convict system which had aggravated ill feeling between the
emancipists and the exclusives during the era of Macquarie were to be dropped. Land grants to
exhibit-convicts were abolished. Brisbane was instructed [by Lord Bathurst] not to appoint an
emancipist as a magistrate until that man proved himself by meritorious discharge of other civil
employment, and until he had been able to form a full estimate of his private character. The
Simeon Lords and the Samuel Terrys could store up for themselves treasures on earth, but they
must not expect to break bread at the Governor’s table or hold high office in the colony of New
South Wales.’
36 Cox, above n 27, 21. According to the proclamation in the Gazette: ‘wherever practical, the streets were
to be rectangular and the cross streets at right angles to the main street.’ Street widths of one hundred feet
(with carriage way of sixty six feet) were mandated, though Surveyor Mitchell ‘preferred a narrow street
in a country subject to hot winds, dust and scorching sun.’ Freestone, above n 19, 49 attributes Governor
Darling’s regulations of 1829 as marking ‘the beginnings of the quarter acre block.’
37 Ibid. Cox suggests that Captain Arthur Phillips street layout of 1792 was ‘the first attempt at town
planning an urban design.’ Typical of plans in NSW, it was not given effect to as ‘the luxuries of urban
design were dropped for civic expediency.’

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emancipated settlers would subvert the traditional order. The cessation of free land grants would coincide with a push to create a more ‘traditional’ society as the ideas of the nineteenth century social engineer Wakefield gained prominence after 1830. Many immigrants became the beneficiaries of assisted passage chosen for their utility to the economy of the colony.

The free settlers had pretensions to create a social order reminiscent of England; a society in which the control over the wealth would be in the hands of an elite. They aspired to become what would later be derided as a ‘Bunyip aristocracy.’ These exclusivists initially had the ear of the Imperial government and sought to entrench their power position through control of the nominated legislative council. Their efforts to transplant British class distinctions would be obstructed by the ready availability of land and an equality of opportunity. Land may have ceased to be granted for free, but it could still be purchased. In England, ownership of land (as a rule) became the key to participation in civil society. In contrast, in the colony, ownership of land did not engender any feeling of obligation to contribute to the development of a civic society. The colonial experience was, according to Kelly and Stoianoff, ‘antagonistic’ to local control over civic affairs. Governance was something done by the government, not by the

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38 Manning Clark, above n 32, 144. Clark suggests that for years the ‘Tory landowners’ would toil with the conundrum of how ‘to transfer power over land and immigration from the Governor in a nominated council to their own group without increasing the power of the bourgeoisie?’

39 Keith Sinclair, A History of New Zealand (2000), 59. As Sinclair notes:

‘Wakefield wrote of “the Art of Colonisation” and hoped to make it an objective and experimental science, much as Bentham and the ‘philosophical radicals’, on whose teachings he was brought up, hoped to discover a science of politics. But though his economic and political theories derived in part from the doctrines of the utilitarians, he was in many respects an old fashioned mercantilist. At home he sensed the threat of revolution in the unemployment, low wages and grim living conditions which afflicted the poor. The rich were alarmed by radical political movements and hungry mobs, while they were uneasy about the stern competition for existence amongst themselves.’

40 Younger, above n 14, 196. Younger suggests that ‘Australia remained out of reach of the poorer Englishmen’ up to 1830 suggesting that opportunities were only available for men of property.

41 Moore, above n 5, 206. Moore notes that the term is attributed to ‘democrat journalist Daniel Deniehy.’ He suggests that ‘Sydney’s bourgeois merchants and working-class artisans had a different vision for New South Wales’ based on the principle of a limited franchise. Hirst, above n 7, 238, says that William Wentworth’s plan for a local aristocracy was ‘laughed out of court’ when it was put forward. Notably, Wentworth himself had turned a full half circle from his early years when he championed the cause of emancipists.

42 Younger, above n 14, 204-5. The ‘exclusives,’ led by James Macarthur, had sought in the 1830s to use influence in England to exclude emancipists from the limited franchise for election to the Legislative Council. Later, it would be property qualifications that would be used as the means to exclude the people from participation in local governance.

43 Freestone, above n 19, 105, suggests that:

‘There was no Australian tradition of philanthropic capitalism aimed at ensuring living environments for factory workers on a par with overseas initiatives like the “Bradford-Hallifax” school of model industrial village builders.’

people.\textsuperscript{45} In the colony, a social compact based on equality of voice,\textsuperscript{46} not dependent on class would become a touchstone for Australians.\textsuperscript{47} It is a compact that has the potential, as Craiutu suggests, to ‘degenerate’ into selfishness.\textsuperscript{48}

5.2.2 The Emergence of the Ratepayer Ideology

The ratepayer ideology, introduced in chapter 1, emerged out of the overt resistance by the people to attempts by the government to create a local government structure in the colony.\textsuperscript{49} This resistance would successfully delay the implementation of municipal government until 1906 when the state government finally mandated the creation of municipal governments throughout NSW. The people willingly accepted parcels of land granted by the crown, squatted on other crown land and bought land from others when it became available because of the

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\textsuperscript{45} Younger, above n 14, 190. Governors Brisbane and Darling took a different approach to Macquarie. Younger says that initially ‘there was not the slightest possibility of an emancipist being appointed to the Legislative Council.’

\textsuperscript{46} Equality is a necessary precondition to democracy. Jon E Lewis (ed), \textit{The New Rights of Man} (2003), 376-7 cites Tocqueville as saying:

‘The more equal social conditions become, the more do men display this reciprocal disposition to oblige each other. In democracies no great benefits are conferred, but good offices are constantly rendered: a man seldom displays self-devotion, but all men are ready to be of service to one another.’

\textsuperscript{47} Moore, above n 5, 396. Moore argues that: ‘It is not surprising that New South Wales boasted robust liberal radicals so early in its history, when the seeds were sown by the defiant Scottish Martyrs and officers of the United Irishmen.’ Windeyer, above n 4, 253, confirms this view. Windeyer suggests that while the majority of convicts were sent for ‘offences, more or less serious,’ … others ‘for example the Scotch Martyrs, the Irish exiles and the Dorchester labourers’ were sent for political reasons.

\textsuperscript{48} Aurelian Craiutu, ‘From the Social Contract to the Art of Association: A Tocquevillian Perspective’ (2008) 25 \textit{Social Philosophy and Policy} 263, 277. To avoid that outcome what is required is a strong civil association tradition. As Craiutu notes:

‘Civil associations, Tocqueville believed, are particularly needed in democratic times when people are equal, independent, and individually weak, and when they tend to prefer equality over liberty and wholeheartedly embrace individualism as a way of life. If left unchecked, this passion for equality could develop into a real threat to liberty, while individualism, a peculiarly democratic phenomenon fueled by the passion for equality, tends to degenerate into pure egoism or selfishness.’

\textsuperscript{49} Andrew Kelly, \textit{The role of local government in the conservation of biodiversity} (Ph. D. Thesis, University of Wollongong, 2004), 73. Kelly, citing the ratepayer ideology, suggests that municipalisation would have meant having to contribute to the cost of infrastructure provision. As Kelly notes:

‘Many landholders who amassed wealth through profitable land uses and/or escalating property values owed much of their success to facilities provided by government, such as roads and bridges, without having contributed to their costs. As a result they were unwilling to embrace municipalisation.’

economic opportunity it provided. As towns grew and as urbanisation became part of the fabric of society, the need for essential infrastructure grew. But, the new landed class resisted paying for this infrastructure; they saw this as the responsibility of government in the new colony. Landowners consequently benefited from ‘soaring property values due to government-funded roads and bridges’ that connected the emerging economy to established ports and trade routes. Kelly and Mant suggest that the landed class resisted municipalisation because of the ‘grim spectre of property taxation.’ The landless people did not have to be enlisted to the resistance because of disenfranchisement by operation of law.

The Sydney City Incorporation Act 1842 (NSW) gave Sydney the status of a city. But the Act limited the franchise to property owners who derived rent of greater than twenty five pounds per annum. Eligibility for office was further restricted to those having assets of more than one thousand pounds or an income of fifty pounds per annum. This exclusionary legislation did little to encourage civic participation, setting the example for local government into the future. Mayne suggests that the wider Sydney population held local government in contempt, fuelled by the press ‘catering to the prejudices of the unenfranchised majority.’

Kelly and Stoianoff suggest that resentment to participation in local governance was even ‘stronger’ in areas remote to Sydney. The New South Wales Constitution Act 1842 (UK) contemplated the creation of a series of ‘District councils’ throughout the colony to facilitate local governance. Governor Gipps sought to avail himself of these new powers by proclaiming some 28 District Councils. Kelly describes these as ‘phantom’ councils because of the ‘utter

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‘The aspirant gentry were ‘go getters’ on the make and while some had been imbued with notions of leadership, command and social responsibility during service careers as a group they lacked the British aristocracy’s sense of obligation and service.’

Hirst, above n 3, 148. The ‘wide electorate made it easier for more people to make demands on the government – for roads, bridges, railways and local services.’ In Hirst, above n 7, 239, Hirst also makes the point that ‘[i]t was because [the colonists] were so certain that their British rights were protected that the Australians expanded the activities of the state so unconcernedly.’

Kelly and Stoianoff, above n 44, 541.

Andrew Kelly and John Mant, ‘Towards more effective structures at the local level’ in Robert Freestone (ed), Spirited Cities (1993) , 239

The voluntary incorporation model proposed a land based franchise commensurate with the imposition of direct taxation based on land holdings.

Manning Clark, above n 32, 211. The Act was exclusionary. According to Clark, it ‘conferred the vote on every male person of the full age of 21 years who for one year had occupied a house, warehouse, counting-house of ship of the annual value of £25.’


Kelly and Stoianoff, above n 44, 541:

‘The system was, however, an utter failure. Opposition to rating proved to be even stronger away from Sydney, especially where landholders had benefited from soaring property values due to government-funded roads and bridges that brought their estates closer to town and market.’
failure’ of the exercise. The Legislative Council opposed Gipps’ attempts and rejected the bills because they would have imposed higher taxation on the members of the landed class. Younger notes that even though Gipps was instructed by London to institute the councils by letters patent (to override the actions of the Legislative Council), both ‘he and his successor felt this course unwise, and they took no action.’ By 1847 only one council had succeeded in imposing a rate.

The discovery of gold hastened calls for self-governance but not local governance. Manning Clark suggests that the decision of the Imperial parliament to confer self-governance in 1855 was made to dry up a ‘prolific source of revolution.’ But achieving this status without struggle meant that the necessary ideation in the minds of the people that they were the government was absent. In England it took almost a millennium for power to be exercised by ‘the people’ through representative democratic structures. In NSW it took only seventy years. A significant proportion of the population receiving the right had no experience of governance except as subjects under law. As Hirst notes, after self-governance the ‘style’ of government ‘remained paternal and managerial.’ Yet, the absence of a municipal structure meant that the local member of parliament was left with the obligation to petition parliament for even minor

57 Kelly, above n 49, 76-78. As Kelly notes (at 78): ‘Widespread financial paralysis due to legislative problems and community antipathy guaranteed the inevitable demise of district councils.’

58 Younger, above n 14, 206. Bridges, above n 49, 423, also observes that:

‘[Alexander] Berry was to say years later that Gipps, at one time a popular governor, entirely lost standing with the public and ruined his health by persistent attempts to introduce a ruinously expensive general system of municipalities.’

59 Kelly, above n 49, 78.

60 This is not to suggest that social pressure for self-governance did not exist, it did. See also Manning Clark, above n 32, 220. Clark sees this as the ‘English genius for compromise, or the policy of the embrace of moderates and the isolation of revolutionaries by the established order.’ And see Moore’s comments below n 62.


62 Moore, above n 5, 396. Moore believes that whilst the impact of Canadian patriots hastened self-government for the colonies, nonetheless the principled stand taken by Australian political prisoners benefited our democratic system:

‘The adoption of universal male suffrage decades ahead of Britain comes direct from the Chartist programme, as did other Australian innovations such as short parliaments and the secret ballot. The early embrace of trade unionism by the colonial working class owes much to the Todpuddle Martyrs, and in creating on of the world’s first Labor parties the unions were following in the tradition of working-class political action pioneered by so many Chartists exiled for their activism.’

63 As Hirst, above n 7, 233-6 suggests:

‘The Australian colonists had no experience of government as a system of placemen, pensions, fees and private enrichment. The British officials who ruled under the governor’s control were remarkably efficient and honest. … The transition of the Australian colonies to self-government was managed as part of the ordinary business of government. … The style of government remained “paternal and managerial.”’
matters such as road repairs because there was simply no other authority with responsibility for
the task. In areas where the ratepayer ideology was strongest, this was not a concern to the
people.\textsuperscript{64}

In an effort to shift the focus of attention, the colonial parliament of New South Wales made its
own attempt to create a local civic culture with the enactment of the \textit{Municipalities Act} 1858
(NSW).\textsuperscript{65} Permissive, and not compulsive, incorporation had become settled policy of the self-
governing colony.\textsuperscript{66} The 1858 Act permitted the voluntary incorporation of a municipality upon
the petition of fifty householders and in the absence of a ‘sufficient counter-petition.’\textsuperscript{67} The
1858 Act did not facilitate participation by the people generally as the franchise was once again
limited to rate-paying landholders. This aspect, according to Kelly, attracted ‘strident public
criticism.’\textsuperscript{68}

5.2.3 The risks of Participation

As Halligan and Paris note, ‘[t]he scope of local politics has been historically shaped by power
relationships between political spheres and economic interests.’\textsuperscript{69} In areas where there was
embryonic civic culture, there were pitfalls to participation in local governance.

The citizens of Shoalhaven saw the opportunities of the 1858 legislation. Alexander Berry, a
member of the Legislative Council, was the largest land holder in the district and thus he was

\begin{itemize}
\item \textsuperscript{64} Kelly, above n 49, 78-79. Kelly suggests that in sparsely populated areas, the land owner’s energies
were instead ‘directed at conquering a seemingly inhospitable environment.’
\item \textsuperscript{65} AJC Mayne, \textit{Fever, Squalor and Vice: Sanitation and Social Policy in Victorian Sydney} (1982), 49,
referencing editorial comment in the Sydney Morning Herald and the parliamentary debate on the debates
Municipalities Bill of 1856, notes that the argument against giving municipal councils in New South
Wales deliberative functions was that:
\begin{quote}
‘[Whilst municipal institutions in Britain had] once enjoyed considerable responsibilities
because in a pre-democratic age, they formed popular bastions against arbitrary government,’
that function, according to the Attorney General, had ‘passed away, so that “municipal bodies
now existed not for general government but for the carrying out of [administrative] matters of
local concern.”’
\end{quote}
\item \textsuperscript{66} FA Larcombe, \textit{The Stabilization of Local Government in New South Wales 1858-1906} (1973), 252.
Larcombe suggests that the compulsory incorporation model:
\begin{quote}
‘had acquired a somewhat sinister connotation through its association with the district council
system introduced by Gipps in 1843. … ‘Henceforth permissiveness became settled policy while
compulsion became a matter for clandestine discussion.’
\end{quote}
Whilst there were 192 voluntary municipalities, by 1906 only 0.9 per cent of the state was affected by an
incorporated council.
\item \textsuperscript{67} Kelly, above n 49, 80.
\item \textsuperscript{68} Ibid 81.
\end{itemize}
perceived to have an ‘ample pocket’ to extract ‘great sums as rates to finance the venture.’

A petition of 103 signatures was quickly organised and despite Berry’s counter-petition, the Municipality of Shoalhaven was proclaimed in September 1859. Berry successfully sought a declaration from the Supreme Court that the municipality was invalidly incorporated as it contained portions of both towns and rural districts, contrary to the Act, which allowed only the incorporation of towns ‘or’ rural districts. Kiama, Goulburn and other municipalities suspended operations pending the outcome of the appeal to the Privy Council in London. The council wanted to appeal but having regard to the outcome in the Supreme Court, the proceedings in the Privy Council had to be taken in the name of the mayor and the councillors. The appeal was unsuccessful. Even though the Court disagreed with the Supreme Court on the interpretation of the Act, as territory had been included in the petition that had not sought inclusion, the incorporation was declared by the Privy Council to be illegal. The mayor and councillors were personally liable and had to pay the costs of the proceedings. Berry enforced his entitlement to costs and distrained on their possessions. If there was needed a good example as to why the people should not participate in local government, Berry’s case was it.

The motivation of the state government to impose local governance had been to shift the obligation and cost of providing and administering local infrastructure and services from itself onto others. Local government functions were unpopular because they were a direct cost sought to be passed on to the people. When the 1858 Act was replaced by the Municipalities Act 1867

71 Bridges, above n 49, 17. Bridges suggests that Berry held to the view ‘that towns were dehumanising and undesirable.’ This, coupled with the fact that Berry would have to pay substantial rates (which Bridges notes (474) at over two thousand pounds per annum) would explain Berry ‘strong opposition’ to the incorporation of the municipality.
72 Ibid, 495. Bridges discovered that following the successful result in the Supreme Court and Berry’s action to recover costs from the alderman, the Cowper government paid out of the ‘unforseen contingent fund’ £1,222 ‘on condition that the council seek leave to appeal to the Privy Council and repay the money unless that tribunal also ruled the municipality to be illegal.’
See also FA Larcombe, The Advancement of Local Government in New South Wales 1906 to the Present (1973), 9. Larcombe notes that the implications of the Shoalhaven decision extended to Sydney with the Camperdown council also suspending operations ‘until the passage of the Municipalities Act 1867.’
73 Bayley, above n 70, 88-9. Bayley indicates that the Mayor and Councillors had petitioned the government for assistance as the boundaries had not been drawn by them but rather, by the government officer. The argument was that under the Act, once elected they were required to take their place or face a twenty pound fine. Bridges, above n 49, 501, notes that in 1864 the NSW government paid the sum of £1000 into the Privy Council as security for costs.
74 Bridges above n 49, 514, observed that the ‘Shoalhaven Municipality affair had a profound effect on local government.’ For example, Larcombe, above n 68, 9, notes that Camperdown (population 300), the smallest municipality under the 1858 Act, having suspended operations pending the outcome, was then amalgamated with the neighbouring Cook Municipality in February 1870.
75 Hirst, above n 3, 149:
(NSW), the government compounded the difficulties for participation by allowing cumulative voting (it was an enticement to the wealthy to support municipalisation). Persons holding sufficient land could have up to four votes at elections. As Kelly says of municipal councils created in the nineteenth century, they:

‘became the stronghold of a begrudging propertied class in built-up areas who insisted their contributions … would boost land values, boost businesses and help feed local prosperity.’

In the result, the state made ‘little call on citizenship.’ Whilst initially it was the landed few who resisted contributing to the civic life of the community, those of lesser classes who became property owners realised the personal advantages to them in not having to contribute to municipal infrastructure. For those in the towns who could not meet the franchise requirements, their disenfranchisement from power engendered a disinterest in participating in the civic culture because such matters were made irrelevant to them.

‘The colonial government did all their work without imposing direct taxation. Until the late nineteenth century there was no income tax and no company tax. … But local government did tax directly; its revenue came from rates collected on land. This was the chief reason why it did so little, and why in so many places it did not exist at all. Few wanted to give local government more responsibilities because that would increase direct taxes.’

Bridges, above n 49, 514, suggests that Berry’s opposition to municipalisation, namely the injustice of raising rates on land owners in one locality and to expend it in another, ‘was very soon echoed and to this day remains a potent cause of dissatisfaction with local government.’

This was not a novel idea. As John A. Phillips, ‘England’s “Other” Ballot Question: The Unnoticed Political Revolution of 1835’ (2008) 24(S1) Parliamentary History 139, 152 notes, a similar anti-democratic initiative was introduced in Britain by the passage of bills promoted by Sturges Bourne in 1818 & 1819 (58 Geo. 111, c. 69, and 59 Geo. 111, c.12). These acts were directed to regulating vestry (parish council) meetings which, following the Napoleonic wars and rapid urbanization, had descended into the chaos of ‘mob control.’ The adoption of such mechanisms to avoid mob rule would have been known to members of the NSW parliament.

Kelly, above n 49, 82.

Ibid 85.

Hirst, above n 7, 239:

‘The characteristics of the Australian state as they were formed under imperial rule were accentuated rather than abandoned or modified with self-government. Such a state made little call on citizenship. The citizens had not created the state and were not called upon even as taxpayers to take a very active part in it; their most characteristic stance was as supplicants for their share of the cornucopia.’

Kelly, above n 49, 79. The resistance continues. Kelly cites the comment attributed to ‘a prominent citizen’ of Tibooburra in a 1997 SMH article ‘Tibooburra Fights for its Council-Free Zone’ arguing against municipalisation proposed at that time:

‘[w]e don’t need for anything out here. We have the best dirt roads in NSW. We don’t need a council and we don’t want to be dictated to. The town has been here for 120 years and we have never needed a council.’
The ideation of the people in New South Wales therefore draws upon these historical roots. As Wakefield noted, the people of the colony were a ‘new people’.\footnote{Sinclair, above n 39, 60. Wakefield believed that because the imperial government had not deliberately planned for the creation of a British society in the colonies, a ‘new people’ were emerging. In Wakefield’s \textit{A Letter from Sydney} in 1829 he described these new people in derogatory terms suggesting that they were a people: ‘whose opinions are only violent and false prejudices, the necessary fruit of ignorance; whose character is a compound of vanity, bigotry, obstinacy, and hatred most comprehensive, including whatever does not meet their own pinched notions of right; and who delight in a forced equality, not equality before the law only, but equality against nature and truth; an equality which, to keep the balance always even, rewards the mean rather than the great, and gives more honour to the vile than to the noble … We mean in two words, a people who become rotten before they were ripe.’} These people would rather ‘walk through the streets up to [their] knees in mud than pay a penny in taxation.’\footnote{Kelly, above n 49, 74. Kelly is citing comments made at a public meeting called in Sydney 1835 opposed to measures to set up a local authority to provide infrastructure and health services.} The refusal to support the establishment of local government structures and consequential lack of experience in municipal governance, coupled with the entrenched belief in the ideology of property,\footnote{Hirst, above n 3, 146. Hirst argues that a constant concern of the Colonial office was restraining the demand of the colony on the imperial purse: ‘The Governor’s job was to promote the development of the economy, which would enable the colony to pay its way and bring more benefit to Britain. There was a notable harmony between what the British government wanted of the governors and what the settlers wanted of the Empire.’} explains the development of the ratepayer ideology in New South Wales.\footnote{Kelly and Stoianoff, above n 44, 549. Citing the ‘benefit principle’, a ‘municipalised version of the user pays principle,’ Kelly and Stoianoff suggest that: ‘Throughout municipal history, ratepayer interests have articulated the benefit principle to argue that it is inequitable for landholders to bear the burden of funding non-property related services.’ See also Mayne, above n 65, 43. Mayne argues that ‘[s]ensitivity concerning taxation made ratepayers particularly subjective in their assessments of municipal services and amenities they were thus funding.’ He cites the petition presented to the City Council in 1875 requesting it to undertake roadworks in the Albion Estate in Surry Hills. The residents, noting that the council made ‘very considerable revenue’ from rates and fees petitioned on the basis that: ‘it is but fair that the contributories of this increase of revenue should receive in return something like a quid, pro quo.’} From uncharted territory to urban form; New South Wales today is clearly the product of its history.\footnote{Jonathan King, \textit{Waltzing Materialism} (1978), 107. Jonathan King, a descendant of Governor King, grandly laments: ‘Australians had the opportunity to start from scratch, learn from mistakes, implement new town plans imaginatively, and respond to the beauty of the sparkling bays and golden beaches, the quiet grandeur of the eucalyptus forest, and build anew, unfettered by the constraints and prejudices of the past. That they failed to do this is on the last continent to be settled is one of the tragedies of modern human civilization.’}

5.3 NSW Planning Legislation:

As can be seen from the previous section, historical circumstance dictated that it would become the role of government, not the private sector, to provide and fund the infrastructure to enable the commerce of the colony to prosper. Government responsibility was founded on the need to
commercialise the economic opportunity of the colony to become a supplier of raw materials to
Britain and to open a market for its manufactured goods. The incorporation of liberal ideas
coupled with apathy towards participation meant that the government governed the people, and
governed them well.\textsuperscript{86}

5.3.1 A New Role for Government

Like the Romans who came to Britain, the British came to Australia and planned towns and
built infrastructure,\textsuperscript{87} but they did not impose crippling taxation.\textsuperscript{88} Town planning could be said
to have begun with Governor Phillip in that an initial plan for Sydney was drawn by him, but it
was not followed.\textsuperscript{89} Instead, it would be Macquarie, inspired by the Scottish Enlightenment,
who would set about defining the Colony.\textsuperscript{90} Macquarie did not have the means to fund his
programme but through innovation, Macquarie found a way.\textsuperscript{91} Subsequent governors embarked
on their own civic construction projects building ‘roads and bridges, improve[ing] ports,
courage[ing] exploration, survey[ing] lands for settlement, and provid[ing] settlers with their

\textsuperscript{86} Hirst, above n 3, 150. Hirst comments that:

“‘The government’ remained without social character; it was an impersonal force for good. …
They [the people] were very conscious of being British subjects and the local state, however
utilitarian in its daily workings, protected their British rights and liberties and hence their
freedom from the state.”

\textsuperscript{87} Freestone, above n 19, 10. Freestone argues that ‘[s]urveyors in either the field or head office were the
main town planners of the colonial era.’

\textsuperscript{88} Hirst, above n 3, ‘Until late in the nineteenth … The government collected its revenue from taxes that
were hardly noticed – duties collected on imported goods – and from the sale of crown lands.’

\textsuperscript{89} AJ Brown and HM Sherrard, \textit{Town and Country Planning} (1959), 24, suggest that Captain Phillip was
the first to attempt town planning with ‘a design for the layout of Sydney streets prepared in 1792.’ The
design was not followed and Sydney ‘was largely developed by chance.’

\textsuperscript{90} Cox, above n 27, 21. Cox argues that the ‘most inspired attempts for an urban design for Sydney were
by Governor Macquarie and his architect Francis Greenaway.’ One interesting aspect to the reign of
Macquarie is that it epitomises why, in later years, there was such resistance to the imposition of local
government on communities and the development of the ratepayer ideology. Macquarie ‘proved’ to the
people of New South Wales that the government was responsible for the provision of infrastructure such
as towns, roads and ports without the burden of taxation being cast onto the people to pay for it. If
Macquarie could, in ten brief years, achieve so much, why couldn’t later governors do the same? As
Michael Duffy, ‘The Visionary we need right now’, \textit{Sydney Morning Herald} (Sydney), 30 December
2009, 4, eulogises:

“Macquarie was the Augustus of the southern hemisphere. … He replanned the towns that were
already there, created new ones and erected 200 main buildings, … He left NSW with 300 miles
of good roads.”

\textsuperscript{91} L Sharon Davidson and Stephen Salsbury, \textit{Australia’s First Bank} (2005), 19. Australia’s first bank was
the initiative of Macquarie. The ‘first shareholders and directors were government officials and merchants
associated with Macquarie, including ex-convicts or emancipists.’ London declared the original charter
invalid but the bank survived and was reconstituted.
workforce.’

The colony would also have its own bureaucracy to administer this infrastructure.

5.3.2 Involuntary Local Government

As noted in the previous section, the initial attempts to create a voluntary incorporation model for local government comprehensively failed to engage the people of New South Wales. Neither the 1858 Act nor the 1867 Act created mechanisms that gave voice to the people who actually lived in the locality. In the result, the government was free to take advantage of circumstance. But faced with having to attend ‘to every petty little local requirement in every locality’ parliament, led by Premier Carruthers, forced local government onto the people through a suite of legislation known as the Local Government Act 1906 (NSW) (the 1906 Act).

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92 Hirst, above n 3, 146-149.
93 Macquarie’s successor Darling wound back many of the reforms. See Brian H Fletcher, ‘Administrative Reform in New South Wales Under Governor Darling’ (1979) 38(3) Australian Journal of Public Administration, 251-2. Darling replaced the convicts, they being, in his opinion, persons ‘who had forfeited every claim to character.’ He then created, effectively, a Civil Service ‘modelled on that of Ceylon and Mauritius,’ with departmental offices under his supervision. Governor Darling also increased the salary of the positions to attract free employees, and obviously, these could not be catholic. Fletcher notes (259) that:

‘Darling substituted a centralized, tightly-organized administrative system for the loose organisation that had existed under Brisbane. He placed his own office on an efficient basis and instituted a system of minutes and memoranda to convey official instructions to the Colonial Secretary, whose office was reorganized to enable it more effectively to discharge its functions.’

94 Mayne, above n 65, 42-3:

‘A property-based system of plural voting, linked with special property qualifications and absence of payment for municipal office, generally limited active participation in local government to wealthy men. … it was alleged local councils had, in the absence of a widely drawn electoral foundation, become a battleground for selfish cliques whose interests extended no further than determining the occupancy of the mayoral chair.’

95 Giving local community’s voice would impede the ability of government and its allies to take action. Slums held the threat of disease which affected rich and poor alike. Shirley Fitzgerald, Sydney: A Story of a City (1999), 81, suggests that after an outbreak of bubonic plague in 1900, the state government took the opportunity to seize privately owned waterfront property. She notes that ‘in the name of public health, large tracts of the waterfront, maritime housing, stores, churches and pubs were resumed and much was knocked down.’ The episode was justified because:

‘The city was no place for people to live. Suburban living became the fashion, and those who did remain in the inner city area were increasingly seen a living lives which were less than satisfactory.’

Freestone, above n 19, 214 notes that by 1917, resumptions by the Sydney City Council ‘had displaced about 9000 residents and destroyed thousands of houses.’ Such actions understandably politicised the people most likely affected. Patrick O’Farrell, The Catholic Church and Community, an Australian History (1985), 281-9, notes:

‘Catholics were over represented in the poorer congested inner-city areas.’ The actions of government and ‘the facts of economic and social life were driving Catholics into the Labor Party, although none too quickly and not without much misgivings.’

96 Gary Lewis, ‘Million Farms’ Campaign, NSW 1919-25’ (1984) 47(Nov) Labour History 55, 55. Lewis describes Carruthers as a ‘solicitor, investor’ He ‘was by political nature a Liberal Free Trader moving
The 1906 Act was not an ambitious piece of legislation. Generally, councils were to act as ‘glorified roads trusts, with power to collect waste in urban areas.’ Unlike earlier legislative models, the 1906 Act introduced a ‘benefit-related’ tax base in that rates were assessed on the unimproved capital value. The philosophy of the Act was to encourage development. Kelly and Stoianoff suggest that the assumption was that ‘land values would reflect the extent of benefits accrued from public expenditure.’

There was power in section 108 of the 1906 Act to declare an area an ‘urban area.’ This declaration enabled the council to exercise the ‘additional functions’ specified in section 109, which extended to building regulation. It was a rudimentary urban planning law. In the absence of such powers, there was no law which otherwise regulated the use of land apart from the common law of nuisance. Wilcox, also cited in Kelly, says the powers under section 109 were ‘widely acquired’ and became a ‘core council function.’

towards an increasingly conservative position as he aged.’ Carruthers resigned as Premier in 1907. Lewis notes, ‘[a] Royal Commission into the Lands Department found that Carruthers, when Secretary for Lands, had been ‘excessive’ in his granting of leasehold extensions to pastoralists, had assisted the ‘locking up’ of land and had hampered rural settlement.’ Yet he was subsequently appointed to the Legislative Council in 1910 ‘on the nomination of Governor Sir H Rawson, without the advice of the government.’

Kelly, above n 49, 86. As Kelly notes, there were three Acts; the Shires Act 1905 (NSW), which extended local government (excluding the Western Division) to areas of the state that had not incorporated according to boundaries drawn up by the government; the Local Government Extension Act 1906 (NSW), which extended the new provisions to the 192 existing municipalities that had been incorporated; and the Local Government Act 1906 (NSW), which was a consolidation Act applying a common legislative mechanism to the administration of local government. Towns and rural districts were generally separately administered. Part VII of the Act effectively extended the franchise widely to ‘any natural born or naturalised British subject, male or female’ who was an occupier or owner of land.

That being how Premier Carruthers envisioned them – see Parliamentary Debates, NSW Legislative Assembly, Hansard, 27 July 1905, 1106.

Defined in s132(1) of the 1906 Act as:
‘the amount of the capital sum for which the fee-simple estate in such land would sell, under such reasonable conditions of sale as a bona fide seller would require, assuming the actual improvements (if any) had not been made. …’

Kelly and Stoianoff, above n 44, 11. Kelly and Stoianoff note that the 1906 act was based on the ‘Georgist Principle’ referring to American Henry George ‘who influenced the financial architecture’ of the Act based on an ‘incentive to develop’ philosophy.

Ibid 542.

The powers under s109 were wide but generally related specifically to public health, building, amenity and infrastructure functions. However, sub-section (xxxiv) did extend power to authorise the ‘rearrangement and beautification of the area, and the acquisition of land, streets, buildings, etcetera, therefore, together with the sale or lease of land or buildings after such rearrangement.’

The 1906 Act was recast in 1919 becoming the Local Government Act 1919 (NSW) (the 1919 Act). Even though by this time the British had passed its first town planning law, the public interest ideology did not find its way into the NSW Act. Part XII of the Act expressly referred to ‘Town Planning,’ but the work of Part XII related to the regulation of subdivision of land and the opening of roads. Pursuant to section 309, the Governor was empowered to proclaim an area as a ‘residential district.’ Upon proclamation, the uses of land prescribed by the section as ‘incompatible with residential environments’ were prohibited within the proclaimed area. But with these exceptions, the 1919 Act generally confined the role of local government to being the lesser arm of government responsible for the ‘three Rs’, rates, roads, and rubbish.

5.3.3 Building Control

Part XI of the 1919 Act regulated buildings. Land use, with the exception of areas declared residential districts, remained unregulated. Pursuant to section 341, the applicant for approval had the right to appeal against ‘the decision of the council or any neglect or delay’ of the council to determine the application for building or subdivision.

Court of Appeal refused to label as nuisance the blocking of access to wind draft by a newly erected timber warehouse next door on the basis that ‘for the benefit of the community’ landowners “have and must have rights” to use property in whatever ways such property was “commonly and lawfully used.”


This was despite the nascent interest in town planning locally. Freestone, above n 19, notes that ‘[v]oluntary town planning associations were formed in every [capital] city between 1913 and 1916.’

Robert Stokes, The Battle for the Big Back Yard: An Examination of the Conflict Between Suburban Character and Urban Consolidation and the use of Public Participation in Managing this Conflict (Ph. D. Thesis, Macquarie University, 2007), 17. Stokes suggests that this legislative scheme led to ‘ad hoc’ decisions of a planning nature ‘in response to health and amenity concerns about the spread of low cost and tenement style housing.’ Paradoxically, he notes (at 158) that in 1928 s309 was amended by the Local Government (Amendment) Act 1928 (NSW) which inserted s309 (f) to allow councils to prohibit ‘any building for the purpose of a residential flat building.’

See Tanveer Ahmed, ‘Bona fide democracy begins on your doorstep,’ Sydney Morning Herald (Sydney), 9 September 2008, 11. Ahmed cites the common catch cry that councils ‘are caricatured as being concerned with the “three Rs” rates, roads and rubbish.’ His article, whilst noting the importance of local government, suggests that the apathy towards participation in local government continues because of the perception that the role of local governance is confined to these functions.

Berverling and Taylor, above n 103, [450,010] C60,152.

L. Stein, Principles of Planning Law (2008), 6. As Stein notes, unfettered land use rights historically relate to the laissez-faire doctrine and the ‘bundle of rights’ attached to the ownership of land.

The precursor to this right in NSW can be sourced to the appeal right created by the City of Sydney Improvement Act, 1879 (NSW). Mayne, above n 65, 148, notes that the prospect of regulation of buildings caused such complaints from developers about ‘arbitrary’ regulation by ‘autocrats’ that by the time the Bill was passed in 1879 it included provision for the creation of a specialist Board to hear the appeal ‘of any person “dissatisfied with the conduct proceedings or decision” of Corporation officials.’
The rights of the public to participate in the decision-making process were severely curtailed. Under the 1919 Act the public did not have a right to be notified of the application or to make submissions. Decisions of the council made under the 1919 Act could not be challenged in judicial review except on the fiat of the Attorney General. The system for processing applications is ominously close to the current system.

The work of Goodall and others, points to a continuing disconnect in the early years of the twentieth century between the government and the people on the issue of urbanisation. The emergence of progress associations to advance the cause of urban expansion suggests that the local communities sought a voice for its concerns external to the local government structures which the government had sought to impose. Curiously, apart from Labor party affiliations, it does not seem that there was a push to co-ordinate action to politicise the concerns by way of a

111 Unlike the provisions of section 123 of the EP&A Act (the open standing provision), a person had to have legal standing to commence judicial review proceedings. An illustration of this is found in the discussion in Mutton v Ku-Ring-Gai MC (1973) 1 NSWLR 233; 241-2:

‘An act of the local corporation is justiciable in two main circumstances. First, when the exercise of power directly affects individual rights, the decision will be potentially reviewable. See de Smith, Judicial Review of Administrative Action 2nd ed, p 273. There are a multitude of examples of this to be found in the Local Government Act. Secondly, when the act of the corporation is ultra vires the act will be reviewable. In the first case the act may be impugned in the courts by the individual whose rights are affected. In the second case the act may be directly impugned by the Attorney General or by some person who has special interest in that he suffers special damage….However, if individual rights are not affected, the courts do not, at the instance of the Attorney General or otherwise, undertake a general supervision of the acts and decisions of local government bodies.’


113 Robert Freestone and David Nichols, 'From planning history to community action: metropolitan Adelaide's internal reserves' (2001) (29) Journal of the Historical Society of South Australia 21, 23. The work of Freestone and Nichols on the ‘internal reserves’ of Adelaide in the early twentieth century supports Goodall. They note:

‘Residents’ responses to internal reserves were, however, ambivalent. Like many planning ideas, what seemed sensible in theory often foundered in practice. Confusion over the exact purpose of internal reserve areas, the tendency for locals to neglect them or use them as rubbish dumps, and local councils’ unwillingness to take on maintenance responsibilities were important reasons for the internal reserve’s eventual fall from grace.’

114 Goodall, above n 112, 4. Goodall argues that:

‘The increasing populations in the 1910s and 20s were settling in a dense pattern, fostering close knit communities and facilitating community organization. The local progress associations were both expressing and shaping the local sense of these emerging communities and of what they understood to be “the public.” It did NOT include Aborigines. A number of the Progress Associations protested in 1926, seeking council intervention, although unsuccessfully on that occasion, to remove Aboriginal residents from their land on Salt Pan Creek. The Depression slowed this process of community formation and assertion but it was to remerge strongly through the 1930s. It was a sense of community which was racially limited and class defined, with the Anglo-Irish component of the population self-consciously beginning to flex its demographic strength to exert control over the direction in which the community might develop.’
formal challenge to unseat members or to make matters an ‘election issue.’ As Goodall notes,\textsuperscript{115} the concerns ‘generated a concerted protest which was invariably expressed in terms of class and local entitlement.’\textsuperscript{116} This suggests that the ratepayer ideology precludes the taking of such political action because a necessary first step is participation in the political process.\textsuperscript{117} As Larcombe observes ‘public apathy has been an anathema to local government ever since its inception.’\textsuperscript{118} The ideology of property embedded in the 1919 Act and market forces would ultimately determine the settlement pattern of New South Wales for the ensuing forty years. The people would not embrace local government.

5.3.4 The Public Interest Ideology Arrives in NSW

The legislative regime of the 1919 Act remained the sole regulatory instrument relating to urban planning in NSW until 1945. But before the Second World War had finished, perhaps anticipating a better future,\textsuperscript{119} the NSW Government added Part XIIA to the 1919 Act by enacting the \textit{Local Government (Town and Country Planning) Amendment Act 1945 (NSW)} (Part XIIA). The Minister for Local Government clearly articulated in 1945 that it was the government’s express intention that land use planning would be democratic. The people were to be part of the planning system ‘to the greatest extent possible.’\textsuperscript{120}

However, the amendments creating Part XIIA did not contain a statutory mechanism to facilitate that democratic ambition.\textsuperscript{121} Stokes, citing the parliamentary debate, suggests that the 1945 Part XIIA legislation ‘was welcomed primarily as a slum control mechanism.’\textsuperscript{122} But the statute was

\textsuperscript{115} In the specific case of the association formed to protect a ‘national park’ area on the Georges River.

\textsuperscript{116} Goodall, above n 112, 22.

\textsuperscript{117} In Tocquevillian terms, this should emerge from a strong association tradition. See Craiutu, above n 48, 285. Craiutu suggests that: ‘unlike Marx who rejected civil society (which in his view was nothing but the realm of greed and selfishness), Tocqueville correctly grasped that the long apprenticeship of liberty depends to a significant degree on the science of association that draws precisely on those bourgeois virtues—self-restraint, temperance, self-interest rightly understood—that Marx despised and rejected.’

\textsuperscript{118} Larcombe, above n 72, 1.

\textsuperscript{119} Younger, above n 14, 643. Younger notes ‘[i]n Australia and in New Zealand, almost forgotten hopes and a reformist zeal were revived. This time a better world would be fashioned.’

\textsuperscript{120} Australian Labour Party, \textit{Five critical years: story of the McKell Labour government in New South Wales, May 1941-May 1946} (1946), 52.

\textsuperscript{121} Freestone, above n 19, 24: ‘Although planning was promoted on a rhetoric of participation, few effective opportunities were presented.’

\textsuperscript{122} Ibid 18. Stokes cites the comments of the Member for Parramatta in the parliamentary debate: ‘we should not allow people to congregate together on the very borderline of slumdom itself.’ New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 22 February 1945, Hansard 2005, (G C Gollan). It may have been hyperbole. A contrary view is suggested in Clive Forster, \textit{Australian Cities: Community
broader than that. The structure of Part XIA, the forerunner to the EP&A Act, was modelled on the British *Town and Country Planning* Act of 1932 (UK). The Minister had the power to make the planning instrument. He delegated to councils the authority to make the decision as to whether or not development occurred in a locality, based on the range of permissible development identified in the planning instrument. Seen in that context, urban planning law in New South Wales was firmly entrenched within the executive, not the parliamentary, branch of government.\(^\text{123}\)

With the enactment of Part XIA the ideology of the public interest would displace the ideology of property as the dominant social institution governing the development of land. In contrast to the minister’s comment, it would be the government and not the people that decided what was ‘in the public interest’ locally.\(^\text{124}\) The County of Cumberland planning scheme was not subjected to local scrutiny before its implementation. As Forster notes, it was an ambitious plan:

> ‘It aimed to coordinate the suburbanisation and decentralisation of housing, manufacturing and retailing, and the more equitable supply of services and facilities. It also sought to develop strong suburban regional centres and to restrict outwards sprawl by establishing a *green belt* of protected non-urban land.’\(^\text{125}\)

There was little public participation in the processes created by Part XIA. Apart from the public being invited to ‘make representations’ on the draft scheme,\(^\text{126}\) the public did not have the opportunity to participate in the plan-making phase. The matters to be taken into account in assessing an application pursuant to section 313 did not include public submissions. The public did not even have to be notified of the making of an application.

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\(^{123}\) This is evident in the ALP’s review of the achievements of the McKell government, above n 120, 48. As the review notes:

> ‘The haphazard and unregulated growth of New South Wales during the past 153 years had to be arrested.

... 

> *The government therefore decided that this State would, for the very first time in its history, be developed according to a master plan.*’ (emphasis in original).

\(^{124}\) Even though in 1945 planning was to be democratic, suggesting local control, in a forerunner to state planning policies, the government legislated in 1949 to override residential district proclamations. Pursuant to the *Local Government (Regulation of Flats) Act* 1949 (NSW), an owner could convert a building into a number of residential flats notwithstanding a residential district proclamation made at the request of a local government area prohibiting such development.

\(^{125}\) Forster, above n 122, 22.
The post war years were a period of rapid population expansion. The County of Cumberland planning scheme of 1951 was the government’s response to calls from garden city proponents in the interwar period such as John Sulman for better urban planning in Sydney. The scheme was bureaucratic in design and manifested a clear public interest ideology. That is, the scheme reflected the government’s view of what it perceived was in the best interest of the community. It was patronistic in approach. The government would protect the people from themselves. The lack of opportunity to participate in the process caused distrust, but also led to agitation for change. In terms of Arnstein’s ladder, citizen participation would be elevated from manipulation to informing, the lowest degree of tokenism.

Stokes suggests that the scheme reflected what he describes as the ideology of suburban character. Through the use of negative zoning provisions, councils were able to prohibit residential flat developments in local government areas so as to protect the amenity or the suburban character of a locality. Goodall notes that there was community resistance to the County of Cumberland plan and its green belt provisions because the plan conflicted with the desires of the progress associations which preferred to:

‘facilitate subdivision and foster “development” of the newer suburban centres, as well as the popular sense of the rising need for housing which had been generated from

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126 See section 342F(3).
127 Forster, above n 122, 15. Forster suggests:
‘the sprawling, decentralised, automobile-dependent, ethnically diverse cities most of us live in today are mainly a legacy of the 1950s and 1960s.’
128 As Freestone, above n 19, 13 notes, Sulman’s 1890 paper ‘The Laying-out of Towns’ was ‘a critical breakthrough’. Yet, in terms of built form, what was actually achieved was a determined project to supply affordable housing through the establishment of the Housing Commission which, at its height in 1946-7, was constructing some 400 fibro homes per month – see Five Critical Years, above n 120, 102.
129 Nicole Gurran, Australian Urban Land Use Planning (2007), 22-3:
The 1960s was a period of great social and political change and planning itself was soon regarded by many to be the antithesis of rational science. … There was a distrust of the type of planning that emerged from bureaucracies in an autocratic, top down manner, without opportunities for public participation.’
130 In 1970 Part XIIA had inserted into it section 342ZA to require councils to give public notice of the making of an application for approval to construct residential flat buildings. Pursuant to sub-section (6)(b) the council was required to ‘consider any objection to the granting of the application’ – see Local Government (Further Amendment) Act 1970 (NSW).
131 Arnstein, above n 2, 217.
132 Stokes, above n 106, 41. Stokes contends that ‘the Australian preference for home ownership and low density living can be conceived as an ‘ideology’ of ‘suburban character.’ He argues further that this ideology ‘reflects and embodies the ideology of private property.’ In the context of the County of Cumberland Scheme, Stokes, citing Wilcox, above n 104, suggests (67):
‘Suburban character was recognized and protected through the categorisation of land into zones “to ensure that its private use will be one which conforms with town-planning principles and the amenity of the area.”’
Depression evictions and camps and the new, post war optimism to establish new families in the district.\textsuperscript{133}

The County of Cumberland scheme reflects the tension then emerging between the dominant ideology amongst the people (that of private property) and, for the New South Wales government, the new ideology of government (that of the public interest). Forster suggests that the scheme was ignored by other government departments and local councils.\textsuperscript{134} The fact that the County of Cumberland scheme was stymied by the actions of government departments and local councils reflects the strength of the private property ideology at the time.\textsuperscript{135} This is supported by the nature of development which was in fact promoted under the scheme.\textsuperscript{136} At the time the scheme was introduced, there had been a debate raging for decades on the nature of municipal governance for greater Sydney. The introduction of Part XIIA must be located in this historical context.\textsuperscript{137}

Part XIIA was the legislative mechanism to give effect to the planning scheme. Section 342C of the Act authorised a council, by resolution, to decide to prepare ‘a scheme with respect to any land within its area.’ The Minister could, pursuant to section 342D, direct councils to make a scheme. Whilst approval of the scheme was under the control of the Minister, who had to

\begin{footnotes}
\item[133] Goodall, above n 112, 7.
\item[134] Forster, above n 122, 22-23. Local councils ‘tended to favour local interests rather than the intention of the metropolitan master plan.’
\item[135] Freestone, above n 19, 146 cites the observation of RS Luke, Chairman of the Cumberland County Council between 1951 and 1958, on his experience of the Council:
\begin{quote}
‘The initial hallelujah chorus of “I believe in planning” began to be tempered by the refrain – “provided it does not affect my property.”’
\end{quote}
\item[136] Forster, above n 122, 23, suggests that: ‘Large areas of nineteenth century cottages were demolished and replaced – in classic modernist style – with blocks of high-rise flats that still dominate the skyline.’
\item[137] Larcombe, above n 66, 202-3. Larcombe devotes over a chapter to the ‘debate’, conducted over a number of decades, regarding the need for a ‘Metropolitan Government’ for Sydney. In Chapter 5 (159) He notes that there were ‘three movements for a larger Sydney area.’ One for larger metropolitan municipalities, one for the creation of a county council structure based on the English system and one for the creation of a single metropolitan authority. He says of these movements (160) that they were ‘a series of spasmodic endeavours gaining attention each time enthusiasts drafted plans, interested local alderman attended conferences or pressure was exerted on government to appoint investigation commissions and introduce legislation, a pressure the Labor Party was eager to accept because of political opportunities latent in such a scheme.’ The debates were riven along political lines and, at times, turned on the extent of the franchise to be granted in any election for members. The period between 1941 and 1948 saw the return of the McKell Labor Government and the introduction of a bill to amalgamate metropolitan councils and create a Greater Sydney Metropolitan Council consisting of two members of each of the forty six parliamentary electorates within the County of Cumberland, with full adult franchise for election of members. Professor Bland, who Larcombe says (203) was ‘an ardent advocate for the extension of local government’, opposed the proposal because it ‘renders tenuous a principle of local government by creating large areas quite beyond the scope and interest and active participation of the average citizen.’ Larcombe notes (204) that by 1947, ‘the Government now become adamant that no further regard would be paid to the people’s wishes.’ It introduced legislation to amalgamate sixty six metropolitan councils into thirty nine areas.
\end{footnotes}
approve the resolution before it could take effect, the content of the scheme was potentially wide. Section 342G(2) authorised the scheme ‘to contain provisions for regulating and controlling the use of land and the purposes for which land may be used.’ Sub-section three listed a range of matters that could be included in the plan, but the sub-section made it clear that the list was ‘without prejudice to the generality of sub-section two.’

Pursuant to section 342F(2) public notification was to be given only of the fact ‘that the scheme has been submitted.’ Section 342F(3) gave the public a period of three months to ‘make representations.’ The following subsection required the council to ‘consider all representations made’ and could refer the plan back to the planning committee in charge of the plan ‘where any alteration of the scheme is considered necessary’. The planning scheme, as finally adopted was to be submitted to the Minister who was required by section 342I to refer the scheme to the Advisory Committee for report, but the Minister retained full power under section 342J to make the plan, with or without alteration, or to reject it. As such, the right to make a submission appears rather meaningless.

Pending the making of the scheme, Division Seven of Part XIIA regulated ‘interim development.’ In the absence of a resolution to adopt a planning scheme, only buildings and subdivisions were regulated by the Act. Where a resolution to make a scheme had been adopted, or where the Minister had directed the making of a scheme, the council had power to approve applications for interim development.

Section 342V authorised council to approve the application for interim development, with or without conditions, or it could refuse the application. Council was deemed to have refused the application if it did not determine it within two months. This deeming provision could be suspended if the council elected to postpone the consideration of the application pursuant to subsection two but the applicant and the Minister had appeal rights to the Land and Valuation Court against that decision. The Minister could also ‘call in’ the application for determination by him pursuant to sub-section three.

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138 Section 342G(3)(l) permitted the scheme to contain provisions for:

‘The zoning of land and the prohibition in any zone of the erection, construction, carrying out or use of any structure or work upon the land or the use in any zone of any land for any specified purpose or for any purpose other than a specified purpose.’

139 Section 342S defined interim development as meaning ‘development of land to which a scheme applies between the date upon which a resolution of a the council … has taken effect … and the date of the coming into operation of the scheme …’
5.3.5 Participatory Mechanisms under Part XIIA

The Act provided in section 342V(4) that where an application for interim development was refused, the council ‘if it thinks fit, make a contribution towards any expense or damage’ that the applicant may suffer as a result of the council’s decision. Pursuant to section 342V(5), the applicant had a right of appeal to the Minister against the refusal of an application, or against any conditions of approval. There was no mechanism for the public to make representations or to be notified of the making of an application.

With the enactment of Part XIIA an urban planning regime for NSW was created wholly within the 1919 Act. Building remained regulated under Part XI, subdivision was regulated under Part XII and land use was now regulated under Part XIIA. For the first time in New South Wales history, a person would have to seek the consent of a statutory authority for the use of land. The concept of spatial regulation would be the mechanism to regulate development. The council and the Minister were constrained only by the limits imposed in the planning schemes. The legislation drew heavily upon the British model contained in the *Town and Country Planning Act* 1932 (UK) discussed in chapter 4. The planning scheme provisions created by Part XIIA were cumbersome and they were not widely used by local councils.\(^{140}\) Despite the Minister’s optimistic exhortation to democracy when he addressed the County of Cumberland Council in 1945,\(^{141}\) the opportunity for public participation under the legislative scheme remained limited or non-existent. Being invited to make a representation is hardly democratic in the context of process. Councils did not initially embrace the benefits in regulating the use of land preferring to allow the market to determine the future planning of a locality. Where the power was used, it was exercised by Councils to protect and enhance property rights by excluding undesirable development. As Kelly argues, ‘[l]and use planning could be fitted snugly within the “ratepayer” ideology.’\(^{142}\)

The existing mechanism contained in the 1919 Act for obliging the council to determine an application in respect of building and subdivision applications was adapted to the determination of land use applications under Part XIIA.\(^{143}\) A decision of the council in respect to an

\(^{140}\) NSW Report to the Minister for Planning and Environment required under s20(1) of the NSW Planning and Environment Commission Act 1974 (November 1975) (November 1975 Report), 28 “Experience subsequent to 1945 clearly showed that the procedure adopted was unduly cumbersome.”

\(^{141}\) See chapter 1, n 1.

\(^{142}\) Kelly, above n 49, 97.

\(^{143}\) This approach was similarly retained as the mechanism in the EP&A Act upon its enactment in 1979 for the determination of development applications.
application for land use approval under Part XIIA was, after the 1962 amendments to Part XIIA, subject to the right of appeal in section 341 of the 1919 Act referred to above. Accordingly, the decision-making processes also exhibited a social exclusionary dynamic in that only the applicant for development had the right to challenge the decision.

It took until 1960 for the first planning scheme to be gazetted.\(^{144}\) In 1962 the Local Government Act was amended to force councils to regulate land use. The amendment allowed the Minister to make an Interim Development Order (IDO) which applied to all councils. The IDO imposed ‘temporary’ land use controls pending the completion of a comprehensive Planning Scheme Ordinance (PSO). An IDO was a ‘boiler plate’ planning instrument which introduced to many local government areas its first ‘table of uses’. IDOs generally adopted a set of standard provisions regulating development known as the ‘model provisions’ which had been gazetted by the government. Local councils were thereafter obliged to administer the IDO via the provisions of Part XIIA pending the gazettal of the PSO. Many councils were content to rely solely on the Interim Development mechanism.\(^{145}\)

5.3.6 Planning Appeals under Part XIIA

Until the enactment of Part XIIA, the appeal against the council decision provided by section 341 lay to the District Court. With the enactment of Part XIIA, the appeal was to be made to the newly constituted Land and Valuation Court and the Local Government Appeals Tribunal, both of which were created in conjunction with the amendments to the 1919 Act. The wording of section 341 of the Act suggested a de novo appeal.\(^{146}\) But from earliest times, the District Court adopted a cautious approach. In *Travena v Woollahra MC*,\(^{147}\) (Travena) White DCJ held (at p 155-6):

\(^{144}\) Kelly and Mant, above n 52, 242.

\(^{145}\) Some NSW councils will only abandon their IDO as its planning scheme as a result of the single LEP process being rolled out by the government in conjunction with the 2008 reforms.

\(^{146}\) s.341 provided:

342(1) Any applicant for approval-
(a) to erect any building,
(b) to open any new public road,
(c) to subdivide any land
May appeal to the Land and Valuation Court against the decision of the council or any neglect or delay of the council to give within forty days after service of the application a decision with respect thereto.

(2) Such court may summons witnesses, hear evidence and determine the matter, having regard to this Act, the ordinances, the circumstances of the case, and the public interest.

\(^{147}\) (1923) 6 LGR 153.
‘The Council is a body chosen by rate payers under the law to decide this class of question as well as a host of others relating to the good government of municipal area, and I do not think that the legislature intended that control of these subdivision matters should be entirely taken from the Council and entrusted to the judges of the District Court.

I do not think that [a council’s] decision should be set aside unless the Court comes to the conclusion, as a result of hearing evidence and consideration of the circumstances, that its decision, imposes an altogether unfair burden upon the appellant, or is based upon some misapprehension either as the facts or the principle to be applied, or has proceed upon some personal or other ground not connected with the merits of the proposal.’  148

In *Summers v Hornsby SC*, 149 Roper J applied the dicta in Travena, affirming the cautious approach of the District Court to the review power in respect of appeals to the Land & Valuation Court.  150 Accordingly, over time, the judicial approach to the Court's role on appeal created a practical circumstance where, in effect, the applicant carried a positive evidential burden into the tribunal. In *Foreman v Sutherland SC*, 151 Else-Mitchell J held:-

‘Time and time again the judgements of this Court have referred to the fact that the implementation of Town and Country Planning schemes require a balance of public and private rights and interests …. where the development consent has been refused on some ground of public interest the burden falls upon an appellant to advance reasons which will displace that public interest.’  152

The ideology of the pubic interest resonated in the courts. By requiring an applicant to displace a positive evidential burden, the court was upholding the primacy of the public interest over private property interests. The post war migration and population boom had led to a spike in demand for housing accommodation which manifested itself in the unprecedented growth of

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148 This view corresponds with the views of the former Lord Mayor's Frank Sartor attacking the powers of the Land and Environment Court in merit appeals expressed in the provocative 2001 City of Sydney publication: See F Sartor, 'City of Sydney Occasional Paper', (Sydney), January 2001, Issue 2.

149 (1946) 16 LGRA 40.

150 Although T Hale, in an unpublished paper ‘Policy Politics and Decision-Making in the Land & Environment Court,’ suggests (at p 10) that the Land & Valuation Court limited the application of Trevena ‘to amenity issues or council policy.’

151 (1964) 10 LGRA 269.

152 Hale, above n 150, 11.
residential flat and unit development in Sydney. Burnley suggests that in the period 1964-75, thirty percent of construction activity was devoted to residential flat development. The ubiquitous ‘six pack’ became the dominant expression of this built form.

Stokes identifies that this trend to approve residential flat development ‘engendered a fierce groundswell of opposition’ with the residents of ‘traditional low-density suburbs’ organising ‘resident action groups’ to protest and agitate against multi storey residential development. Freestone suggests that the ‘most radical and dynamic contestation’ were the green bans imposed by the Builders Labourers Federation. The only participatory mechanism available to the people to prevent such undesirable development was the ability to apply pressure to local councillors to refuse development. The exercise by councils of the discretionary power to say no to development meant that many appeals were brought before the Land and Valuation Court. By 1974 there was, in the area of planning, a multiplicity of potential jurisdictions to ventilate a planning dispute. It was not uncommon for a dispute to be commenced on appeal to the Land & Valuation Court, to be adjourned to enable the Supreme Court to determine a point of law and then to be sent back to the Land & Valuation Court for final determination (only to await the appeal on a question of law from that Court to the Court of Appeal).

5.3.7 Pressure for Reform

There was clear community dissatisfaction with the land use system created under Part XlIA. But whether or not pressure from below, from the people, led to the legislative change is

153 In Five Critical Years, above n 120, 100, the ALP calculated that by the war’s end, NSW was about ‘160,000 homes”short” – 80,000 of them not built because of the depression, 80,000 of them not built because of the war.’ (emphasis in original).
154 I H Burnley, ‘Immigration and housing in an emerging global city, Sydney, Australia’ (2005) 23(3) Urban Policy and Research 329, 337. Burnley suggests that apartments accommodated a disproportionate number of migrants because:
    ‘apartments facilitated settlement, for they were cheaper than the gentrifying inner city. … Apartments and cottages on low cost land, social institutions and networks, and decentralising industrial and retailing employment meant that the west became the primary receiving area for lower income LOTE immigrants after 1970.’
155 Stokes, above n 106, 130. The action groups formed the Coalition of Resident Action Groups to lobby and petition the government.
156 Freestone, above n 19, 29. As Freestone notes: ‘Green bans were conceived not as permanent boycotts but as holding actions to permit a more even playing field of negotiations.’
157 Ibid 159. And as Stokes above n 106, 109 notes:
    ‘By the late 1950s, litigation between resident groups, councils, and developers required judges to determine the public interest in permitting residential flat development’ as councils sought to stem the flow of applications via the refusal mechanism.
It was arguably the administrative complexity and the perceived failure of the system that led to a renewal process. As Berveling & Taylor observe:

‘In short, to most judges, practitioners, commentators and members of Parliament the system as constituted was seen to be increasingly unworkable. There was bipartisan support for the overhaul of the existing system.’

The Environmental Planning & Assessment Act and its cognate legislation (including the Land & Environment Court Act) was the outcome of that overhaul. Whilst there was extensive public consultation prior to parliament considering the EP&A Bills in 1979, it was parliament (the then newly elected Labor Government) that determined the final form of the Act. It set out to create a comprehensive system for resource management in the sense that it attempted to

‘At the same time, the rise of resident action groups, movements for social justice and public participation in government, environment and heritage protection and green ban movements in Sydney and Melbourne, all shaped a new climate for planning.’

Forster, above n 122, 121, believes that the 1970s was a time of renaissance for local government after a long period of criticism as ‘inept, inconsequential and often corrupt.’ He suggests that ‘[l]ocalism and “small is beautiful” came into vogue, as resident’s associations and other pressure groups took a more active part in local politics.’

The enactment of the EP&A Act was arguably the result of a ‘republican moment’ as described by James Gray Pope, ‘Republican Moments: The Role of Direct Popular Power in the American Constitutional Order’ (1990) 139(2) University of Pennsylvania Law Review 289, 367. It was a time when the citizenry arose to ‘disrupt cosy relationships among politicians, administrators, and interest group lobbyists.’ Against this is the fact that the calls for reform of the Planning system came from across the spectrum of actors. As is noted in the Minister for Planning and Environment, ‘Towards A New Planning System for New South Wales’ (NSW Government, 1974) (The green book), 4:

‘Calls for change have come from a wide variety of individuals and organizations and it would be fair to say that there is a demand for fundamentally rethinking the planning system. This desire for change was the main reason for an investigation into planning machinery at State and local government level by a Government Parties Committee, which submitted its report in July 1973.’

In the debate on the bills in the Legislative Council in 1979 the opposition, while acknowledging that it had commenced the process of review and that the system needed reform, stated that the current system ‘contained the worst features of both the American [proscriptive and rigid] and the United Kingdom [discretionary and uncertain] systems without their corresponding advantages.’ NSW, Parliamentary Debates, Legislative Council, 21 November 1979, Hansard 3356 (W J Holt).

Berverling and Taylor, above n 103, [600,005], C180, 022. This is precisely the complaint being made now by the Standing Committee Report above n 158, 24, 29 and 51. As the Standing Committee report notes (at 24):

‘Many Inquiry participants argued that the EP&A Act and the planning framework has suffered from too many issue-specific amendments over the years. The conclusion drawn by most participants was that the Act and the planning framework now required an overall review of the entire system.’

At 29, the committee notes that in evidence to the Committee the former Minister for Planning, Mr Frank Sartor, ‘had always been of the view that a rewrite of the EP&A Act was warranted.’ Ultimately, at 51, the committee recommended an independent expert and representative group ‘undertake a fundamental review’ of the Act and to formulate recommendations for change (see recommendation 1 of the committee).

Gerry Bates, Environmental Law in Australia (7th ed, 2010), 8. Arguably, it was at the forefront of what Bates describes as the ‘great [environmental law] social revolution.’
promote and regulate all development occurring in the state, but within environmental constraints. As the Minister explained in the second reading speech,

‘The essential aim of the bills is to create a system of environmental planning under which decisions on land use and resource management are made within the physical capacity of the environment in order to promote the economic and social welfare of the people of New South Wales.’  

The government of the time clearly envisaged a transparent land use planning process with a novel role for the court. The court was to become an institution that gave ‘guidance’ to councils in relation to both planning appeals and the law in relation to planning. In his second reading speech the Minister for Planning & Environment, D.P. Landa, said of the intention to create the Land & Environment Court:

‘The Court is an entirely innovative concept, bringing together in one body the best attributes of a traditional court system and of a lay tribunal system. The Court … will be able to function with the benefits of procedural reform and lack of legal technicalities as the requirements of justice permit. … The Court will establish its own body of precedents on major planning issues, precedents sorely sought by councils and the development industry but totally lacking in the now to be abolished Local Government Appeals Tribunal.’  

As will be seen in the next section, the participatory mechanism in the new act was virtually indistinguishable from the mechanism contained in Part XIA with the singular exception of the open standing provision that meant any person could bring a matter before the court without first having to obtain the Attorney General’s fiat.

5.4 Participation under the EP&A Act:

There was a moment in the consultation process for the EP&A Act when there was the possibility of participation being taken to a higher level than tokenism. In the 1974 report commissioned by the Liberal government into the planning system (the green book), it was suggested that:

163 NSW Parliamentary Debates, Legislative Assembly, 13 November 1979, Hansard 2882, (Hon Mr William Haig Minister for Corrective Services).
164 Cognate Environmental Planning Bills second reading speech NSW, Parliamentary Debates, Legislative Council, 21 November 1979, Hansard 3355 (Hon Mr David Landa).
The most complete form of involvement is public-decision making. This may in fact be achieved by presenting alternatives, from which people can choose the preferred one. The difficulty of this practice lies in the undue influence by an articulate minority, unless the choice was by referendum which would be costly and time consuming if used in every case. However it would be relatively easy where a small number of residents or users, who could all be consulted, could decide on some local matters.\textsuperscript{165}

By the time of the second report in 1975, this suggestion had been had become a citizen initiative. The government was suggesting that ‘local residents [could] initiate a local detailed plan for their area. If this happened, the residents could present a proposal to the council which should indicate its attitude and then deal with it.’\textsuperscript{166} The final report to the (Labor) Minister, published in November 1975, merely suggested that:

‘Local government should be responsible for planning decisions at the local level so long as their decisions conform with the requirements set down for the State and for the Region, or sub-region, in which a local council is located.’\textsuperscript{167}

For those interested in civic participation, it was a brief moment.

5.4.1 The EP&A Act in 2011

The EP&A Act (and its complimentary legislation such as the \textit{Land and Environment Court Act 1979 (NSW)}) was radical in its approach to social inclusion in planning processes. The language of the Act clearly creates the impression that the people are relevant to the planning process.\textsuperscript{168} The introduction of an open standing provision in section 123 of the EP&A Act, which allowed any member of the public to bring a challenge in the LEC both against and to enforce decisions made under the Act, was unique in Local Government processes. Previously, a person had to have legal standing, that is, sufficient interest in the proceedings.\textsuperscript{169}

\begin{footnotesize}
\begin{enumerate}
\item[165] Green book, above n 159, 21.
\item[166] Minister for Planning and Environment, 'Proposal for a New Environmental Planning System for New South Wales (Second Report)' (NSW Government, 1975), 10 (the White Book).
\item[167] NSW Planning and Environment Commission, 'Report to the Minister for Planning and Environment required under s20(1) of the NSW Planning and Environment Commission Act 1974' (1975), 42.
\item[168] As Stein J noted in \textit{Curac v Shoalhaven City Council} (1993) 81 LGERA 124, at 128: ‘Reasonable opportunities for public participation in plan making and in the development process are crucial to the integrity of the planning system provided under the \textit{Environmental Planning and Assessment Act}.’
\item[169] An illustration of the principles formerly applicable is found in \textit{Mutton v Ku-Ring-Gai MC} (1973) 1 NSWLR 233; 241-2: ‘However, if individual rights are not affected, the courts do not, at the instance of
\end{enumerate}
\end{footnotesize}
The language of the Objects of the EP&A Act also manifested a new, socially inclusive approach. However, successive reforms to the EP&A Act over its history, culminating in the 2010 further amendments, have eroded the relevance of the people in the processes of the Act. Presently, the public does not have a participatory role in the decision-making process either at the plan-making or development assessment stages. Once the plan makes development permissible, the probability is that development will be approved. If the decision made is to approve development, then except for a limited range of significant development known as ‘designated development,’ the public do not have a right under the Act to challenge the grant of consent in merit review proceedings. The voice of the community is stifled.

The government stated in 1979, when introducing the EP&A Bill, that the intention of the EP&A Act was to create a regulatory system for resource management within the physical capacity of the environment, whilst providing increased opportunity for public participation and involvement. Under the EP&A Act, the planning instrument is made by the executive branch of government. It is the ‘plan’ or instrument that makes development permissible. Once a plan or instrument is made, an application for development consent may be made.


Standing committee report above n 158, 24. The committee noted: ‘many Inquiry participants argued that the EP&A Act and the planning framework has suffered from too many issue-specific amendments over the years. The conclusion drawn by most participants was that the Act and the planning framework now required an overall review of the entire system.’

This is the express thrust of the NSW Department of Planning, ‘Discussion Paper: Improving the NSW Planning System ’ (2007) (2007 Discussion Paper). It is echoed in the Standing Committee’s report in the context of ‘cutting red tape’ and making the system ‘more efficient.’

Designated development is prescribed by Schedule 3 of the EP&A Regulations 2000.

Andrew Edgar, ‘Participation and responsiveness in merits review of polycentric decisions: A comparison of development assessment appeals’ (2010) 27 Environment and Planning Law Journal 36, 50-51. Edgar notes that ‘according to the LEC’s process, objectors are effectively sidelined.’ When they can participate, their evidence ‘is given little or no weight.’ The process relies on the Council to call expert evidence to counter-balance the evidence of the proponent.

NSW Parliamentary Debates, Legislative Assembly, 17 April 1979, Hansard p 4278 Hon Mr Haig Minister for Corrective Services:

The essential aim of the Bills is to create a system of environmental planning under which decisions on land use and resource management are made within the physical capacity of the environment in order to promote the economic and social welfare of the people of NSW.

The phrase ‘Environmental Planning Instrument’ (EPI) is defined in section 4 of the Act. It includes State Environmental Planning Policies (SEPPs) and Local Environmental Plans (LEPs) but excludes Development Control Plans (DCPs). Section 24 regulates the making of EPIs. SEPPs are made by the Governor. LEPs are made by the Minister (or his delegate). DCPs are made by councils – see s74C.
Development is defined very broadly in section 4 of the EP&A Act. Seen in the context of that definition, what is created under the EP&A Act is a site specific or topical (as in place specific) system for the regulation of development. Once an Environmental Planning Instrument (EPI) (which includes a Local Environmental Plan (LEP)) makes a specific type of development permissible (as opposed to making development prohibited), it is the applicant for development who determines whether, and if so, what type of development is proposed for a specific parcel of land. Whether an application for development is required, and if it is, whether the application requires a ‘determination’ depends on the nature of the proposed development and the requirement of the planning instrument. The Standard Instrument LEP now mandates the inclusion in Part 3 of any new LEP instrument the details of ‘exempt’ and ‘complying’ development.

If development is ‘exempt’ (for example development in the nature of a pergola or a fence), then pursuant to s76 of the Act, that type of development can be carried out without first having to submit an application for determination. Similarly, ‘complying development’ (which includes a two storey dwelling), also does not require merit assessment. Provided the nature of the development meets ‘specified predetermined development standards,’ then all that is

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178 Presently development is defined to mean:
(a) the use of land, and;
the subdivision of land, and
the erection of a building, and
the carrying out of a work, and
the demolition of a building or work, and
any other act, matter or thing referred to in s.26 that is controlled by an environmental planning instrument, but does not include any development of a class or description prescribed by the regulations for the purpose of this definition.

Although ‘work’ is not defined, s.4(2) of the Act also provides:-
A reference in this Act to: …
(d) a work includes a reference to any physical activity in relation to land that is specified by a regulation to be work for the purpose of this Act but does not include a reference to any activity that is specified by a regulation not to be a work for the purposes of this Act.

179 The particular type of development that ‘exempt’ and ‘complying’ is described in the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008. Exempt development is ‘minor’ development such as sheds, pergolas fixed BBQs and fences. Complying development refers to a broad range of development previously the subject of merit assessment including single and two storey dwellings, alterations and additions to dwellings and subdivision of land. According to the Department of Planning Fact Sheet ‘How are Neighbour’s rights protected?’ issued 15 December, 2008, it will be the code that protects neighbour’s rights – even though there is no mechanism to ensure this. Reassuringly, the fact sheet states: ‘it is recommended that you discuss your proposed plans with your neighbours before undertaking any building work.’ However, the code also provides that neighbour notification is to occur as a matter of process only after the complying development certificate issues. Clause 3.39A of the code stipulates that two days notice of the commencement of works approved under a certificate must be given to neighbours. What neighbours are supposed to do upon receipt of that notice is one of the curiosities of the legislative scheme.

180 See s84A.
181 See s76A(5)
required is for the development to be certified, by either the council or an accredited certifier. The development may then proceed to construction without further assessment. There is no administrative decision made about the merits of such development. All other development is development that requires consent under the Act. Carrying out development without consent is an offence against the Act. Presently, the decision-maker can be the Minister, the Planning Assessment Commission (PAC), a Joint Regional Planning Panel (JRPP) or the Council (or its internal delegate), depending upon whether the application for development is made under Part 3A or Part 4 of the Act.

It is the making of an application for development or for the project under Part 3A (or its replacement) which invokes the procedures for seeking consent to a development proposal. The involvement of the public and its participation in the decision-making process is dependent upon procedures to bring to the attention of the public the fact of the making of the application (usually by notification of the lodgement of the application). Participation is limited to the making of a submission about the development (unless it is designated). Presently, the public does not have a participatory role in the decision-making process either at the plan-making or development assessment stages. Once the plan makes development permissible, the probability is that development will be approved.

5.4.2 Participation in Plan Making

Upon the enactment of the EP&A Act, the power to initiate the making of a local plan was reposed in the local council. The draft LEP could not be made until the expiration of the period prescribed by the then section 60 for the making of written submissions. It was only if

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182 See s76A
183 See s75D in relation to Part 3A applications and s78 in relation to Part 4 applications. It is acknowledged that Part 3A is to be repealed. Whilst the Part 3A repeal Act received assent on 27 June, 2011, only schedule 2.26 (relating to the extension of the EP&A Regulation to 1 September, 2013) is in force. The proposed State Environment Planning Policy (State and Regional Development) 2011 has not yet been made.
184 This has been made more likely since the reforms introduced by the former Chief Justice Peter McLellan in 2003. See P McLellan, 'Future Directions for Property Law' (2004) 57 Environmental Law News 5, 10. As His Honour noted in 2004:

‘The future evolution of the appeal processes of the court must ensure that so far as possible, the process is not a contest. … The “culture” must be one where problems are solved.’

185 Now it is the Minister who initiates the making of the plan. Currently, all councils are in the process of remaking the local instrument to conform to the requirements of the adopted Standard Instrument LEP – see Standard Instrument (Local Environmental Plans) Order 2006.
186 AJ Nott, Environment Planning and Development Law (1982), 50. The decision would be by ordinary resolution – see s54(1). The minister retained power to direct the making of a plan – see s55(1).
the council ‘considers that the issues raised in submission are of such significance’ that a public hearing could be convened.\(^{187}\) At its highest then, the system allowed, as Farrier notes, ‘generous opportunities to comment.’\(^{188}\) This is not a position of power.

Currently, SEPPs are made by the Governor.\(^{189}\) The plan making provisions are contained in Part 3 Division 4 of the EP&A Act. It is the Minister that makes the LEP.\(^{190}\) Generally, it is the Council (and not the public) that is responsible for developing the local plan. The Department of Planning encourages councils to use the ‘gateway’ process to ‘test’ whether LEP proposals are ‘viable’.\(^{191}\) It is the Minister that determines viability. If a proposal is viable, the Minister issues a ‘Gateway Decision.’ It is only after that decision is made that the process continues and participation occurs.\(^{192}\) Participation is restricted to consultation. There is no right to require the convening of a public hearing. The Department of Planning states that the gateway process will:

‘create strengthened confidence in the local plan making process by providing greater transparency and efficiency. This confidence will lead to the protection of local communities and growth of the New South Wales economy.’\(^{193}\)

\(^{187}\) Ibid 55. See s67. Nott noted that there was no judicial duty placed on the council, he further states that: ‘the only ground of challenge available to him must either be that the council did not in fact consider the report [pursuant to s67] and the submissions and the matters raised at the public inquiry (and there would have to be clear evidence of this), or that the council’s corporate mind was so foreclosed that it gave no genuine consideration to those matters.’

\(^{188}\) David Farrier, *The Environmental Law Handbook* (2nd ed, 1993), 61. Farrier describes the NSW planning system thus:

‘Participation at the plan-making stage is important because opportunities for public participation at the later stage- when specific proposals are made for specific sites- are usually more limited. Although there are exceptions, the general thrust of the New South Wales approach to planning is to grant generous opportunities to comment at the plan-making stage, but to restrict them when it comes to decisions about specific projects.’

Farrier goes on to observe the paradox that arises in that the people are ‘most eager’ to exercise participation rights at the later stage.

\(^{189}\) See s24(2)(a) of the Act.

\(^{190}\) See s53. The discretion whether or not to make a plan is unfettered. Consultation with the community is mandated by s57 – the consultation ‘must be in accordance with the community consultation requirements for the proposed instrument.’

\(^{191}\) See s56. Guidelines have been issued by the Department - see NSW Department of Planning, ‘Local Plan Making’ (NSW Government, 2008).

\(^{192}\) A failure to comply with the exhibition requirement would lead to invalidity, see: *Smith v Wyong Shire Council* [2003] NSWCA 322, Spigelman CJ at [59] and Tobias JA at [176]. The Act was amended as a consequence of this decision by the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act* 2005 (NSW) but the amendment did not change the need for public exhibition of a plan as part of the plan making process under s66 of the Act. The test for compliance is summarized in *Gales Holdings Pty Ltd v Minister for Infrastructure and Planning* [2006] NSWCA 156, [110].

How this will be achieved through the gateway process is not explained. The approach is bureaucratic and very paternalistic towards participation. The Standing Committee noted in its 2009 report that engaging the community in strategic planning ‘is a challenging issue.’ Yet despite some three hundred pages of report, the committee also observed that ‘the committee did not receive much evidence to suggest how community engagement could or should be improved.’ Arnstein would suggest that the community needs to be empowered.

Empowerment begins at the rung of partnership and rises through the rung of delegated power to the ultimate rung, citizen control.

Partnership requires for its effectiveness the capacity for the power-holders to negotiate with an organised citizen power-base. The logical organised power base representing the local community ought to be the local council. Yet, for participation to be active, that implies that the council should have some mandate from the community about the content and make up of the plan. What should be paramount should not be the council’s view of what is in the community’s best interest for the neighbourhood; rather, it should be the community’s view, as articulated to the council. This is something more than making a submission under the Community Strategic Plan provisions of the Local Government Act 1993 (NSW). It requires that the community value participating in the making of the local plan.

5.4.3 2008 Reforms

Generally speaking, until the 2008 reforms of the EP&A Act, it was the local council that was invested with the function and duty under the Act to determine the widest range of development applications. In 2008 the NSW Government took the view, in the context of development

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194 Standing Committee Report, above n 158, 91.
195 Ibid.
196 Arnstein, above n 2, 217.
197 Ibid 221.
198 Standing Committee Report, above n 158, 35. In evidence to the committee, Michael Harrison, Director, Strategy and Design at the City of Sydney Council said:
‘Council experienced difficulties incorporating higher density development [into its strategic plans] because without a mandate for a requirement for higher levels of design quality, it was difficult convincing the community that high density could be a good outcome.’
199 See s402 of the Act. The council is required to identify in the plan ‘the main priorities and aspirations’ for the future, extending to 10 years from when the plan is endorsed. The plan must also identify the community engagement strategy that enables participation. Unfortunately, the strategic plan does not have the status of an Environmental Planning Instrument. This means that even if the Community Strategic Plan referenced the aspirations for a neighbourhood, it would not amount to a mandatory consideration when development applications are being assessed.
assessment and review that the ‘right’ of the public should only be to have a say ‘commensurate with the level of impact and significance of the development.’

In contradistinction to the intention stated in the objects of the EP&A Act to increase opportunities for participation, the 2008 reforms to the EP&A Act removed a substantial body of decisions from the development approval process. The 2008 Amendment Act introduced a new Part 2A to the Act which creates additional layers of bureaucratic assessment of applications. The Minister for Planning constituted five Regional Panels by making the Joint Regional Planning Panels Order 2009 on 26 June 2009. The first decision by a panel was made by the Southern Region Panel on 24 September, 2009.

The 2008 reforms modified the decision-making process for the determination of the balance of the applications made under the EP&A Act. The introduction of Joint Regional Panels to decide applications formerly determined by councils means that the ability of the public to politically engage the council in the democratic process is removed. The 2010 Amendments have made

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200 2007 Discussion paper above n 173, 60.
201 The amendments were effected by the Environmental Planning and Assessment Amendment Act 2008 (NSW) (2008 Amendment Act). Not all of the amendments effected by the 2008 Amendment Act will come into law. In the last days of the 54th parliament in 2010, the government passed the Planning Appeals Legislation Amendment Act 2010 (NSW) (the 2010 Amendment Act). In the 2008 Amendment Act it was proposed to create by s23K to create Planning Arbitrators who would have assessed development applications refused by Councils. In the second reading speech introducing the 2010 Amendment Bill, the government indicated an intention to repeal the unproclaimed provisions and to replace the planning arbitrators with ‘a new conciliation-arbitration scheme designed specifically for disputes involving small-scale development’: see NSW, Parliamentary Debates, Legislative Council, 11 November 2010, Hansard 27686 (Second Reading Speech), Michael Veitch.
202 There are now:
  - A Planning Assessment Commission (PAC) created by s23B which assists the Minister in the determination of Major Projects.
  - Joint Regional Planning Panels (JRPP) created by s23G which determine significant regional applications.
  - Independent Hearing and Assessment Panels (IHAP) created by s23I which assess local applications referred (or required by an Environmental Planning Instrument to be referred) to it.

The scope of the powers of the Planning Panels is uncertain but clearly the Government is moving to sideline councils in the delivery of the Government’s policy – see P Bibby, ‘Planning power play earns council’s ire’, SMH (Sydney), 30-31 May 2009, 6:

‘Soon, however, they will have additional powers [by reason of amendments introduced by the Minister to Parliament on May 13 2009]. They will be able to write the detailed guidelines for smaller sections of a local government area and specific types of development.…
But the president of the Local Government and Shires Association, Genia McCaffery, said this was a significant expansion, allowing panels effectively to take over councils’ core business. …
Councils and local communities are effectively locked out of that process.’

203 Department of Planning, Planning Circular PS 09-016 issued 2/7/09.
204 Southern Region JRPP, ‘First Joint Regional Planning Panel Meeting Held in Wollongong’ (Press Release, 24 September 2009). The determination was to approve development for two office and research laboratory buildings.
further in-roads to the ability of councils to defend ‘no’. The NSW Government set out its rationale for reforming the NSW planning system in its 2007 Discussion Paper ‘Improving the NSW Planning System’ (2007 Discussion Paper). The 2009 Standing Committee report supports the thrust of the reforms, taking up the rhetoric of the 2007 Discussion Paper and the aim of achieving ‘Australia’s best planning system.’ Whilst the then government acknowledged the importance of the planning system to the community, it is suggested that the amendments appear to be a clear departure from the commitment to public involvement in the planning process encapsulated in the objects of the EP&A Act. As Pearson and Williams note, the reforms have meant that local government has lost ‘a significant part of it consent authority function.’

If the role of public is limited only to active participation in the development (but not making) of plans, with no role in the application assessment process then this suggests a policy change by the government in relation to public participation. It is plain from the 2007 Discussion paper that the role of the public in the decision-making and decision-review processes is viewed negatively. Participation is described as being exercised in an ‘adversarial and discouraging’ manner. The Government noted a perceived ‘expectation that the community should be entitled to veto development even when such development complies with the planning intent and controls’.

This is unsurprising when the people had no effective role in the making of the planning controls.

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205 The scheme introduced by the 2010 Amendment Act excises development applications and modification applications for single dwelling and dual occupancies from the current merit appeal process. If the parties cannot reach a decision in the process (presumably that the development be approved) then, as explained in the second reading speech, the Commissioner ‘will without further adjournment immediately determine the matter by way of arbitration.’ The commissioner’s decision will be final; there will be no further right of merit appeal. On 27 September 2010 the Government placed on exhibition the draft 2010 Regulations. As is explained in the Departmental Fact Sheet Overview of the draft Environmental Planning and Assessment Regulation 2010 published in conjunction with the draft Regulation, ‘the majority of the current provisions in the 2000 Regulation are carried over … without significant amendment.’ The Fact Sheet Development assessment changes proposed in the draft 2010 Regulation notes that in relation to post determination processes: ‘No changes are proposed to the 2000 Regulation in relation to reviews and appeals, post-determination notification and other matters dealing with development consents.’

206 2007 Discussion paper above n 173.

207 Standing committee report above n 158, 34.

208 Linda Pearson and Peter Williams, ‘The New South Wales planning reforms: undermining external merits review of land-use decision-making?’ (2009) 26(1) Environmental and Planning Law Journal 19, 19. They conclude their analysis by noting (at 34) that the Land and Environment Court ‘has been severely undermined by the latest planning reforms.’


210 Ibid, 19.

211 Ibid.
5.4.4 Notification

Before the 2008 reforms the vast bulk of applications for development were regulated by Part 4 of the Act. Insofar as a determination was required, the Act made the council the consent authority. In respect to such applications, councils had the capacity in its LEP, or in a Development Control Plan (DCP) or adopted policies, to make provision for such applications to be notified. This brought the application to the attention of the public and enabled the public to make a submission in relation to the development proposal. Pursuant to s79C(d) of the Act, such submissions form part of the material evaluated by the decision-maker and are material which the decision-maker is bound to take into account. The exclusion of notification provisions means that the public will not now know that an application for development has been made until after the application has been determined. The current explanation for there being no general right to be informed of the lodgement of an application for development is that the Government believed that the ‘[p]reparation of simple advisory documents and education campaigns could assist in defining what the rules are about development in an applicant’s backyard, as well as the backyard of their neighbour.’

There is an elegant simplicity to the logic. There is no need to confer an administrative discretion if the development ‘complies.’ Complying development should simply be approved without scrutiny. As the Minister said when introducing the NSW Housing Code on 12

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212 The procedure for making such applications is set out in s78.
213 Though the task of setting aside a consent on the ground that a submission was not taken into account may be problematic. See in this regard *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277 at [79]-[80] per Basten JA. An applicant challenging the grant of consent carries the onus of identifying ‘some matter specified in s79C … as a mandatory consideration, and then … [has the obligation to] demonstrate that it has not been taken into account.’ In judicial review proceedings the advertence to the submissions in the report may be enough to put a consent beyond legal challenge.
214 EDO, *The State of Planning in NSW: With reference to social and environmental impacts and public participation* (Environment Defender's Office, 2010) (EDO Report 2010), 18. The EDO 2010 report notes that the ‘first step for effective community engagement is notification.’ Accordingly, to deny the right to notification is fundamentally anti-participatory and contrary to the Rio Declaration principle. It is suggested that the mechanism adopted is deliberate to frustrate effective access to judicial and administrative procedures.
216 Under the authority of the SEPP (Exempt and Complying Development Codes) 2008 there are now the following ‘complying development codes’: the General Housing Code the Rural Housing Code the Housing Alteration Code the General Development Code the General Commercial and Industrial Code the Subdivision Code the Demolition Code
December 2008: ‘If a proposed house meets set standards which limit its potential impact on neighbours and the look of a street, it should not be tied up in red tape.’

5.4.5 Public Participation and Accountability under the EP&A Act

In the context of democratic theory, the normative approach to accountability is the ballot box and the judiciary. To seek a mandate for policy initiatives, prospective representatives publish their position and electors differentiate between candidates based on policy platform difference. In implementing policy, government is constrained to acting within power conferred by legislation. Actions in excess of power are reviewable in judicial review. Decisions made by ministers and councils to approve development are similarly constrained by administrative law principles.

The decision review mechanism in the EP&A Act has two aspects. Firstly, there is a mechanism for a ‘merit review’ of a determination to refuse consent to development. This is by way of an appeal de novo to the LEC. Secondly, there is a mechanism for judicial review by application to a judge of the LEC in respect of a decision made by a consent authority. Generally, unless the development is of a particular character known as designated development, the public does not have a right to initiate a merit review. By reason of the open standing provision of s123 of the Act, the public do have a general right to initiate a judicial review of a decision made by a consent authority, which includes the Minister.

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218 See sections 97 and 98 of the EP&A Act.
219 Arguably, judicial review, in the context of democratic theory, is anti-democratic. Joseph M. Farber, ‘Justifying Judicial Review: Liberalism and Popular Sovereignty’ (2003) 32 Cap. U. L. Rev. 65. As Farber notes, ‘judicial review carried out by [un-elected] judges significantly limits citizen’s power to influence political outcomes.’ For this reason, the courts are keen to limit the scope of the enquiry under judicial review to avoid a de facto merit appeal. The Court of Appeal held in Anderson v Department of Environmental Change (2008) 163 LGERA 400, at [47] that: ‘It is obvious that [the use of terms like real, proper and genuine to evaluate the decision] is fraught with the danger of a slide into impermissible merits review.’ The correct approach is to undertake ‘an evaluative process based exclusively on what the decision-maker has said or written.’
220 Designated Development is prescribed by Schedule 3 of the EP&A Regulations. The draft 2010 Regulation proposes, according to the Department’s fact sheets (n 202 above), ‘minor changes are proposed to the classes of development identified as designated.’ The EP&A Act, s98, sets out the third party appeal right. The right is limited to those persons who made a submission against the development.
221 Demonstrated most effectively by the recent successful challenge to the making of the Ku-Ring-Gai Town Centres Plan – see: Friends of Turramurra Inc v Minister for Planning [2011] NSWLEC 128
The effectiveness of the entitlement to seek a judicial review is found in the recent challenges to the decision-making process to give effect to the redevelopment of an area in the Hunter known as Huntlee. In *Gwandalan Summerland Point Action Group Inc v Minister for Planning* (Gwandalan), Justice Lloyd struck down the Minister’s consent to a major project application upon the basis of apprehended bias. In the view of the court, the Minister had accepted a ‘land bribe’ in the negotiation phase of the application. Subsequent to the decision, the government announced a proposed rezoning of the site to resolve legal uncertainty. To facilitate development in accordance with the adopted Lower Hunter Regional Strategy, the Minister entered into a Voluntary Planning Agreement (VPA) pursuant to s93F of the Act. That administrative step was itself the subject of a successful judicial review challenge. Whilst it may seem surprising, the door remains open for a valid decision to be made authorising the rezoning. Subject to the submission of a further development application, the development contemplated by the strategy may yet eventuate.

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222 [2009] NSWLEC 140. Lloyd J declared the consent granted by the Minister to be void as it was tainted by apprehended bias flowing from the Minister’s earlier decision to enter into a MOU in relation to the same development. Unsurprisingly, the former Minister was ‘perplexed’ by the decision – see Frank Sartor, ‘Let’s have a little sanity - and a new planning act’, *Sydney Morning Herald* (Sydney), 3 September 2009, 11. Mr Sartor noted that land swap agreements were ‘not unusual’ – ‘The new environmental lands would be a great win for future generations. Good policy? Yes. Land bribes? Certainly not.’ … ‘None of this is going to help investment in NSW. We need to bring sanity back, and soon. And again, it shows why we need a new planning act.’ As a post script, His Honour retired not long after the decision was handed down. The Chief Judge of the Supreme Court nominated Justice Lloyd for a position of Acting Judge. The government subsequently refused to re-commission Justice Lloyd – see Joel Gibson, ‘Judge rejection ‘threatens’ court independence’, *Sydney Morning Herald* (Sydney), 8 March 2010, 3. No reason was given by the Attorney-General. On 3 December 2010 Frank Sartor announced his retirement from Parliament. In his valedictory speech Mr Sartor described Justice Lloyd’s comments as ‘a gratuitous and defamatory comment that has done himself and the court no credit.’ See Sean Nicholls, ‘No Regrets: Sartor steps down from tough gig’, *Sydney Morning Herald* (Sydney), 4-5 December 2010, News 6.

223 Kelsey Munro, ‘Catherine Hill Bay Project Gets Go-ahead’, *Sydney Morning Herald* (Sydney), 29 July 2010, 6.

224 See *Sweetwater Action Group Inc v Minister for Planning* [2011] NSWLEC 106. Justice Biscoe found that both the decision of the Minister to recommend amending the Major Developments SEPP and the amendment made by the Governor (gazetted on 31 December, 2010) were void, in part, because the Minister wrongly took into account an improperly made Voluntary Planning Agreement made between the Government and the Developer.

225 It is useful here to note the observation of Tobias JA in *Calleja v Botany Bay City Council* [2005] NSWCA 337, at [25]: ‘any attempt to always find planning logic in planning instruments is generally a barren exercise.’

226 This is not an uncommon occurrence. The landmark case in the LEC in relation to the court’s powers in judicial review was the series of cases involving the Parramatta Council’s decision to approve the proposal to redevelop Parramatta Stadium. The LEC struck down the consent and the Court of Appeal upheld the decision (see below n 224). A subsequent application was approved (validly) by the council and the Stadium was built. In a similar vein, Cowra Council had three attempts to lawfully approve development for a cattle feed lot see: *Noble v Cowra* [2001] NSWLEC 149; *Noble v Cowra* [2003] NSWLEC 178; *Noble & Anor v Cowra* [2006] NSWLEC 583. When Parramatta council was unsuccessful in the High Court (see *R&R Fazzolari v Parramatta City Council* (2009) 165 LGERA 68) in being able to implement its proposal to compulsorily acquire land for redevelopment, the NSW parliament amended the *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) to rectify the outcome – see *Land Acquisition (Just Terms Compensation) Amendment Act* 2009 (NSW). The council
Seen in that context, there are significant limitations in judicial review proceedings. They are not a challenge to the merits of the decision. The administrative defect may be remedied by an effective exercise of the administrative power and, most significantly, the challenger bears the legal onus of proof to establish the administrative law grounds to vitiate the consent. If there is further reform of the planning system but the only recourse to law available to challenge a consent is judicial review proceedings, then it is suggested that this will decrease, not increase, the opportunities for public participation in the decision-review process. This is also the view of Pearson and Williams as noted in their review of the 2008 reforms. It will remain the position if any new reforms to the system do not broaden the opportunities for merit review.

Presently, even with the 2008 reforms, the right in favour of the developer to seek a merit review has been retained. If the outcome of the bureaucratic process is not an approval for development, then the result can be challenged. Whether the exercise of such an appeal right is a ‘second go’ is debateable. Developers exercise the right to a merit appeal at their peril in that it throws open to the Court the whole of the application. Whether the exercise of such an appeal right is a ‘second go’ is debateable. Developers exercise the right to a merit appeal at their peril in that it throws open to the Court the whole of the application. If such a process is activated by the applicant for development, then the public has an opportunity in the decision-review process to engage the decision-maker because third party objectors then have the right to seek separate representation.

227 Parramatta CC v Hale (Hale) (1981-2) 47 LGERA 319: 345 (Mason P): ‘Where it is a collegiate body which makes the s.91 [now s80] determination, s.90 [now 79C] requires that the collegiate mind, in granting its approval, shall have considered the s.90 matters. Proof of a state of mind, whether by person or collegiate body, may be a matter of difficulty, but the person who seeks under s.123 to bring down a decision, must discharge that onus however difficult that may be and he must do so in accordance with proper legal requirements and by inference, not suspicion. The responsibility to make the consent determination is given to a responsible authority, which will normally be a council democratically elected. The Court exercising jurisdiction under s.123 does not sit on appeal from its determination. A conclusion by a Court finding a breach of s.90 by way of inference is one to come to only after anxious consideration, but when the inference is available and ought to be drawn, the Court should, in service of the policy which underlies the Act, not hesitate to give effect to the inference it has drawn.’

228 Pearson and Williams, above n 208, 34: ‘The capacity of the court to review the merits of administrative decisions, interpret the application of policy and statute, and provide guidance to decision-makers and other interested parties has been severely undermined by the latest planning reforms.’

229 This was the position of the former minister Frank Sartor when he was Lord Mayor of Sydney – see Nadia Jamal, ‘Sartor seeks curbs on “out of control” planning court’, SMH (Sydney), 23 August 2000, 6.

230 See Double Bay Marina Pty Ltd v Woollahra MC (1985) 54 LGRA 813. Leave of the court is required and the ‘rights’ of the objectors are limited and qualified but, once the developer lodges an appeal, it crystallises the objectors' right to participate in the proceedings. More recently though the extent of this right was questioned. In Morrison Design v North Sydney CC (2008) 159 LGERA 361, Preston CJ held (at [53]):
In the context of process, it is clear that the intent of the 2008 reform of the EP&A Act was to remove scrutiny of applications so as to speed up the approval process.\(^{231}\) The development industry had complained about the time taken to assess ‘residential approvals’,\(^{232}\) which comprise the majority of all development applications.\(^{233}\) The Government responded and aimed to create a system ‘robust enough to deal with a much larger range of proposals than at present.’\(^{234}\) A target was set namely 30 per cent of all development applications to be complying/exempt development applications within two years, rising to 50 per cent of all applications within four years.\(^{235}\)

The objects of the EP&A Act were not specifically amended by the 2008 reforms. However, there has been an implied watering down of the objects. The role of public participation was diminished. Whilst the reform agenda may have been consistent with ‘trends’ in other jurisdictions,\(^{236}\) the government had no mandate from the people for the reforms. In contrast, the new government elected in March 2011 has sought a policy mandate to ‘return local planning powers to local communities.’\(^{237}\) That mandate is yet to be implemented.\(^{238}\) It will require

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231 This notwithstanding that the standing committee report, above n 158, 151, recognised that: ‘Decisions on whether or not to approve, or modify, development applications can have a profound affect on individuals and communities. Individual applicants are affected because their right to develop their land is constrained by decisions made by consent authorities. Approved development can also affect the amenity of adjoining or nearby property owners or the broader community. As such the right of appeal or review decisions is a fundamental element of the planning framework.’

232 2007 discussion paper above n 173, 17. The Discussion Paper also notes (at p 74): ‘The development industry has said that it does not use complying development because it is just too complicated’.

233 Ibid 71. The Government’s reasoning was expressed as follows: Given that more than 60 per cent of all development applications are for either new housing, or alterations and additions to existing houses, the residential building sector is the most likely development type that can benefit from a streamlined use of the complying development path.

234 Ibid 72.

235 Ibid 81. This target was reinforced by the then Minister when introducing the legislation in May 2008. The rhetoric is maintained in the Ministerial Press Release announcing the draft 2010 Regulation - see Tony Kelly, ‘Streamlined Process to Improve DA turn-around Times’ (Ministerial Press Release, 17 September 2010): ‘An independent analysis of our changes shows they have the potential to slash processing times for the majority of applications by up to 36 days and cut $316 million a year from landowner holding costs’ (emphasis in original).

236 The standing committee report, above n 158, references (in chapter 2) the ‘trends in planning’ and the ‘agenda’ set by the Council of Australian Governments towards ‘reducing complexity and red tape; standardisation of instruments; and increasing ministerial involvement in strategic planning initiatives, but nowhere is it referenced to a source of authority in a policy taken to the people at an election.

237 NSW Liberals and Nationals, ‘Putting the Community Back into Planning’ (2009), 1.

238 However, the process has begun – see The Hon Brad Hazzard MP, Minister for Planning & Infrastructure, ‘Overhaul of the Planning System Heralds a new era in NSW’ (Media Release, 12 July 2011).
legislation to give effect to the articulated policy position. The semantics of any new legislation will be important.

5.5 Semantics of Participation

It is the thesis of this research that for participation to be relevant, it must be meaningful. In the context of the social task of participation being addressed under the legal frame of reference, the semantic structures of communication (or social position) contained in the Act are the means by which the social task of participation is realised. Social positions allow actors to communicate in either an active (inclusive) or passive (exclusive) manner. Where the actors ‘voice’ is allowed by the Act to ‘resonate’ so as to alter the decision-maker’s position, then it can be said that a mutually inclusive mechanism exists.239 If a social position is impervious to another position in the structure of communication, then it can be said that an exclusionary dynamic prevails. It is here that McAuslan’s point is well made; a right to participate is ‘meaningless if the planning authorities [are] able to determine the extent and mode of participation.’240 This point can be easily demonstrated by considering the social positions in the merit assessment of development applications.

5.5.1 Inclusion under the 1919 Act

In assessing the legislative scheme created by the 1919 Act (and Part XIAA referenced in section 5.3 above) in accordance with Bora and Hausendorf’s semantic methodology referred to in Chapter 2.3.3, it can be seen that a socially exclusive dynamic was established. At the surface level of discourse, the social position of administrator was delegated to the council.241 Whilst the citizens of the locality in which development was to occur could be conceived as being relevant actors, only the applicant for development had a valid form of communication in the system of reference. If the answer to the application was yes, that was the end of the process. Only the applicant for development enjoyed the right of appeal against the refusal of the application by Council. The citizens had a passive role; they were given no voice that could

240 McAuslan, above n 31, 20.
241 Bora and Hausendorf, above n 239, 484: ‘The image of self is that of a neutral, impartial, unbiased decision-maker who is obeying the law and political will.’ Bora and Hausendorf (at 482) define the social level of discourse as ‘what is made noticeable by the participants.’
influence the decision-maker. They did not have a general right to be notified or to make submissions. They could not even challenge a legally ‘wrong’ decision without the fiat of the Attorney-General.

5.5.2 Inclusion under the EP&A Act

An almost identical situation applies under the EP&A Act. Pursuant to Part IV of the EP&A, the administrator position is occupied by the council (or now the PAC/JRPP). The applicant for development is given an active role, the role of proponent. It is the applicant who determines whether or not the decision-making processes are invoked. Once again, if the decision is yes, that is the end of the process. It is the applicant for development that determines whether or not an appeal is taken against no. The people are given the same passive role in the process as they had under Part XIIA. They have no role either in the assessment of the application (other than to make a submission if given the opportunity). They do not have a right to initiate a merit review of any decision by the administrator to approve development unless the application relates to designated development. In semantic terms, whilst the administrator and the applicant have a powerful voice in the process, the people have no such power. All that the people can do is to accept the final decision.

This position is contrasted to the mechanism created under the open standing provisions. Here the voice of the citizens is active and powerful. The Act facilitates the voice of the people being heard by giving an unrestricted right to any person to bring a matter before the court. In that forum, all the relevant actors, that is, determining authority, applicant for development and the applicant in the proceedings, have an equal voice.

5.5.3 Absence of Voice

It seems therefore that the NSW parliament has always created land use legislation with an exclusionary social dynamic. Whilst the legislation may give the public a right to be consulted, their voice has never had administrative resonance or power to influence the decision-maker unless a breach of the Act occurs in the decision-making processes. Power is

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retained in the hands of parliament to enable it (and not any other body such as the council or the community) to determine whether or not development is permissible in a locality (affecting each ‘site’). Whilst lip service is given to determining the view of the people, the role of balancing the competing (and conflicting) policy goals (namely ‘progress’ as against the status quo) is retained by parliament; but exercised in its name by the executive branch.

In the context of what development is to occur in a locality, because parliament has the power to define both the public interest and the nature and role of participation, parliament’s will always prevails. This supports Nicholson’s view of law as the manipulation of ideology. It is the path to state despotism. As courts are obliged to give effect to laws passed by parliament, valid decisions of the executive to make ‘the plan’, and decisions made by councils (and the PAC or JRPP) to approve ‘the development’ will be enforced by law. There is accordingly no citizen power in these processes. Unsurprisingly, historical precedent is being followed. From the inception of planning laws the people have been excluded from positions of power in the planning system. The people have never had a voice in the processes, meaning a voice which could resonate in the mind of the decision-maker to affect the outcome. If the ‘valid’ form of communication, in semantic terms, is ‘prescribed by law and procedure,’ then the public has no means of communication with the administrator. The arguments of the people raised against a proposal do not have equal status with the arguments of the executive (in relation to the

Cambridge University in support of his contention that such systems ‘do not reflect the ideals of participatory democracy.’

A situation which is intensified by the mandating of the Standard Instrument process and the adoption of a state-wide vocabulary in the standard dictionary.


Keane, above n 20, 328. Citing Tocqueville (commenting on the US melding of money and politics post the civil war):

‘Government meddling in the affairs of civil society would choke the spirit of civil association and result in a new form of state despotism. Unlike past despotsisms, which employed the coarse instruments of fetters and executioners, this new ‘democratic’ despotism would nurture administrative power that was ‘absolute, differentiated, regular, provident and mild’. Peacefully, bit by bit, by means of democratically formulated laws, government would morph into a new form of tutelary power dedicated to securing the welfare of its citizens – at the high price of clogging up the arteries of civil society, thus robbing citizens of their collective power to act.’


‘The rule of law does not have much to do with law and order and it does not mean simply rule by law (that is, if there is a law on the subject then it must be followed – remember Germany in the 1930s: oppression was sanctioned by a democratically elected leader, but it was not a law that was just and therefore conforming to our notions of the rule of law.’

As Andrew Kelly and Christopher Smith, ‘The Capriciousness of Australian Planning Law: Zoning Objectives in NSW as a Case Study’ (2008) 26(1) Urban Policy and Research 83, 85 note: ‘there is considerable support for the notion that if a development is permissible under the relevant planning instrument, approval is guaranteed.’

Bora and Hausendorf, above n 239, 484.
making of the plan), or with the arguments of the applicant for development (in relation to the nature and scope of development proposed for the neighbourhood).  

Adopting the ideology of public participation would address this deficit. However, it would necessarily require a sharing of power. When legislation, such as the EP&A Act, expressly refers to increasing opportunities for public involvement and participation in the processes created by legislation, then a social expectation is created that parliament intends to facilitate, not frustrate, social inclusion. What, then, does the government mean when it suggests in its policy that citizens are to be ‘empowered’? If it doesn’t mean an equal voice via the legislative mechanism at both the plan-making and decision-making level, then what does empowerment mean?

If legislation is to reflect the public participation ideology, then it will have mechanisms, in semantic terms ‘communicative structures’; to enable meaningful dialogue (resonance) to occur between the various actors in the system. Each of the social positions being the government, the council, the applicant for development and the people are valid. If we are aiming to produce the ‘best’ planning system, then we must create by legislation semantic structures that actually empower the people, not just the bureaucracy and the applicant for development. The Act must allow the community to ‘enter the conversation’ and to affect the outcome of decisions being made about development in the locality. The test for resonance is whether the expression of ‘no’ by the people has power to affect the decision. When we have done that, then we will have created a system where development proposed for the neighbourhood will reflect and meet the needs of the people living in that locality.

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249 Ibid. Bora and Hausendorf suggest that in a valid form of communication, ‘[a]rguing about facts with equal status for every argument is the legitimate form, which can be disturbed by interference with political interests and strategies.’

250 Liberal National policy document above n 237, 1.

251 Bora and Hausendorf, above n 239, 483.

252 Standing Committee Report, above n 158, 34. The Standing Committee accepted that the ‘best planning system’ was one which met ‘the social, economic and environmental expectations and needs of the local community.’ (Emphasis added).

253 Pope, above n 159, 345-6: ‘It is not easy to divert citizens from private pursuits or politicians and administrators from the cosy routine of interest group bargaining. When disempowered groups try to “enter the conversation,” as Michelman points out, “we” may sometimes feel that they “seek to disrupt it.”’

254 At present, what is important is procedural compliance. The mechanism for making the plan is clear. As Spigelman CJ remarked in Vannmeld Pty Ltd v Fairfield City Council [1999] NSWCA 6, [38]: ‘the detailed scheme of consultation and public exhibition in the Environmental Planning and Assessment Act, makes it clear that Parliament regarded the procedural steps as of considerable significance for the integrity of the process of formulating local environmental plans.’ There is no mechanism that makes submissions important. Section 79C requires only that they be taken ‘into consideration.’ Having taken them into account, the decision-maker can ‘ignore’ them.
There is no tradition that planning has to be democratic in its processes. McAuslan’s public participation ideology suggests a radical way of ideating the role of planning; it requires the people and the government to reject the status quo. As can be seen from this chapter, the non-participatory roots of planning law run deep. Power is entrenched in the government and in its bureaucracy. In that context, how likely is it that power will, in Arnstein’s terms, be given up ‘by the city’?255 This question is addressed in the next chapter.

255 Arnstein, above n 2, 222.
Chapter 6: Should Planning be Democratic?

To what extent does democracy require citizen participation in – and veto over – decisions about the future of neighbourhoods and disposition of private property?

James Q Wilson

‘If democracy fails, then it is ultimately the citizen who has failed, not the politician.’

John Ralston Saul

6.1 Introduction:

In this chapter the discussion returns to the core of this thesis. A call to repeal section 5(c) of the EP&A Act poses the theoretical question, should planning be democratic? There are deeply held and divergent views on the nature and purpose democracy in land use planning and the allocation of power to make decisions about development in a locality. McAuslan’s ideologies of planning frame the competing theoretical arguments.

The New South Wales planning system remains the same melange of competing ideologies that McAuslan believed in 1980 to be the central cause of the ‘disarray in, and disillusion with, the

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1 James Q Wilson, Urban Renewal: the record and the controversy (1966), xiv. Wilson posed the question in the context of urban renewal thus:

To what extent does democracy require citizen participation in – and veto over- decisions about the future of neighbourhoods and disposition of private property?

2 John Ralston Saul, The Unconscious Civilization (1997), 82. Saul also noted that: ‘The politician can always find a new place in a new configuration of power – witness the growing attachment of the elected to private sector interests.’

3 By way of some example: market theorists like Christopher Webster and Lawrence Wai-Chung Lai, Property Rights, planning and markets: managing spontaneous cities (2003), 178 suggest that ‘transaction costs also rise with the degree of democracy.’ Conversely, the government and the community disagree on the role of participation. In the report published by EDO New South Wales, ‘Reconnecting the Community with the Planning System’ (2010)(EDO 2010 Report), 34, it is suggested that it was ‘apparent the DoP and the community have different views on what is the ‘end point’ of a consultation process.’ John Wiseman, ‘Designing Public Policy after Neo-liberalism?’ in Paul Smyth, T Reddel and Andrew Jones (eds), Community and Local Governance in Australia (2005), 69, categorises the ‘diverse range of new citizen and community engagement strategies.’ These range from engagement as consultation to engagement as participatory and deliberative democracy.
The historical analysis undertaken in this research has demonstrated that despite periodic exhortations to democratic principles, planning law has never been ‘democratic’ in the sense that McAuslan theorised as the public participation ideology. Planning law has never been ‘a vehicle for the advancement of public participation.’

The neo-liberal view asserts that cities are ‘complex social wholes.’ It is the magnitude of the complexity that makes it impossible for the people ‘to hold sufficient committee meetings’ to gather the necessary information to make the plan. The argument runs that it is not possible to consciously plan for social outcomes. Accordingly, it is better for the citizens to participate in an urban planning market by allowing the price mechanism in the market to facilitate creative choices prescribing only such rules as are necessary to protect the institution of private property. In contrast, land use planning law seeks to effect a redistribution of property rights by regulating the use of land in the public interest. That public interest is determined by the government. However, powerful social and economic forces still drive government policy.

Gleeson and Low suggest that under the sway of neo-liberal ideology ‘it must surely follow that economic and socio-political power will be the new arbiters of who wins and who loses in the land economy.’

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5 Ibid 5.
6 Mark Pennington, 'Citizen Participation, the 'Knowledge Problem' and Urban Land Use Planning' (2004) 17(2-3) *Review of Austrian Economics*, 221: ‘The principle difficulty with [Lindblom’s] particular view of citizen participation, however, is its failure to explain adequately how the relevant process of adjustment is to take place in the absence of market generated relative prices.’ (emphasis in original)
7 Ibid.
8 Webster and Lai, above n 3, 15: ‘Unlike the prescriptive rules that govern much of the planned order of the state, the rules necessary to ensure that individuals use their private property rights (including the right to their own labour) for the benefit of others are simpler, fewer, more abiding and more universal.’
9 Nicole Gurran, *Australian Urban Land Use Planning* (2007), 24. Gurran, reflecting on the development of Australian cities, identifies the tension that necessarily exists when the state has: ‘a desire to facilitate “free market” economic development … through a system of land allocation and later regulation of land use through bureaucratic planning that purports to promote the “public good”, by encouraging the accumulation of private wealth through individual property rights.’
10 For example, see the Report, Standing Committee on State Development, ‘Report 34: New South Wales Planning Framework’ (NSW Legislative Council 2009) (The Standing Committee Report), 132. The committee suggests that despite ‘widespread community dissatisfaction’ with the Part 3A procedures, ‘because of its significance, there is a need and, as evidenced during the Inquiry, scope for improvements to its application and assessment processes.’
By necessity, the NSW government acknowledges that its decisions ‘directly impact at the heart of local communities.’ The government justifies its strategic policy position by asserting that investment worth twenty billion dollars is regulated by the planning system. That is, the government wants to keep control over what development occurs in the neighbourhood because of the value of the investment in land. In seeking to retain control, the government denies any opportunity for planning to become more democratic, more participatory. Once again history repeats itself. The fear of the ‘mob’ is apparent. By making planning democratic, the executive would lose control over land development. The efficient operation of the market would be compromised. Is it a question of tactics? Whilst it might be an overstatement, it could be suggested that in New South Wales, the previous government had mobilised its forces against democratising planning. If planning is to be returned to local communities in NSW then the fear of participation must be addressed.

To make planning inclusive and participatory it is necessary to sever a Gordian knot. The difficulty is that Australians have a propensity to allow government to govern. The ratepayer ideology is entrenched. It has been demonstrated by this research that the ideologies of property and of the public interest are snug bedfellows. It is therefore unlikely that the people of NSW will seize the nettle and take advantage of any ‘republican moment’ to institute a wide ranging reform of local government. Unless such an event occurs, the government will remain in control of the neighbourhood. The bureaucratic and not the participatory theory of governance

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13 Sir Peter Hall, Cities in Civilization (2001), 655: ‘There is a certain terrible permanence in our failure to run our cities. What can be said with certainty is that essentially, imperial Rome displayed many of the characteristics of the twentieth-century developing world: the opulence of the few and the grinding poverty of the many; the public services theoretically available to all, but exploited by the rich; the basic failure of the economy – and underlying the economy, technology – to deliver adequate living standards and adequate lives to the average man and woman.’
15 The Macquarie Dictionary (1981): ‘to devise and use instantly a drastic solution to a problem.’ Attributed to the King of Phrygia ‘who tied a knot which was to be undone only by the one who should rule Asia. It was summarily cut by Alexander the Great in 333 B.C.’
will prevail. Land use planning will not become inclusive in its processes.\textsuperscript{17} If that is the case, then the answer to the question posed by the thesis of this research is yes.

### 6.2 What has History taught us?

History teaches us that those with wealth and power control the development of land. Without power, citizens are subjects under law. With power, citizens become responsible for their governance and the outcomes they, as a polity, choose. They become, in Aristotelian terms, \textit{of the city}.\textsuperscript{18}

The absence of participatory mechanisms in democratic governance creates the fertile ground for government by patronage. It was the feature of Roman society.\textsuperscript{19} It continued to be a feature of British society into the modern period.\textsuperscript{20} Arguably, NSW is still experiencing aspects of this phenomenon. If it is the quality of participatory mechanisms that marks the difference between subjugation under a rule of law and the protection of democratic rights, then the incorporation of participatory mechanisms into the legislative model is an absolute necessity.\textsuperscript{21} To have a right to participate is to have power.\textsuperscript{22} A state whose strategy was consistent with the ideology of

\textsuperscript{17} See for example, Michael J Jacobs, 'Sustainability and Community' (1995) 32(2) \textit{Australian Planner} 109, 112. Jacobs argues that there has to be a ‘reinvention of collectivism.’ Under this reformulation, the ‘people acknowledge and identify with the community on whose behalf [collective action] is undertaken.’

\textsuperscript{18} Graham Maddox, \textit{Australian Democracy in Theory and Practice} (1985), 2. Maddox, commenting on Aristotle’s oft quoted phrase ‘Man is a political animal’ notes: ‘For the ancient Greeks the word “political” meant “of the city”, “of the polis”, the institution in which people normally lived their lives. Aristotle’s argument was that man is a creature born to live in complex organisations with his fellow creatures, in community and harmony, through compromise, but united through a common purpose, which is to live a shared life.’


\textsuperscript{20} K Mannheim, \textit{Freedom, Power and Democratic Planning} (1951), 229. Mannheim points out that in a society based largely on patronage: ‘it is very likely that a great number of “yes-men” will be found in it. … the “rebellious will be squeezed out – they will be considered misfits – and those who submit will gradually forget how to stand on their own feet.’

\textsuperscript{21} There seems to be little argument that in terms of democratic theory, participation is the ‘corner-stone’ of democracy. As Sherry R. Arnstein, ‘A Ladder of Citizen Participation’ (1969) 35(4) \textit{Journal of the American Institute of Planners} 216, 221, notes, the question is whether or not, the people should be ‘planned for’ or whether power should be redistributed to the people. Participation \textit{begins} with effective consultation. Laws made to advance the public interest must at least conform to that requirement. This would be consistent with Principle 10 of the Rio Declaration. Whether it should be more than consultation is the question.

\textsuperscript{22} J. Uhr, \textit{Deliberative democracy in Australia: the changing place of parliament} (1998), 11. Uhr references the experiments of Fiskin into ‘deliberative democracy’ and suggests that:
public participation would be a state where the principles of open government prevailed; the government would be accountable to the people. As McAuslan argues:

‘a more open government affects the whole climate of public life by increasing the possibility of the public accountability of officials, increasing general public awareness of issues of public policy and increasing the possibility of successful challenges to government decisions by a whole range of individuals and groups.’

But planning laws are made by the powerful: by government and its allies. It has been demonstrated in chapter three that planning laws are not organic, they are not necessary to facilitate the orderly administration of cities and towns. What is organic to cities is ‘relentless evolutionary change’. The historical analysis in this research has established that to function, a state (and whether a city-state or nation-state) only needs an identity and a system of laws. The history of the Roman civilization shows that participation by the citizenry in the governance of the state is not necessary for there to be urban planning. Provided the state can enforce its laws, it will be able to continue its legitimacy and give effect to its strategies. The private property ideology only requires governance, not participation in governance, to enable the market to operate efficiently.

Participation by the citizenry is similarly not an essential element in relation to land use policy. In an urban environment, all that is required is for someone to ‘make the rules.’ As is shown by the Roman civilization discussed in chapter three, it is easier to make grand architectural statements when there is no civic participation in urban planning. As Previté-Orton notes, the

‘This version of deliberative democracy rests on the belief that the policy process must be reformed by opening it up to a wider range of deliberative sources and by forcing elected policy-makers to account publicly for their decisions to accept or reject various community proposals.’

McAuslan, above n 4, 215.

‘The institutions that make cities attractive to individuals and keep urban society from the anarchy of uncontrolled competition have been evolving since the earliest stages of civilization. These institutions are subject to relentless evolutionary changes as co-operative motivations (individual needs and demands) change and as the number of individuals co-operating steadily rises.’

Webster and Lai, above n 3, 14.

‘The sad and prickly truth is that cities cannot be effectively planned, much less made beautiful, by democratic government. … ‘This link between beauty and tyranny is not just happenchance. It is directly causal.’

Elizabeth Farrelly, Blubberland: The Dangers of Happiness (2008), 177. As Farrelly notes:

Phillip Bobbitt, The Shield of Achilles, War, Peace and the Course of History (2002), 6. Without identity, ‘a society cannot establish its rule of law because every system of laws depends upon the continuation of legitimacy, which is an attribute of identity.’

R Tawney (1981) cited in Gleeson and Low, above n 11, 89. As indicated in chapter two, Tawney’s view was that ‘someone must make the rules and see that they are kept, or life becomes impossible and the wheels do not turn.’
Roman period was marked by ‘[p]rivate munificence and municipal extravagance.’ Yet the magnificence of its physical structures did not bring equality, liberty or participation. The ideology of property was sufficient to organise the interactions of people within that market based society. But as a society, it did not necessarily meet the needs of Roman citizens. Power was retained in those who controlled ownership of land. In a society ruled by the private property ideology, the state does not seek to be accountable to the people. It does not confer power to the people to make decisions about governance, let alone development. Independent cities with autonomous local administration emerged after the fall of Rome. These cities were the crucible for participatory models of governance.

The historical analysis in chapter 4 highlights why Arnstein suggests that participation is power. The process of wresting control begins when the people ideate that the individual has significance in society. This is the point being made by Ndebele – that the ‘people’s sense of the contingency of power is precious.’ It would take a further millennium from the fall of

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28 CW. Previté-Orton, The Shorter Cambridge Medieval History (1955), 20. Previté-Orton notes that ‘encouraged’ by the government, ‘[t]emples, baths basilicas for public businesses, theatres, amphitheatres, and spectacles were lavished on the townsmen by their wealthier fellows and their magistrates.’

29 Edgar Bodenheimer, 'Influence of Roman Law on Early Medieval Culture, The' (1979) 3 Hastings Int'l & Comp. L. Rev. 9, 10. Bodenheimer argues that the Roman legal system had given Roman society ‘a considerable measure of stability.’

30 Leonardo Benevolo, The history of the city (1980), 291:
‘The traders and artisans who inhabited these cities – the bugesses (bourgeois) – were in the majority from the very beginning. They therefore began to try and free themselves from the feudal political system and obtain conditions that would favour their own economic activities: freedom of the individual, judicial autonomy, administrative independence, and personal taxation proportionally related to income, the revenue from which could be used to finance works in the public interest…’

31 Engin Fahri Isin, Cities without Citizens (1992), 49:
‘Let us make no mistake about it: the modern city as a corporation retained the principle of separation of the city from its citizens. The city was governed by an elite. While in the autonomous city, citizens among themselves decided who belonged to the city and who was to govern; in the early modern city it was the State administration who appointed a governing elite that exercised power over the citizens.’

32 John Sheehan and Garrick Small, 'Aqua Nullius' (Paper presented at the 13th Pacific-Rim Real Estate Society Conference, Freemantle, Western Australia, 21 to 24 January 2007), 6. Sheehan and Small suggest that:
‘The modern era has been dominated by the notion of the superiority of the individual, begun by John Wycliffe (d 1384), accelerated by Niccolao Machiavelli (d 1572) and systematised in the eighteenth century by the Enlightenment philosophers. In legal theory, William Blackstone (1769) Commentaries on the Law of England reflected the modern inclination, while Frederick Karl von Savigny (1814) established the German historical school on the premise that law was not a construct of reason but convention that responded to the society’s needs of a time.’

33 J. Keane, The Life and Death of Democracy (2009), Keane records a conversation between himself and South African Novelist Njabulo Ndebele on the benefits of democracy. Ndebele suggests that democracy per se is not a good thing, however he says:
‘democracy is the closest people get to an experience of faith: the sense that against every kind of obstacle, they have to get on with things, keep searching for what will in the end work,'
Rome for that idea to reach fruition in the context of representative democratic structures. Even ‘passive’ participation can be powerful.  

Religion played a significant part in the development of the ideal of the individual in the mind of the English over the course of the second millennium. Whilst it was beyond the scope of this research to undertake an analysis of this contribution, the significance of that contribution needs to be recognised. What can be said is that religion and religious freedom, as well as the desire to compel uniformity of religious belief, was the crucible in which the ideological beliefs of the people would be formed. Religion would be the engine that drove the Empire. Out of the contest of ideas would be spawned the structure of democratic government which, refined over centuries, would result in the Westminster system. The law was a tool in the weaponry of the factions, but force of arms achieved that which rational argument could not. Participation in governance was wrested by force.

The mercantile period was the juncture of history when the ideology of property was twinned with the law making power of parliament. Until this time, the common law protected the property rights of landed people. In accordance with legal theory, judges of the common law did not ‘make’ law; they merely interpreted it (although the contrary is arguable). In the mercantile period, parliament wrested the power of governance from the sovereign. As law has no form outside the substance given to it by parliament, and as parliament was by this time supreme, parliament could override even the common law protections over property to advance

knowing that although they don’t know exactly where they are going things won’t happen if their arms are folded. … people’s sense of the contingency of power relations is precious, that possibility is felt most intensely when they have tasted its opposite.’

34 Hall, above n 13, 37. Hall argues that Athenian democracy involved elements of passive participation because of the level of education required to speak in the assembly. He suggests that ‘what Athens demanded of the average citizen was passive democracy: listening and voting.’ Participation at this level was the key to no one group having monopoly power over the polis. At the level of land use planning, it suggests that the policy must be ‘put’ to the people so that it can be endorsed.

35 Herbert Butterfield, Christianity and Western Civilization (1951), 28. Butterfield suggests that ‘modern political liberty may be said to emerge from the politico-ecclesiastical controversies of the Middle Ages.’

36 AC Grayling, Towards the Light: The Story of the Struggles for Liberty and Rights that made the Modern West (2007), 17. Grayling cites Lord Acton as believing ‘that the struggle for religious liberty in the sixteenth century made a major contribution to the birth of liberty in modern times.’

37 Hilary Carey, ‘Religion and Society’ in Deryck Schreuder and Stuart Ward (eds), Australia's Empire (2009), 188. Citing the work of Linda Colley, Britons: Forging the Nation, 1707-1837 (New Haven, 1992), Carey suggests that religion ‘was essential to the business of Empire’ and that ‘it was as heirs to this tradition of Protestant triumphalism that the first convict settlements in Australia were planned and executed in the late eighteenth century.’

38 Adam Smith, The Wealth of Nations (2010), 212. Adam Smith himself noting that parliament had been ‘peculiarly attentive’ to the needs of commerce and industry at the time he was writing in 1776.

39 As Lord Wright observed ‘ I have often wondered how this perpetual process of change can be reconciled with the principles of authority and the rule of stare decisis’ cited in J. Stone, Legal System and Lawyers’ Reasonings (1968), 230.
the self interest of the landed elite who now controlled parliament. As has been examined in 
chapter four, planning laws have their genesis in the self-interested private bill legislation of the 
eighteenth century.40

6.2.1 Govern us but govern us well

The analysis of the history of the second millennium in England in chapter 4 has also 
demonstrated that laws are the servant of the powerful.41 During the early years of the industrial 
revolution, the law making power of parliament transformed the English economy and its 
society. Law was fundamental as the driver of social change. This process is here described as 
the ideology of parliament as the instrument of managed social change.

What history does show is that when parliament makes planning laws, it chooses whether those 
laws are intended to serve the interest of private property or the interest of the public. The 
public interest, like law, has no substance outside the form given to it by another. It is defined 
either by the government (the bureaucratic method) or by the people (the participatory 
approach). The analysis in chapters 4 and 5 demonstrates that up to the present, parliament has 
expressly reserved to itself the power to define the public interest.42 There has been no sharing 
of power via the creation of participatory mechanisms.

40 L. M. Edwards, 'Ideational social capital and the civic culture: Extricating Putnam's legacy from the 
social capital debates' (2009) 23 Social Epistemology 125, 128. The functional social schema that applied 
before this time was centred on the maintenance of the traditional power relationships. Social capital was 
paramount in this society. The sovereign had the greatest social capital. Power was centralised in and 
around the sovereign and the administration of government depended on the dispensation of patronage. 
Corruption was the predominant feature of administration. It would not be until the eighteenth century 
that an ideology of government as a deliberate instrument of managed social change would emerge. 
Before this time, it is possible to see the role of Ministers, Parliament and ‘placemen’ representatives 
having a single self-interested purpose. In an ontological sense, the political actor’s goal in any choice of 
action was to ‘maximise their self-interest as defined by their personal utility function’ to the sovereign. 

41 Smith, above n 38, 49. Smith refers to Hobbes aphorism that ‘wealth is power’ but notes that a person 
of great fortune ‘does not necessarily acquire or succeed to any political power.’ It is the power to 
purchase ‘command over all the labour, or over all the produce of labour which is then in the market’ that 
enables a wealthy person to command power.

42 Which reinforces JS Mill’s point, referenced by Uhr, above n 22, 73, that ‘each and every political 
regime tends to promote the “class interest” of the dominant social group.’
The history of the nineteenth century highlights that McAuslan’s public interest ideology was born out of a desire to maintain power; it was not the product of enlightened altruism.43 What drove parliament was the fear of the mob.44 Historically, towns were the nursery that fomented the mob. It was in towns that the ideation of government by the people for the people emerges.45

In England, participation in local affairs led to parliamentary power. But not before some had suffered the loss of liberty and been transported to Australia.46 Yet it is undeniable that by the mid nineteenth century, the people had demanded power over local affairs. Once power was acquired after the enactment of the Municipal Corporations Act (UK) of 1835, the middle class set the ‘political agenda’.47 Urban amenity, a decidedly self-interested factor, became a focus of government. Laws became ‘regarded as simply [an] expedient for this or that purpose, and as properly based on the voluntary consent of citizens endowed with equal civil and political rights.’48

Unlike England, which had to suffer bloody revolution before power was shared with the people, Australia would be spared that fate. Because of its historical circumstance, the colonies in Australia would be fast-tracked into democracy in the mid nineteenth century. However, this did not lead to the development of a participatory culture in the governance of the colony. The analysis in chapters 5 shows that the gemeinschaft that developed in the colony was one which was anti-participation. In contrast to England, the people in Australia did not want to participate in local governance. In the newly developing colony, a ratepayer ideology would prevail which would hinder the development of a truly civic culture. In this uniquely Australian culture, local governance was not sought, it had to be imposed. The people resisted by apathy.

43 This point is demonstrated by the motivation to pass the Municipal Corporations Act in 1835. As John A. Phillips, ‘England’s ‘Other’ Ballot Question: The Unnoticed Political Revolution of 1835’ (2008) 24(S1) Parliamentary History 139, 150 notes: ‘Thus the Quarterly Review’s assumption that the Whigs intended the Municipal Corporations Act to transfer power from the legitimate party in England’s towns, the Conservatives, ‘the party of the Constitution’ dedicated to the defense of Protestantism, to the Whigs, a mere parliamentary party, proved amply justified. Perhaps more surprisingly, the Whigs actually realized their ambition in large measure. The reformers benefited from the destruction of the old corporations because the national party structure had been transferred successfully from parliamentary politics to the local political arena.’

44 See in particular the discussion in chapter 4.6 above.

45 R.K. Webb, Modern England from the Eighteenth Century to the Present (2 ed, 1980), 228. Webb suggests that the Municipal Corporations Act (UK) of 1835 extended political voice in the administration of towns to the middle class.

46 The Todpuddle Six, the Irish political exiles and the Scottish Martyrs are but examples.


48 Keane, above n 33, 309. Though this is not to say that this transformation occurred without struggle. As Keane also notes (168-9): ‘the opponents of democratic representation fought tooth and claw, and with considerable success, against its perceived inefficiencies, its fatal flaws and supposed evils.’
The ready availability of land, and its alienation to all classes (even the emancipated), defeated early attempts to introduce class distinctions which prevailed in England. This dynamic led to the ideation of a different social compact in Australia. The vastness of the continent to be settled militated against the formation of a civic culture similar to that which existed in Britain. The privilege of ownership of land in colonial New South Wales did not engender feelings of social obligation to participate in civic affairs.\textsuperscript{49} As is shown in chapter 5, participation remained about self-interest.\textsuperscript{50} The ideology of private property was enthusiastically embraced. Hirst suggests that in the emerging culture of Australia, the function of government as understood by British tradition changed. He says that ‘[I]t was not primarily to keep order within and defeat enemies without; it was a resource on which settlers could draw to make money.’\textsuperscript{51} Large sections of colonial society would accept self-exclusion from the structures of governance as the price for the liberty to pursue individual economic reward.\textsuperscript{52}

In late nineteenth century Australia, isolation would inspire politicians and government officials to aspire to a common goal of federation as a self-interested means of protection from intrusion by non-British European powers.\textsuperscript{53} As Manning Clarke notes, the push for federation was not the product ‘of popular hunger for independence.’\textsuperscript{54} Federation would deliver a greater sense of

\textsuperscript{49} John Hirst, \textit{Looking for Australia} (2010), 237. Hirst describes the settlers’ preference for no local government as ‘an Australian innovation in political philosophy.’ It is also arguable, as Rodney Cavalier, \textit{Power Crisis: The Self-Destruction of a State Labor Party} (2010), 2, does, that the experience of being emasculated members of a party was a disincentive in itself.

\textsuperscript{50} Uhr, above n 22, 62. Uhr notes that the edifice of representation rests on the accountability of the elected members to the electorate. ‘In New South Wales, as Hirst, above n 49, 148-150, suggests: ‘disreputable men had gained seats’ such that ‘[r]espect for parliament evaporated.’ He also suggests that the ‘1880s was the heyday of drunks and demagogues’ in parliament.


‘Until late in the nineteenth century there was no income tax and no company tax. All the money you earned you kept. Government was not a burden that you had to pay for, it was a magic pudding; you could cut slice after slice and there was always more.’

\textsuperscript{52} Absent the rising voice of the people, the government defined the public interest. Tony Moore, \textit{Death or Liberty} (2010), 208, suggests that ‘New Liberalism had embraced state intervention as necessary to preserve Australia from class conflict, to foster manufacturing and to ameliorate some of the anti-social aspects of capitalist modernity.’

\textsuperscript{53} Stuart Ward, ‘Security: Defending Australia’s Empire’ in Deryck Schreuder and Stuart Ward (eds), \textit{Oxford History of the British Empire (Companion Series): Australia’s Empire} (2009) , 239-41, cites the ‘Irish-Australian social reformer’ Edward O’Sullivan, who argued for federation in 1895 saying ‘what does it matter what reforms we attempt to make … if, after all, we are liable to a sudden attack by an overwhelming force.’ Ward argues that:

‘Parkes took the Edwards report (on the scant defences of the colonies) as his point of departure in his celebrated “Tenterfield Speech” of October 1899, in which he called for a Federal constitution in order to “preserve the security and integrity” of the colonies.’ Ward also says that Parkes advanced no other argument for Federation other than the security threat.

\textsuperscript{54} Michael Cathcart (ed), \textit{Manning Clark’s History of Australia} (1993) (Manning Clark), 405. Manning Clark argued that:
identity to the people than was experienced under the colonial government; it would foster the growth of nationalism but it would stifle republicanism. Not without political struggle, conventions in the last decade of the nineteenth century would see the federation proposal put to the people for endorsement. Once again, as it had been in the past, government would be given to (and not taken by) the people. In its drafting, the original people of the country were excluded from citizenship. The Imperial parliament enacted the Australian Federation by passing the Commonwealth of Australia Act 1900 (UK) with the assent of Queen Victoria. As Hirst muses, did the people ‘value’ the prize?

Regardless of the fact that representative democracy had been achieved by 1901 (both at a State and Federal level), participatory democracy is yet to be achieved. The ideation in the people of they being ‘the government’ is yet to fully take form. In the early years after self-government, unionism would provide a sense of belonging to the working classes but even this opportunity would be curtailed by power seeking elements. As Younger notes, ‘solidarity’ was closely linked with trade union principles and ‘introduced a much more thorough degree of political

‘The moves towards federation were the product of neither of popular hunger for independence nor of any widespread determination that Australians should claim responsibility for making their own history. In fact, as Alfred Deakin observed, the prospect of federation had failed to rouse public enthusiasm. The federalists, he wrote, were striving against “the inexhaustible inertia of our populace as a whole.”’

Moore, above n 52, 397. Moore argues that ‘traditions that the transported radicals, rebels and protesters fertilized’ were still-born in the rush to Federation and that whilst revived in the 1990s, they have now ‘withered and die[d].’

Keane, above n 33, 167. As Keane notes: ‘Representative democracy was in fact the child of bitter power conflicts, many of them fought in opposition to ruling princes, churchmen, landowners or imperial monarchies, often in the name “of the people.” Struggles in support “of the people” produced great strife during the second age of democracy.’

Hirst, above n 51, 27. Hirst argues that it is a distinguishing feature of our democracy. He also suggests that politicians ‘are a very mixed bag indeed, not identified with any one group in society, so distinct that they were a group in themselves - the despised politicians.’ But he leavens this by also noting that in Australia, ‘government is without social character, it is an impersonal force.’ Notably, the Australian experience shows that sometimes power can be given to the people without violent struggle. The question this poses is whether the prize is valued by the people?

Uhr, above n 22, 84. Uhr says that ‘the functions of political representation extend beyond simply determining who should rule; as many of the Australian constitutional framers appreciated, ruling is only part of the larger function of representation.’ Earlier (at 11), Uhr suggests that: ‘Civic participation has remained a reassuring ideal even though liberal democracies have typically not generated widespread popular participation in the political process, or even in the electoral process.’

Andrew Leigh, Disconnected (2010), 74, cites WG Spence the founder of the Shearer’s Union, speaking in 1909 on unionism: ‘Unionism came to the Australian Bushman as a religion. It came bringing salvation from years of tyranny. It had in it the feeling of mateship which he understood already, and which always characterised the action of one “white man” to the other. Unionism extended the idea, so a man’s character was gauged by whether he stood true to Union rules or “scabbed” it on his fellows.’ Cavalier, above n 46, 1-14, says that there was never a ‘golden age’ for members of unions, and that after 1916, control of the Labor party by its membership was displaced by control by the affiliated unions.
organisation than any other party or political pressure group had achieved. The Australian experience led to the early definition of party politics as the mode of representative government; however, this did not mean participatory democracy in the sense of participation in politics.

6.2.2 Property and Ideology are Snug Bedfellows

In the context of land use planning history in NSW, the County of Cumberland Planning Scheme marks a turning point. The pull of the private property ideology abated allowing the public interest ideology to secure a foothold. Just as in England fifty years before, the state government intervened in the operation of the market by introducing planning laws. This enabled the government to centrally define the public interest. Goodall notes that there was community resistance to the measures. But it was not manifested in political action. The ideology of public interest accommodates the ideology of private property, they are snug bedfellows.

The historical evidence in chapter 5 suggests that the ratepayer ideology still resonates strongly in the psyche of the people of New South Wales. Edwards, reconstructing Putnam’s study

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60 RM Younger, Australia and the Australians: A Concise History (1982), 401.
61 Cavalier, above n 49, 56. As Cavalier notes, the Labor party ‘below’ has disappeared, ‘parliamentary parties have become self-perpetuating oligarchies.’ This is supported by Leigh, above n 59, 76. Leigh has graphed the decline in union membership from half the workforce in 1982 to just 19% of the workforce in 2008.
62 The deliberate intention of the McKell Government was to redress the perceived failure of the market as a consequence of the depression and the Second World War. As the ALP itself noted, Australian Labour Party, Five critical years: story of the McKell Labour government in New South Wales, May 1941-May 1946 (1946), 5:

‘Perhaps the most characteristic and significant feature of this Government was its determination to work on the basis of a master plan.

…

There would be no more merely haphazard development in industry; in the growth of cities and towns as huge jumbles of confusion.’
64 McAuslan, above n 4, 265. McAuslan suggests that the ideologies of private property and public interest have:

’a common interest in combating the ideology and practice of public participation, for just as the ideology threatens the power and position of the bureaucracy in government so also it threatens the power and position of private property in society.’
65 The continuation of apathy is most recently demonstrated by the responses to both the Standing Committee call for submissions and the EDO’s workshops held in late 2009. Mr Haddad, the Director General of Planning acknowledged to the Standing Committee, above n 10, 89 that:

‘One area of consultation that we are still struggling with is consultation at the strategic level. We find that when we put our policies out or plans out we are not getting the engagement sufficiently and then, of course, people engage more at the specific development application
Making Democracy Work to differentiate between its rational choice and constructivist elements, has shown that the existence of a civic culture ‘is strongly correlated with people’s ideological beliefs about how their society should be governed.’\(^6\) Hirst, citing Almond and Verba’s study, identifies that a good civic culture ‘requires a balance between the participant and subject orientations.’\(^6\) In short, it is dependent upon participation by the people.\(^6\) The historical absence of a participatory civic culture in New South Wales has allowed various governments to eschew adopting the public participation ideology in planning legislation.\(^6\)

Aroney argues that:

‘One of the characteristics of a properly operating system of representative government is that members have an “obligation” to listen to and ascertain the views of their constituents during the life of the Parliament.’\(^7\)

If there is no pressure from the people, the government does not have to listen. A small clique can govern ‘in the name of the people.’\(^7\) As is discussed in chapter 5, the development of the ratepayer ideology in New South Wales is explained by the absence of local government structures from the inception of the colony. There was no tradition or experience in municipal governance. The function of government in NSW was different to that which applied in England. To disrupt this cosy arrangement requires radical action.

6.2.3 Severing the Gordian Knot

What is necessary to foster participation and promote participation? Put simply, it is mechanisms that encourage the people to actively take the opportunity to express their voice.\(^7\)

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stage when there is an actual proposal. We may need to do a bit better in this area but it is an area of ongoing thinking. It is a challenge.’

Who is the one that is not listening?

\(^6\) Edwards, above n 40, 140.

\(^6\) Hirst, above n 51, 4.

\(^6\) Leigh, above n 59, 55-63, argues that Australians are not ‘truly active at the pointy end of politics.’ Australians are not ‘politically active.’

\(^6\) Ibid 59-62. Leigh graphs the declining percentage of the Australian population who are members of recognised political parties. According to Leigh, the membership of the Liberal Party has fallen from its 1967 high of 1.5% of the population base in membership to its current 0.5% or 80,000 Australia wide.


\(^7\) Cavalier, above n 49, 47, states that in the decade since 1999 there has been a collapse in the membership of the state Labor party to ‘just 6500 members’ and that ‘[f]ewer than 1000 people play any sort of active role in the party.’ Yet during that time, the Labor party had absolute control over planning policy.

\(^7\) Uhr, above n 22, 85-6. The democratic revolution in England began with reform of local government. The aim, suggests Uhr (citing Rossiter 1961), is to ‘cultivate a new “public voice.”’ The theory is:
If this is to be achieved in NSW, there will need to be a reconfiguration of the ratepayer ideology in the psyche of the people. Until this occurs, the governing elite will retain control over the making of laws, including planning laws. Arnstein also drew on history to support her conclusion that if participation is to occur, power has to be ‘wrested’ from the powerful by the powerless, suggesting that perhaps force is necessary. Sharp would disagree, suggesting that ‘political defiance’ is the pathway. On either analysis, the status quo must change. In terms of process, Bora and Hausendorf demonstrate how it is the quality of the participatory mechanisms that matters. Arnstein wrote in strong terms about participation in the planning process linking participation directly to power structures. She identified the nexus between participation and power in the graduations of the ladder of participation.

The question that this poses is will it be necessary for there to be ‘bloody revolution’ of a political kind before the state elects to share power with the community in relation to planning policy and decision-making? Would the community be prepared to ‘politicize urban space’? The people need to do more than merely ‘complain’. They must be prepared to participate in

‘Representation is a good thing in itself and not simply an instrument of convenience for an enlarged political society. The scheme of representation is intended to alter the dynamics of political life by channeling public opinion through a series of screens or filters, designed “to refine and enlarge public views” in such a manner that the elected representatives “may best discern the true interest of their country” with the least distraction from “temporary or partial considerations.”’

Arnstein, above n 21, 222.

73 Gene Sharp, *From Dictatorship to Democracy* (4 ed, 2010), 4. As Sharp notes: ‘By placing confidence in violent means, one has chosen the very type of struggle with which the oppressors nearly always have superiority.’ (emphasis in original)

74 Ibid 77. As to physical force, Sharp would disagree. Sharp suggests liberation can be achieved through political defiance, but it requires: ‘Vigilance, hard work, and disciplined struggle, often at great cost.’

75 Rakodi Carole, ‘Cities and people: towards a gender-aware urban planning process?’ (1991) 11(6) Public Administration & Development (1986-1998) 541, 546. Rakodi argues that ‘[p]ower is based both on control of the formal decision-making process and on access to the spoils of political or bureaucratic office.’ But the concept of ‘taking power’ is different. The economic depression of the 1890s and the response of the NSW government to the strike led to the formation of the Labor Party in NSW. As Hirst, above n 49, 151, notes: ‘[t]here was briefly among the working class that galvanising anger that comes from a sense of betrayal.’ Out of that anger was the formed the Labor Party which quickly changed the dynamic in the NSW parliament. The people, federally, have recently changed the parliamentary dynamic at the 2010 election by giving the major political parties a parliamentary minority to govern with. At the state level, the people of NSW have given the new Liberal National government a thumping majority at the 2011 election to govern with. Which method of dealing with government will produce real reform is the unanswered question.

76 Fran Tonkiss, *Space, the City and Social Theory* (2005), 63. Urban social movements:

‘politicize urban space as an object of contestation between private and public property, development and environmental quality, the interests of the motorist against those of the rest. They also politicize spaces in the city through tactics of occupation, protest, sabotage and play (see Cohen 1993; McKay 1998). Urban space is both the object of political agency and its medium.’

77 Michael Duffy, ‘Democracy that leaves people's views out of the equation’, *Sydney Morning Herald* (Sydney), 2-3 August 2008, 28. Following the then Minister for Planning Frank Sartor transferring planning power to a planning panel appointed by himself, the community rallied. A meeting of 200
the structures of governance, including local governance. Without participatory mechanisms, the ideology of the public interest will prevail and the government will continue to dictate planning policy. When an elite has the power to make law, it can, by patronage, grant favours. The people have not generally been the beneficiaries of this patronage. 79

6.3 Should Planning be inclusive?

Planning law remains captured by the bureaucratic theory of governance. In 2009 the Standing Committee was unable to identify a model which would ensure effective community engagement at both the strategic and application levels. 80 The Director General of Planning, Mr Haddad, seemed flummoxed as to why the department could not engage the people, 81 both at the strategic level and at the level of local plans. 82 The Committee agreed that ‘the right to appeal ‘concerned citizens’ were brought together by a group called ‘newDemocracy’ (founded in 2004 by Transfield chief Luca Belgiorno-Nettis and whose patron was Fred Chaney and John Button). Duffey notes that ‘the idea was to use a process known as deliberative democracy to give citizens the chance to learn more about an issue – in this case the state’s development approval system – and suggest solutions.’ This citizen initiated process has not led to political reform. Indeed, the frustration simply grew, becoming front page news- see J Huxley, ‘Tell 'em they're dreaming - north shore gets bolshie', Sydney Morning Herald (Sydney), 28 September 2009. 1. ‘From Balmain to Beecroft, Catherine Hill Bay and Ku-ring-gai, Dungog and Double Bay, from all parts of the state, the people had come to unload on its unloved government. To put its next government on notice.’ Writing about the same ‘stunt’, John Pitt, ‘Democracy has the death rattles in NSW’ (30 September 2009) New Matilda <http://newmatilda.com> at 14 December 2009, proclaimed the ‘death of democracy.’ He noted that a collective of ‘about 30 residents’ associations representing some 60,000 people’ held a mock state funeral at parliament house in Sydney. Pitt suggested the demonstration ‘highlights the desperation felt by many residents’ about the planning system - neglecting to note that only 300 people actually attended. At the 2011 election the ‘Save Our State’ party could not get a protest vote of a sufficient number to fill a quota for the Legislative Council. 79

Farrelly, above n 27, 188: ‘Planning is generally seen by politicians as yet another spigot for delivering windfall favours to political mates, rather than any genuine embodiment of the public interest.’ 80 The Standing Committee could have referenced a paper produced by Drs Lyn Carson and Katherine Gelber presented in 2001 to the then Department of Infrastructure, Planning and Natural Resources entitled ‘Ideas for Community Consultation: A discussion paper of principles and procedures for making consultation work.’ This paper is cited in EDO 2010 Report, above n 3, 39. McAuslan, above n 4, 29-30, suggests that participation is achieved by giving residents an ‘assurance of a future for their neighbourhood, so the change around in policies is stated to be based in part at least on resident’s attitudes and views.’ 81

Standing Committee Report, above n 10, 89. The Director General observed that: ‘We find that when we put policies out our plans out we are not getting the level of engagement sufficiently and then, of course, people engage more at the specific development application stage when there is an actual proposal. We may need to do a bit better in this area but it is an area of on-going thinking. It is a challenge.’ 82

Ibid 100. The Director General commented that: ‘We need to ensure that their local strategies are properly reflected in the planning instruments. This is the end outcome. If the standard planning instruments that we now have do not reflect local strategies – the strategies that have been developed to reflect local requirements – either we have to find another one or we will have to do something about it.’
planning decisions is a fundamental and necessary element of the planning framework, but it did not support a widening of the third party appeal mechanism.

The question is therefore not whether the public ought to have a role in the NSW planning system. The question is what should the role of the public be? Whether or not planning should be inclusive is a question of strategy. It is the government that adopts strategy. The difficulty is that McAuslan’s ideologies of public interest and public participation are mutually exclusive. As McAuslan notes, law conforming to the ideology of the public interest:

‘is translated into laws which confer wide powers on administrators to do as they see fit and which either provide no redress or appeal (for how can there be redress against an administrator who is advancing the public interest) …’

It is only if the purpose of the law is to promote the advancement of participation in the planning processes that consideration needs to be given to the mechanisms by which such participation is to be facilitated. There is good reason to consider making planning laws which are socially inclusive. In the urban setting, planning law is fundamentally about local issues. The intent of planning instruments is to control development. Of necessity, development occurs on particular parcels land within the neighbourhood. In a functioning democracy, someone must perform the ‘function of antagonism.’ In the context of land use planning, who should speak for the local community?

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83 Ibid 155.
84 Ibid 89. The Committee recognised that there was ‘general agreement’ that the system would benefit from greater community engagement.
85 Clive Forster, *Australian Cities: Community and Change* (1995), 126-7. Forster reviews the competing arguments as being between ‘public participation in decision-making as opposed to the centralist “government knows best” style of administration.’ Forster also suggests that the ‘danger’ with participation is the ability of ‘affluent communities to insulate themselves from change,’ whilst at the same time frustrating the ‘economic master-plans’ of state government. In contrast, the EDO 2010 report, above n 3, 46, suggests that participation: helps to ensure better decision-making; offers the prospect of buy-in by the community; and delivers a measure of fairness, justice and accountability. In short, ‘clearly public involvement is essential to the workings of a democratic system of government.’
86 McAuslan, above n 4, 4.
87 Uhr, above n 22, 73. As Uhr notes: ‘In Mill’s reworking of responsible government, the representative assembly disengages from the ministry and engages more fully with community opinion. The vital new role of the assembly in this revised version is to fulfil “the function of Antagonism.”’
In New South Wales, our constitutional arrangements do not allow the representative assembly to so disengage: parliament is controlled by the executive. In theory, it is the function of the assembly to ‘throw the light of publicity’ (JS Mill) on the acts of the executive. As the assembly does not perform that function, who will?
6.3.1 Seizing the Nettle

In theory, land use planning is about a ‘to be constructed’ future. Notionally, this admits of the possibility of incorporating democratic processes into land use planning processes.\(^{88}\) It is the people that live in neighbourhoods; they are the umwelt of the community.\(^{89}\) But whilst ever the minister, and not parliament, makes the planning instrument, the land use process is fundamentally undemocratic. If planning is to be inclusive, then the local community ought to be empowered by the planning process. Even the neo-liberal paradigm acknowledges that for a ‘planned order’ to emerge from changes brought about by economic circumstances, the people need to be able to express their ‘voice.’\(^{90}\)

As a polity, we must therefore determine the purpose of our planning laws.\(^{91}\) Some, like Farrelly, argue that this will encourage another form of ‘mob rule.’\(^{92}\) Others, like Hague, suggest that governments already recognise that they ‘need to forge relationships with civil society and the private sector to manage change.’\(^{93}\) An informed choice must be made. The people have to decide the purpose that our planning laws are to serve. This necessarily implies that the community should have the choice of whether or not to have planning laws at all.\(^{94}\)

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\(^{88}\) Cliff Hague and Paul Jenkins (eds), *Place Identity, Participation and Planning* (2005), 31. Hague argues that the neo-liberal argument has ‘been countered by a renewal of calls for more participatory or collaborative planning.’

\(^{89}\) Ibid 7. Hague and Jenkins suggest that:

‘Places are places (and not just spaces) because they have identity. Place identities are formed through milieu of feelings, meanings, experiences, memories and actions that, while ultimately personal, are subsequently filtered through social structures and fostered through socialization. … [being relational] place identities are encapsulated within power relations and are likely to be highly contested.’

\(^{90}\) Webster and Lai, above n 3, 20. Webster and Lai suggest that:

‘What can be said about the congestion and evolution of the city as a whole is true of parts of the city. Neighbourhoods change – rapidly or imperceptibly; by intrinsic or extrinsic influences; by market activity or government activity. Citizens standing to lose from the emerging order may react by exit or voice. New spontaneous order emerges in response to exit, and new planned order emerges in response to voice.’

\(^{91}\) Albert Mabileau et al, *Local Politics and Participation in Britain and France* (1989), 2. Mabileau suggests that this may be more myth than reality. However, the ‘presumption of local responsibility’ is seen as ‘an inducement to local political participation.’ He also suggests that it was this potentiality which inspired the classic participatory theories of John Stuart Mill and Tocqueville.

\(^{92}\) Farrelly, above n 27, 167. As Farrelly tersely suggests:

‘As electors we limit our horizons to the back fence, reliably voting on self-interest alone, and economic self-interest at that – which is what gives pork-barrelling its power. Thus a terrible paradox has emerged: democracy as a form of mob rule that seems incapable of acting in the mob’s best interests.’

\(^{93}\) Hague and Jenkins, above n 88, 29.

\(^{94}\) As Juval Portugali, ‘Learning From Paradoxes about Prediction and Planning in Self-Organizing Cities’ (2008) *7*(3) *Planning Theory* 248, 260, notes, as cities are complex self-organising systems:

‘plans [whether of planning authorities or of non-formal agencies such as households or companies] do not determine or control the development of the system concerned (a city, a region, etc), but rather become participants in a multi-agents planning game.’
regards to social policy, it is considered by the polity that planning laws are necessary in the public interest, then the next choice is whether the bureaucratic or participatory model should be adopted.

The bureaucratic model is not socially inclusive. Tokenism is not participation. Paying lip service to the concept of participation by merely referring to it in legislation is a paternalistic response. It has been the absence of a genuine debate on the purpose of our planning law that has led to a renewal of interest in neo-liberal principles. Gleeson and Low point to the ‘rhetoric and practice’ of planning which has ‘tended to focus on the facilitation of economic development and the need for administrative efficiency.’ This supports the contention that there has been a resurgence of a neo-liberal ideology in planning. But the plethora of bureaucratic measures enacted to centralise power (neatly tabulated by the Standing Committee in its report), also suggests another agenda. It is clear that the intent of successive reforms to the EP&A Act since its inception have been driven by the public interest ideology. The situation in Britain is no different.

Before planning laws, the ideology of private property embedded in the common law gave control over the development of land to the owner of that land. If the neo-liberal agenda was in fact a return to the ideology of private property then you would expect to see less (or indeed no)

95 This is reflective of the dominance of the neo-liberal agenda which is anti-participation. Suzanne Lawson and Brendan Gleeson, ‘Shifting Urban Governance in Australia’ in Paul Smyth, Tim Reddel and Andrew Jones (eds), *Community and Local Governance in Australia* (2005), 76, suggest that there has been a ‘rescaling of urban governance’ to achieve ‘competitive advantage for urban regions within a global economy.’ This has led to ‘spatially based interventions by government’ such as urban consolidation policies to ‘fix’ uneven geographical development. The neo-liberal agenda could be taken further. In M. Bagaric and J. McConvill, ‘Goodbye Justice, Hello Happiness: Welcoming Positive Psychology to the Law’ (2005) 10(1) *Deakin Law Review* 1, 23, Bagaric et al suggest that in terms of public happiness (the Benthamite purpose to which all law should be directed), planning laws ‘should be relaxed’ to allow people to do what they like with their property ‘unless there is evidence to suggest that the proscribed conduct is detrimental to one’s happiness.’ Planning by codes that reduce red tape and remove merit assessment of applications is a step in this direction.

96 See table 2.1 standing committee report, above n 10, 23.

97 This is best demonstrated in the ‘Barker’ report: Kate Barker, ‘Barker Review of Land Use Planning: Final Report - Recommendations’ (2006). The report was commissioned by the Chancellor and the Deputy Prime minister of the UK to consider ‘how, in the context of globalisation … planning policy and procedures can better deliver economic growth and prosperity alongside other sustainable development goals.’ Whilst recognising (at 4) the ‘importance of public participation and democratic accountability,’ the report (at 11) suggested that decision-making should be made at the ‘most appropriate spatial level.’ That means ‘an independent planning commission’ for projects of national significance, and the local planning authority at the local level. There was no recommendation for a widening of appeal rights to allow third party appeals. The focus was on streamlining the system. Control over the system was retained in the Minister and the bureaucracy. The report included a recommendation to incorporate a presumption in favour of development. The Friends of the Earth, ‘A Better Plan: An alternative view of the Land Use Planning System’ (2007) outlined its objections to the report, including the comment that the Barker report ‘recommends reducing the voice of the local people.’
regulation.98 Yet, the planning instrument still regulates what development is permissible in a locality. The minister has centralised the plan making process via the standard template process.99 The minister still makes the planning instrument. It is suggested by Kelly and Smith that one effect of this constraint is the ‘[e]rosion of worthwhile local ingenuity.’100 In short, the community has lost control over development occurring in the neighbourhood.

The articulated purpose of the most recent reforms of the EP&A Act was to ‘cut red tape.’ The 2008 measures to de-politicise planning by removing decision-making from councils and transferring the power to decide to panels reinforce the manifest intention to exclude the voice of the people from the process.101 To facilitate powerful economic interests, power (or control over development) has been retained in the hands of the government and not private interests (as would be the case if we were returning exclusively to the ideology of property). Measures have been introduced by legislation to speed up decisions. This initiative has created an environment where ‘yes’ is the most likely outcome of an application for development.102 Only the applicant

98 Mark Pennington, 'Hayekian Political Economy and the Limits of Deliberative Democracy' (2003) 51(4) Political Studies 722, 732. In contrast to the Habermian deliberative democracy theory (a commitment to transparent egalitarian structures where equal standing is given to all stakeholders), the advantage of the market under Hayekian theory, Pennington suggests, is that the market has the advantage of being polycentric. As such:

‘The institution of private property, … affords multiple minorities the space to try out ideas, the merits/demerits of which may not be readily discerned by the majority, but from which the latter may learn.’ (emphasis in original)

Regulation inhibits the creativity of the choices made by individuals under market conditions.

99 In the Standing Committee report, above n 10, 98-100, the committee notes the view of the Department that:

‘councils will be able to meet their specific local needs through the use of local objectives and provisions, albeit, “where appropriate” and approved by the department.’

The committee then outlines evidence to support its comment that there was ‘constant criticism’ that the standard instrument ‘was too city-centric and did not adequately address the needs of rural and regional councils.’ Evidence given to the committee included evidence from Mr Gordon Clark, Strategic Planning Manager, Shoalhaven City Council who said his council was required to use a flooding clause that had ‘already been in the system.’ His response to the committee was:

‘We are told to use one of the ones that have already been through the system. We could say yes, that is fine, but the flooding clause for Liverpool does not assist the Shoalhaven. We have got a completely different situation. We need a more tailored clause that applies to our situation.’

Mr Haddad, the Director General of the Department of Planning, summarised his concern about specific local provisions by saying: ‘When we standardise all over the State we must ensure that we do not keep on adding things as we might end up non-standardising.’


101 Farrelly, above n 27, 179. Farrelly suggests that:

‘flexibility [in planning laws] delivers the very opposite of its promise. The talk may be all transparency, accountability and consultation but the reality is different; a system of government from closed rooms and whispering corridors, moneysed access and the privileges of power, of public life being reduced to the rhythmic exchanges of private favours.

102 McAuslan, above n 4, 44, notes a similar control focus in the intent of the 1968 reforms to the UK Town and Country Planning Act which curtailed rights of appearance at Public Local Inquiries. As McAuslan notes, the old forms of participation were:
(and not the public) has the right to appeal ‘no’. When the answer is generally yes, where does the opportunity to be heard arise? This structural change in the distribution and allocation of development rights has been secured by the government without any true mandate from the people to embark on that path.

6.3.2 Who owns the neighbourhood?

It is arguable, in the context of neighbourhood, that the umwelt is an open access resource. It is owned by no-one but it is used in common by the community. If it is the case, as suggested by Webster and Lai, that ‘anarchy results from individuals asserting their economic right to a resource by might,’ then tyranny arises when the political elite silences the voice of the people in decisions about the allocation of shared common resources. Without participation by the people in the ordering of the neighbourhood, a form of oppression exists.

Market theorists would suggest that markets ‘democratise resource allocation;’ but they then argue that democratising planning would lead to collective action inertia in decision-making. They oppose participation because it is an inefficient allocation of property rights. Pennington argues that the market is a superior mechanism because it ‘enables people to adjust their behaviour to the changing scarcity of goods without ever having to be consciously aware of why this is the case’ (emphasis in original). The obvious difficulty with the application of the

‘replaced by new forms of participation which, by vesting control of the process in public authorities throughout and by eliminating any rights in individuals, ensured that the process and its participants were at all times subordinated to the interest of the public authorities – the guardians of the public interest.’

103 Linda Pearson and Peter Williams, ‘The New South Wales planning reforms: undermining external merits review of land-use decision-making?’ (2009) 26(1) Environmental and Planning Law Journal 19, 25. Pearson and Williams note that according to the department’s figures, of the development approvals records held by the department for 2006/7, of the 86,287 development applications submitted, only 3% were refused.

104 Standing Committee Report, above n 10, 35. The committee records the evidence of the Director, Strategy and Design, City of Sydney who said the council experienced difficulties incorporating policies for higher density development ‘because without a mandate for a requirement for higher levels of design quality, it was difficult convincing the community that higher density could be a good outcome.’

105 Webster and Lai, above n 3, 75.

106 Ibid 180. Webster and Lai, citing ‘Greater Soul’ in Korea, also suggest (at 27) that ‘[m]arket-driven cities constantly innovate, producing new styles of living, new products, new technologies for overcoming the constraints of distance, congestion and resource management.’

107 Pennington, above n 98, 729, mischievously alludes to Oscar Wilde’s quip on socialism as suggesting that deliberative democracy procedures would also ‘take up too many evenings.’

108 Ibid 727.
theory is that in an unequal market, the winners will be the rich and powerful.\textsuperscript{109} Citizens are reduced to mere consumers disconnected from the life of the place in which they reside.

The conundrum is that it is only through participation that the \textit{voice} option emerges.\textsuperscript{110} What brought about social change in the nineteenth century was partly social pressure, but it was also a change in ideation that led to legislative change.\textsuperscript{111} If there is no voice option, then exit is the only choice available. It is clear that there is a social disconnect between the government in New South Wales and the people about decisions on planning.\textsuperscript{112} The disaffection of the people with planning outcomes in their localities reflects the corrosive effect of disengagement of the people from the processes of government.\textsuperscript{113} Hague suggests that the public ‘lost faith in planning long before the economic actors and politicians did so.’\textsuperscript{114} Stokes theorises this disconnect as the ‘battle for the big back yard,’\textsuperscript{115} a dispute between private property interests and the public interest. It is here argued that the dispute is really about whether or not the power to control the development of land should be exercised according to the participatory theory of democracy (socially inclusive) or whether that power should be exercised according to the ‘bureaucratic or technical’ theory of democracy (socially exclusive).\textsuperscript{116} In essence, should there be open government in the planning process?

\textsuperscript{109} Mannheim, above n 20, 233: ‘as society turns more and more from competition between equals to competition between unequals, the chances are enhanced that the powerful and wealthy will swallow up their weaker competitors in the life-and-death struggle of the market place.’

\textsuperscript{110} Robert Freestone, \textit{Urban Nation: Australia’s Planning Heritage} (2010), 29, argues that: ‘Resident action and environmental protest have become established features of the urban political process.’

\textsuperscript{111} WJV Windeyer, \textit{Lectures on Legal History} (1938), 247. As Windeyer notes, the legislative changes were the result of ‘pressure by trade unions, partly because of a changed outlook on social questions by the wealthy and governing classes.’

\textsuperscript{112} In 2009, Nick Ralston, ‘Stars lead planning laws rally in Sydney’, \textit{Sydney Morning Herald} (Sydney), 2009, reported that: ‘Actors, comedians and TV and radio personalities have joined MPs and angry residents in staging a mock funeral in protest at the NSW government’s planning laws.’ However, only 300 people took part. Tanveer Ahmed, ‘Bona fide democracy begins on your doorstep’, \textit{Sydney Morning Herald} (Sydney ), 9 September 2008, 11 extrapolates the disengagement by suggesting: ‘a flourishing democracy depends on people being able to take part in what happens in their backyards. If they feel they lack control over the street they live on, what chance is there of having a say on climate change? Or our interactions with foreign powers?’

\textsuperscript{113} Participants at the EDO forums, EDO 2010 Report, above n 3, 32-3, questioned the use of engaging the system when discretion ‘seems to be exercised in favour of economic interests over community interests,’ and when ‘local considerations are constantly overridden.’ It is not without significance that only 84 people in total attended the workshops, itself suggestive of disengagement with the planning system.

\textsuperscript{114} Hague and Jenkins, above n 88, 30.

\textsuperscript{115} Robert Stokes, \textit{The Battle for the Big Back Yard: An Examination of the Conflict Between Suburban Character and Urban Consolidation and the use of Public Participation in Managing this Conflict} (Ph. D. Thesis, Macquarie University, 2007), 1. Stokes frames the dispute as being ‘between the private property interest in safeguarding suburban character and the public interest in pursuing a policy of urban consolidation.’

In a liberal democracy it is incumbent upon the people to empower themselves so that, as Uhr suggests, ‘they can effectively protect themselves against misguided attempts by government to determine what is in their best interest.’\(^{117}\) Paradoxically, this admits of the possibility of greater democracy in land use processes.\(^{118}\) Whether or not this would be a good thing is debatable. On the one hand, asking the people to be involved in the process is empowering.\(^{119}\) On the other, as Farrelly observes, beautiful historical towns were built under oppressive conditions:

‘From Myknos to Paris, beautiful, traditional towns – beautiful enough still to draw tourists centuries later – were produced under conditions that we would consider intolerably oppressive, with little or no personal choice on the part of the builder, architect or user as to material, style, colour, or decoration.’\(^{120}\)

Do we as a polity aspire to ascetics in built form or to participation? The market cannot guarantee the former nor can democracy the latter. For planning to be democratic, it will involve more than being consulted, it must involve the sharing of power.\(^{121}\) As Arnstein suggests, in power sharing models, ‘citizens hold the significant cards to ensure accountability of the programme to them.’\(^{122}\) If legislation is the means by which there is to be a sharing of power, then Bora and Hausendorf’s work suggests a methodology to assess whether the communicative structures enacted by the government allow for resonance in the decision-maker.

Planning can be inclusive. There is clearly an opportunity for the people, organised in local communities, to take advantage of the means and the devices of monitory democracy and to

\(^{117}\) Uhr, above n 21, 17. Uhr argues that ‘the strength of the liberal model of representative government is that it recognises that individuals are best placed to know their own individual interests.’ If this holds true for representative government then it holds true for local democracy and arguably planning policy.

\(^{118}\) Pope, above n 16, 367. Pope suggests that:

‘Talk of strong democracy and direct popular power sounds romantic in these times of hard-nosed economism. Paradoxically, however, direct popular power provides an effective, if partial and temporary, antidote to three of the most serious evils identified by the economic theory of collective action.’

The three evils being the problem of ‘free rider’ apathy barrier identified in public choice theory which prevents participation, the problem of ‘logjam’ ‘created by interest group bargaining,’ and finally, it dilutes the importance of influences from ‘wealthy interest groups during politics-as-normal.’

\(^{119}\) Keane, above n 33, 853.

\(^{120}\) Farrelly, above n 27, 176. The late Professor Seidler would concur. R Seidler, ‘Aesthetic Jurisdiction of Local Government Authorities’, (Paper presented at the EPLA Conference, Darling Harbour, Sydney, October 2000), 1. Professor Seidler suggested that the powers of consent authorities under the EP&A Act (as at that time) were ‘in direct contradiction to the United Nations International Bill of Human Rights.’ Specifically, ‘covenants on cultural rights … which states that everyone has the right to the protection … of the moral interest of any artistic production in the form of art.’ This included an architect’s artistic right to have a building constructed, presumably as the architect saw fit.

\(^{121}\) Even the EDO 2010 report above n 3 is only making recommendations about a better consultation process; it does not seek empowerment through participation via delegated decision-making.
take back power to determine what is occurring in their localities. As Hall suggests, democracy occurred when the people had ‘confidence in their own independent judgments and therefore demanded the right to control their own destinies.’ Logically, the relevant ‘moments’ in the planning process for this to occur are at the time the local plan is being formulated and at the time a decision is being made on whether development proposed in a locality should be approved.

6.3.3 Sharing Plan-Making Powers

If, as the Standing Committee notes, ‘the test of what is the preferred planning system is a system that meets the social, economic and environmental expectations and needs of the local community,’ then it is essential that the local community has power in that system to affect the strategic decisions that are being made about the neighbourhood of that local community.

Citizen control arises when the local citizens are ‘in full charge of policy and managerial aspects,’ with power to negotiate the ‘conditions under which “outsiders” may change them.’ Logically, local councils could fulfil this role. If the government formally delegated power to the community through legislation allowing the council, and not the Minister, to make the plan for the local area, then participation in the planning process may be worthwhile. But this is

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122 Arnstein, above n 21, 222.
123 Keane, above n 33, 688. Keane describes *monitory democracy* as:
’a new historical form of democracy, a variety of “post-parliamentary politics defined by the rapid growth of many different kinds of extra-parliamentary, power-scrutinising mechanisms. These monitory bodies take root within the “domestic” fields of government and civil society, as well as in “cross-border” settings once controlled by empires, states and business organisations.’

Ahmed, ibid, suggests that ‘[m]odern network societies are less tied to geography and neighbourhood than to communities of interest.’
124 Hall, above n 13, 24.
125 Standing Committee Report, above n 10, 34.
126 EDO 2010 report above n 3, 15. The sentiment is captured in the comment made by a Moruya participant to the workshop:
‘I don’t understand why governments are so worried about public consultation. Public consultation is not the problem. It’s avoiding it that’s the problem. The more of it they do the less problems they’ll have with the public.’ And it is here recognised that the participant was only talking about involvement – at the level of consultation – not participation at the level of empowerment.
127 Arnstein, above n 21, 223.
128 History may repeat itself. FA Larcombe, *The Stabilization of Local Government in New South Wales 1858-1906* (1973), decried the loss of autonomy of local councils and the push for amalgamations in the early twentieth century. It was this feature, in Larcombe’s view, that caused councils lose their democratic legitimacy. Restoring local powers may restore this lost legitimacy?
not the case if the bureaucratic model is to be retained. In the current confusion of the planning system, councils lack the necessary power to resolve divisive issues such as the location of local shopping areas and the character of residential neighbourhoods. Why is it that it should be just the state government which determines the planning policy for local areas? Where is the government’s mandate from the people to ride roughshod over the community view? One potential model would be for the government to confer delegated power to the council and the ‘community’ of interested persons to jointly have the right to determine the plan for the local area (or precinct). In developing the local planning instrument, they would have to take into account the requirements of the regional and state plans which set out the government’s strategic direction for the state, but not be obliged to accept a predetermined planning outcome.

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129 William M Rohe and Lauren B Gates, Planning with Neighbourhoods (1895); William M Rohe and Lauren B Gates, Planning with Neighbourhoods (1985), 54. As Rohe and Gates note, in the bureaucratic model participation occurs late in the process:

‘Citizens are often asked to react to a plan in which a considerable investment of staff time and energy has been made. Thus, rather than respond to citizen concerns, planners often end up defending the plan. … Planners often leave with a feeling that citizens have little to offer, and citizens leave with a feeling that their participation was not genuinely desired.’

130 Paul Bibby, ’Councils battle spread of new supermarkets’, Sydney Morning Herald (Sydney), 20 August 2009, 9. Bibby wrote that proposals for supermarkets ‘are fast becoming Sydney’s new urban development battlefield.’ There is a useful discussion about planning for retail centres and the cases on retail developments in the papers delivered by Gary Green, ‘How not to Plan for Retail’ (Paper presented at the EPLA, Powerhouse Museum, Sydney, October 2009), by Michael Staunton and Chris McEwan, ‘Retail - How to assess its real impact (and how to plan for it)’ (Paper presented at the EPLA Powerhouse Museum, Sydney, October 2009), and by Peter Leyshon, ‘Planning for Retail in NSW - A Rejoinder’ (Paper presented at the EPLA Powerhouses Museum, Sydney, October 2009). Green suggests, at 12, that ‘[s]upply of goods and services has become a distant second in terms of its impact in comparison to the financialisation of capital and its impact on our market which distorts all decision making. Staunton and McEwan argue, at 20, that the cause of the tension is that land is a scarce resource ‘and there is a reluctance by councils to rezone land for higher density and business uses often due to objections by stakeholders or local residents who do not wish to see any development at their expense.’ In fact, Leyshon is of the view, at 2, that ‘the needs of the population for more/better retail services … do not feature … in a debate about whether a retail proposal should be approved or not.’

131 McAuslan, above n 4, 269 suggests that proponents of the ideology of public participation:

‘are sceptical, even hostile, to the special claims to pre-eminence in running the system of professionals, public servants and politicians who do run it and claim legitimacy in so doing by virtue of official qualifications, official appointments or official elections.’

132 An insight into the mind of the bureaucrat is found in an article written by Sue Holliday, the former Deputy Director of the Department of Planning and Richard Norton, also of the Department in 1995. Sue Holliday and Richard Norton, ‘Sydney's future: quo vadis’ (1995) (17) Urban Futures (Canberra) 13. In discussing the need to accommodate population growth the comment is made:

‘the public must grapple with new complexities, new ways of thinking about their lifestyle aspirations, their city and region. The ‘Australian dream’ of a detached family dwelling is neither appropriate nor achievable in contemporary metropolitan Sydney.’ The thought occurs, does the public have a say in it?

133 Arnstein, above n 21, 222. As Arnstein notes, such bodies pose ‘an interesting coexistence model for hostile citizen groups too embittered towards city hall – as a result of past “collaborative efforts” – to engage in joint planning.’

134 Support for this approach is found in Nicholas Aroney, 'Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire' (2007) 26 law and Philosophy 161, 163.
6.3.4 Sharing Decision-Making Powers

The Independent Commission Against Corruption (ICAC) published a Position Paper in 2007 entitled ‘Corruption Risks in NSW development approval processes’ (2007 ICAC Position Paper). Ironically, it was released some two months before the Government’s 2007 Discussion paper. In it ICAC suggested that there should be a widening of third-party appeal rights.\(^{135}\) This recommendation was however not taken up by the NSW Government in its 2008 reforms.

The ICAC recognised that to be effective, the public participation mechanism in the Act must be such as to allow the public to influence the decision so as to constrain the exercise of discretion when the administrative decision is being made.\(^{136}\) This is not the exercise of a right of veto, it is the giving of an equal right to the public to challenge the decision to approve development on its merits. Considered in the context of democratic theory, when assessing and determining an application for development the council is not exercising a representative parliamentary function in the capacity of lawmaker. Council’s LEPs and planning instruments are made by the executive arm of the government. In determining applications, the council is therefore performing a delegated function of the executive government, exercising an administrative power. Allowing a general right of merit appeal would therefore, arguably, not be contrary to democratic theory.

Willey suggests that the ‘very arguments that justify appeal rights for permit applicants extend to legitimate third party rights also.’\(^{137}\) The benefit of widening the process is that it results in improved decision-making. Even if the decided matters determined in the LEC cases show a bias in favour of developers,\(^{138}\) which is disputed,\(^{139}\) the fact is that the process adopted in the

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\(^{136}\) Ibid 46:

Merit based reviews can provide a safeguard against corrupt decision-making by consent authorities as well as enhancing their accountability. Consequently, the extension of third-party merit-based appeal rights may act as a disincentive for corrupt decision-making by consent authorities.


\(^{138}\) F. Sartor, 'Sartor seeks curbs on “out of control” Planning Court', Sydney Morning Herald (Sydney), 23 August 2000, 6: ‘Approx 60:40 in developers' favour according to the Lord Mayor’. 
Court enhance the prospects for a better planning outcome. When the rate of approvals is approaching ninety seven percent of applications,\textsuperscript{140} and when there is pressure to promote and encourage development urban consolidation via medium density development, as there has been since the 1990s,\textsuperscript{141} it suggests that there is perhaps a need for some oversight.

In the context of the rhetorical appeal in the objects of the EP&A Act to increasing opportunity and widening the opportunity to access merit appeals, Willey argues that third party appeals enhance the voice of the citizenry in the process because it acknowledges that ‘parties other than the appellant and the government have a legitimate interest in planning decisions’.\textsuperscript{142} A contrary view was expressed in the minority report of the 2001 Attorney General’s review of the role and function of the LEC. The then President of the Local Government and Shires Association, Peter Woods, suggested that democracy demanded that there be no merit appeals at all, for either the applicant for development or otherwise.\textsuperscript{143} But this position assumes that the council relevantly speaks for the community.

\textsuperscript{139} See J. Kelly, ‘Court provides an important buffer’, \textit{Sydney Morning Herald} (Sydney), 26 March 2000, 12. As to the bias, in 2000 the NSW Attorney General established a Working Party to examine the operation of the LEC – see J. Cripps, ‘NSW Attorney General’s Working Party Report (Majority Report)’ (NSW Government, 2001). The Majority Report of the Working Party published in September 2001 (at 12) notes that of the 48% of cases actually adjudicated between 1996 and October 2000 56% of appeals were upheld and 44% were dismissed, hardly a bias in favour of developers. The most recently published annual 2009 Annual Report (published 24 August 2010) notes (at 28) that matters in classes 1, 2 & 3 ‘comprised 76% of the Court’s finalised workload.’ No figures are published as to the results in class 1 appeal as to percentage appeals upheld or dismissed.

\textsuperscript{140} Pearson and Williams, above n 103, 25. According to Pearson and Williams:

‘Class 1 merit appeals are lodged in only a small percentage of the development determinations made across New South Wales. In 2006/2007, there were 111,194 local development determinations, which included 86,287 development applications determined by councils, 14,386 modifications of development consents under s96 of the EP&A Act, and 11,241 complying certificates. Only 3% of development applications were refused.’

\textsuperscript{141} I H Burnley, ‘Immigration and housing in an emerging global city, Sydney, Australia’ (2005) 23(3) \textit{Urban Policy and Research} 329, 337. Burnley notes in the years following 1980, ‘the State Government promulgated urban consolidation policies, requiring all 43 municipalities in Sydney to construct a proportion of redevelopment and new allotments as medium density.’

\textsuperscript{142} Willey, above n 137, 386. Willey is also of the view that the existence of third party appeals compels the developer to engage with the community ‘more fully, legitimately and sincerely.’

\textsuperscript{143} P. Woods, \textit{NSW Attorney General’s Working Party Report, 2001} (minority report), 5:

‘Councils, in association with their citizens should be the sole determinates of merit in relation to development applications, as they are democratically accountable to local communities for the decisions they make. … I believe that the current system of merit appeals in the Land & Environment Court is undemocratic. This is not a ‘perception’, rather it is a reality.’
6.4 Is a Participatory Culture Possible in New South Wales?

Social change is continuing. New institutions will need to emerge to accommodate 'dissent, or manipulation and frustration.' At a demographic level, it is forecast that our cities will need to accommodate millions more people. Mackay argues that we presently live in an age of discontinuity that is making us realise that:

'[W]e are social creatures who thrive on the sense of belonging to a community, ... no matter how connected we may feel in other ways, there is a special meaning of “community” that relies on locality.'

In this local sphere, as Chen suggests, ‘our life is still governed by domestic political structures and domestic legal systems.’ In an era of monitory democracy, will planning policy and the prospect of a new planning system be the impetus for a new democratic moment? A ‘republican moment’, when the legislative imperative shifts from just to paying lip service to the democratic ideal, to creating a socially inclusive mechanism that confers a right to participate both at the plan making and at the application decision moment. Whilst such a social change to create a participatory culture is possible, history suggests that it is unlikely to occur.

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144 Paul Jenkins, ‘Space, Place and Territory: An Analytical Framework’ in Cliff Hague and Paul Jenkins (eds), Place Identity, Participation and Planning (2005) 19, 24. As Jenkins suggests: ‘Although likely to change in future, the competition and the associated deconstruction and reconstruction of place identities in the past 50 years have been greatest in urban areas.’

145 Cliff Hague and Paul Jenkins (eds), Place Identity, Participation and Planning (2005), 49. Hague argues that: ‘Participation can be a new channel for political action, bypassing the clogged traditional arteries of traditional representative democracy.’

146 From the perspective of demography, Clive Hamilton, ‘Population debate misses the facts’, Sydney Morning Herald (Sydney), 19 April 2010, suggests that the population debate is the ‘grand delusion.’ Hamilton believes that great waves of internal migration caused by climate change will mean ‘many more people squeezed into an ever-shrinking patchwork of liveable areas.’ Do the people have a say in that?

147 Hugh Mackay, Advance Australia ... where? : how we’ve changed, why we’ve changed, and what will happen next (2007), 10, 286-7. Mackay suggests that ‘there is a strong intuitive sense that we need to feel part of the local neighbourhood we actually live in.’ This is strongly suggestive of umwelt.


149 A Bora and H Hausendorf, ‘Participatory science governance revisited: normative expectations versus empirical evidence’ (2006) 33(7) Science and Public Policy 478, 481. As Bora and Hausendorf argue, participatory mechanisms, from a normative perspective, are ‘intended to improve citizenship.’

150 Sharp, above n 74, 21. Sharp observed that there are three important factors: ‘1) the relative desire of the populace to impose limits on the government’s power; 2) the relative strength of the subject’s independent organisations and institutions to withdraw collectively from the sources of power; and 3) the population’s relative ability to withhold their consent and assistance.’ (emphasis in original)

151 Moore, above n 52, 398. Moore concludes his book with the observation: ‘Australia’s leaders across the political spectrum have indulged a national talent for bureaucracy building and managerial surveillance – an illiberal tendency in our public life that is perhaps a
6.4.1 Bureaucracy or Participation?

To affect the current play of power in land use planning, there will need to be a struggle. As McAuslan identifies, legislation is necessary to formalise ‘separate and independent’ mechanisms which facilitate genuine public participation in land use planning processes.\(^{152}\) As Keane has demonstrated, representative democracy emerged from the struggles of the eighteenth and nineteenth century despite the best efforts of the ruling elite who ‘fought tooth and claw’ to prevent it from occurring.\(^{153}\) It is here posited that the same will be true of attempts by the people to wrest control over planning decisions to empower local communities to determine the nature of development in the neighbourhood.\(^{154}\)

As can be seen from the discussion in chapter 5, political and economic processes have conspired to ensure that the bureaucratic and not participatory model prevails. Brown and Sherrard recognised in the 1960s that it is the ‘powerful social and economic forces’ at work in society that shape the physical urban form.\(^{155}\) Nothing much has changed since. Gleeson and Low suggest that the government has continued to listen ‘to a narrow range of constantly mobilised economic powers.’\(^{156}\) It has excluded the voice of the people.\(^{157}\) Even though it appears clear that the present planning system, based as it is on the ideology of the public colonial hangover from the vast convict apparatus erected on our shores to catalogue, control and coerce human beings.’

\(^{152}\) McAuslan, above n 4, 20:

‘A statute whose ideology on this matter was that of participation would provide for the participation in such a way that the right of the public to participate was separate and independent from the bodies whose proposals and plans were to be the subject of participation.’

\(^{153}\) Keane, above n 33, 169. The cause of the people was invoked by both sides in the struggle but only in terms of who was best placed to rule over the people.

\(^{154}\) As Peter Williams, ‘Government, People and Politics’ in Susan Thompson (ed), Planning Australia (2007), 46, notes:

‘Achieving a balance between crucial public policy outcomes and the public consultation and participation processes that ideally should accompany them is therefore likely to be an ongoing challenge for both governance and planning in Australia.’

\(^{155}\) AJ Brown and HM Sherrard, Town and Country Planning (1959), 9:

‘Powerful social and economic forces constantly at work in a changing world shape the physical town into a certain mould directly reflecting those changes.’

\(^{156}\) Gleeson and Low, above n 3, 153.

\(^{157}\) D. Maher, ‘Friendless and Furious: Ku-ring-gai fights for life’, Sydney Morning Herald (Sydney), 19-20 September 2009, 10. Maher, commenting on the resentment caused by the infliction of state urban consolidation policy on the affluent north shore suburbs over community objection, noted that:

‘So much antagonism built up across Sydney that Nick Greiner in 1988 and Bob Carr in 1995 both came to power with the mantra that planning was to be handed back to the people.’ But he then suggests that ‘such promises are rarely kept in Sydney.’ The specific policies as to how planning was to be handed back were never articulated. Nor was either government’s intention to increase urban density. Maher notes that upon being elected in 1995, Carr subsequently ‘decreed that half a million new “dwellings” were to be inserted into the city’s suburbs.’

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interest, has failed of its purposes, this does not mean that the state will cede the power of control over the planning system to either private interests or the people. At the level of the neighbourhood, the state does not believe that the collective wish of the individuals in the locality could inform planning policy and decision-making in relation to the development of the umwelt of the neighbourhood. The state remains firmly of the view that it, and not the people, is best placed to determine what development is in the public interest.\[159\] When it comes to planning for the neighbourhood, like the citizens of Rome described in chapter three, the citizens of New South Wales live in a civic culture where they are citizens in name but without power. Neither major political party in New South Wales has articulated a willingness to depart from the ‘status quo’ being the ideology of the public interest.\[160\] It is again apparent, as it was in 1974, that there is bi-partisan agreement about the need to reform the planning system. But to create legislation based on the ideology of public participation would require a paradigm shift in strategy towards open government in circumstances where there is insufficient pressure from the people for this to occur. Accordingly, any reform of the planning system is unlikely to accord anything more than lip service to genuine participatory models.

6.4.2 Displacing the Ratepayer Ideology

The absence of a civic culture in New South Wales is the complicating factor which feeds into the planning system. It has created a situation where the citizens of the locality in which development is to occur lack the power to influence the decision-maker both at the plan making and development assessment levels.\[161\] In 2008 the government was confident enough in its

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\[158\] As the Standing Committee Report, above n 10, 27, concluded, ‘there was consistent support for a complete review and overhaul of the current legislation.’

\[159\] Josephine Tovey, ‘Mayors boo Premier over takeover of planning laws’, *Sydney Morning Herald* (Sydney), 26 October 2010, 2. During an address to the Local Government and Shires Association Conference at Albury the Premier Kristina Keneally, to boos from the assemblage said:

‘The promise of handing planning powers back to local community may sound desirable, but under the surface what does it mean? It means a great deal more work for local government. I hear nothing about more funding or more resources to support that workload.’

It is a remarkable insight into the mind of the government. It signifies a steadfast refusal to contemplate resourcing the community to participate in the planning process.

\[160\] McAuslan, above n 4, 268-9. The status quo being ‘the existing state of property relations in society, the existing capitalist system with its emphasis on private property and a functioning market for that property.’ McAuslan suggests that ‘the ideologies of public interest and private property are the ideologies of the status quo.’ The ideology of public participation is ‘the ideology of opposition to the status quo.’

\[161\] William M Rohe and Lauren B Gates, *Planning with Neighbourhoods* (1985), 56-57 argue that allowing participation enables citizens to control the agenda. They note that:

‘Controlling the agenda is an important source of power that has traditionally been denied neighbourhood groups in the dealings with public officials on planning issues. Within the context of neighbourhood planning, [neighbourhood planning programmes allow] citizens …
power to fashion the planning system to its design. It removed the role of local government in
determining applications for development thereby removing the last vestige of influence. It is
arguable, following the 2008 reforms, that New South Wales is now descending the Arnstein
ladder of participation towards the zone of manipulation, a socially destructive zone. Governments do not share power unless pressure is applied by the people. There is a
difference between the changing of governments with similar ideologies at an election and
change which results in a different style of governance. This suggests that in the context of land
use planning, the real difficulty confronting the people of New South Wales is whether or not,
collectively, the ratepayer ideology can be displaced. That will require a real shift in the
gemeinschaft of the people.

To date, there is no evidence to suggest that the people will mobilise sufficiently to allow
genuine protest to foment into political pressure for legislative change. Both Andrews and
Edwards reference Putnam’s 1993 work, Making Democracy Work, as indicating that before
a civic culture can exist in a society, there needs to be a culture of political participation, an
associational life among citizens and interpersonal trust between citizens. It was Tocqueville
that observed in the nineteenth century that it is through civil associations that people come to
feel that they are citizens. In Mannheim’s view, it is necessary for the citizenry to be
opportunities to develop and recommend their own projects and raise their own concerns rather
than simply respond to those identified by planners.

Socially exclusive dynamics are destructive of social happiness. M. Bagaric and J. McConvill,
Law Review 1, 10. Bagaric et al suggest that:
‘Involvement and a sense of contribution and control over the activities that impact on one’s life
are key ingredients to a sense of well-being. The connection between participation, control and
happiness manifests in many sorts of domains.’

As AJ Brown, ‘Regional Governance and Regionalism in Australia’ in Robyn Eversole and John
Martin (eds), Participation and Governance in Regional Development (2005) , 17, notes:
‘Yet at the levels of state and federal governments, where the bulk of political power and public
financial resources are held, the in-principle commitment [to participation] translates into a very
different reality.’

McAuslan, above n 4, 273, citing Macpherson, The Life and Times of Liberal Democracy, OPUS 83,
OUP (1977), suggests that to move to what Macpherson terms as ‘participatory democracy,’ it is
necessary for there to be:
‘a change in people’s consciousness (or unconsciousness) from seeing themselves and acting as
essentially consumers to seeing themselves and acting as exerters and enjoyers of the exertion
and development of their own capacities.’

David Humphries, ‘Winning over a tough crowd’, Sydney Morning Herald (Sydney ), 29 August 2010, 1. Humphries argues that:
‘Without vigorously judging national need and scrutinizing parliamentary and executive
outcomes, voters get governments they deserve. Equally, without facilitating scrutiny and by
keeping voters in the mushroom club, governments get the people they deserve.’

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motivated by this ‘democratic personality.’

As Sharp observes, ‘these centres of power provide the institutional bases from which the population can exert pressure or can resist dictatorial controls.’

In New South Wales, political participation is low. The people of New South Wales may have a well developed associational life, but that associational life is not directed, in the main, to the business of politics. Whilst a generalisation, it can also be argued that there is amongst the people interpersonal trust by reason of the nature of the polity in New South Wales. However, this generalisation does mean that there is interpersonal trust between the people and their politicians. To the contrary, there appears to be a significant disconnect between these spheres. Structurally, at the surface level of discourse between the government and the population.

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169 Mannheim, above n 19, 231:
‘[W]e may say that a society is democratic only so long as its members, consciously or unconsciously, are motivated by the ideal of democratic personality and try to abide by this ideal.’

170 Sharp, above n 74, 22.

171 As Cavalier, above n 49, 47, notes: ‘over the past decade, over 100 ALP branches have folded in New South Wales. … Many branches are phantoms or paper frauds.’ This supports Leigh’s observation, above n 57, 54-5 that:
‘politics is something other people do. According to the Australian Electoral Study, 24 per cent of people contacted a politician in the past five years, 13 per cent had attended a demonstration or protest march, and 24 per cent had worked together with people who shared their concern.’

172 Leigh, ibid 59. Leigh suggests that the ‘wave of civic creativity’ post World War II has ebbed. He notes that in the 1960s, 33 per cent of Australians were members of a community association, but this participation rate has fallen to 18 per cent by the mid 2000s. Similarly, the share of the population involved in politics has declined, but from a much smaller base. Once again the high point was in the post war period when the major parties approached a membership above one percent of the total population in the 1960s, declining to less than half of one percent now. Cavalier, above n 49, 48, suggests that a reason for the disconnect, in relation to the Labor party, is because:
‘Ordinary Australians wanting to be politically active – and not seeking a material reward – cannot be bothered with an organisation [Labor] which they have no prospect of influencing in any worthwhile way.’

Salt attributes the disconnect to the rise of a new ‘individualism.’ Bernard Salt, ‘It’s all about me: the rise and rise of individualism’, *The Australian* (Sydney), 2011, 33. That is:
‘What I am referring to is the rise of what might be termed individualism over collectivism. This is the idea that our world view has shifted from the need to play a minor part in a bigger society to the view society, and pretty much everything else, should revolve around us.’

173 This is the conclusion of the EDO 2010 Report, above n 3, 3; See also Wiseman, above n 3, 59. Wiseman suggests that there is now a widely documented fall in the levels of trust; Lawson and Gleeson’s comment, above n 95, 83, that ‘citizens have become increasingly active and highly mistrustful of government’; Mark Findlay, ‘ICAC now little more than a last resort’, *Sydney Morning Herald* (Sydney), 10 September 2009, 11: ‘Neither has [ICAC] succeeded in overcoming public suspicion that it is business as usual in Macquarie Street’; and Leigh, above n 57, 52: ‘Across 16 other developed countries, an average of 43 per cent of respondents expressed confidence in their national parliament. In Australia, only 31 per cent did so. … as the trust data demonstrate, Australian’s commitment to democratic politics is lukewarm’; all these observations support this conclusion.

174 Mackay, above n 147, 312, ‘esteem for politics and politicians is so low – partly reflected in declining membership of political parties, and partly in scathing attitudes towards politics in the wider community – that something has to change.’ See also Harry Smith, ‘Place Identity and Participation’ in Cliff Hague and Paul Jenkins (eds), *Place Identity, Participation and Planning* (2005) 39, 51. Smith cites international
people, a communicative deficit has emerged.\textsuperscript{175} Lacking the necessary participatory mechanisms, the government is unable to engage the people.\textsuperscript{176} Arguably, land use policy presently occurs by the decree of the executive.\textsuperscript{177}

6.4.3 A Revolution in Local Government?

The logical mechanism to create a participatory culture in the making of planning policy and in development decision-making would be the existing local government structures. This has been recognised since Tocqueville first considered how to find the way to protect liberty when the mob demonstrated ‘a willingness to place themselves under the tyranny of the majority.’\textsuperscript{178} In local government is found the representative democratic bodies that can facilitate participation. This approach is supported by social commentators.\textsuperscript{179} It is consistent with the identified shift of local government away from strictly infrastructure needs to the provision of ‘human services’.\textsuperscript{180} That shift began when councils were given the central role in land use planning under Part XlI A of the Local Government Act, 1919 in the 1960s.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{175} Bora and Hausendorf, above n 149, 482.
\item \textsuperscript{176} As the Director General of Planning, Mr Haddad acknowledged to the Standing Committee, above n 10, 89, whilst the community was active to engage the processes at the development application stage, ‘we are not getting the level of engagement’ at the strategic planning stage. As to why, the best he could advance was that ‘it is an area of ongoing thinking. It is a challenge.’
\item \textsuperscript{177} Evidenced by the strident opposition to the Part 3A processes in the EP&A Act (now repealed).
\item \textsuperscript{178} Manning Clark, above n 54, 213. As Manning Clarke notes: ‘The remedies Tocqueville prescribed were: indirect election to increase the number of conservatives in the central house of assembly; local government to give men practice in and induce a taste for participation in public life; a federal constitution, because it combined the advantages of a powerful central government with protection of liberty by the division of legislative and executive powers, and the rights of property by built-in constitutional checks on radicalism; religious education so that citizens might know what was “good and just”.’
\item \textsuperscript{179} Ahmed, above n 112, 11 suggests that: ‘Local government’s great strength lies in its proximity to the people. It is the most transparent, responsive and accountable form of democracy we have.’ … ‘It is the most accessible form of democracy, for candidates and for citizens.’
\item \textsuperscript{180} Andrew H. Kelly and Natalie P. Stoianoff, 'Biodiversity conservation, local government finance and differential rates : the good, the bad and the potentially attractive' (2009) 26(1) Environmental and Planning Law Journal 5, 7.
\end{enumerate}
\end{footnotesize}
It is a view supported by academics advancing the third way. As Smith observes, ‘the end of class politics does not mean that the market alone shapes place identities and territory.’ The difficulty is that local government lacks the support of the people. It also lacks a funding base to enable it to adequately perform the task. Cherry provides an illuminating insight into the different cultures that existed in England as compared to Australia. In England the people had been ‘conditioned’ to local government. In contrast, no such conditioning occurred in Australia because the colonial elites feared losing power. But the people have themselves to blame. As Hirst notes, ‘Australia is very democratic, but Australians have little regard for their democratic government.’ Larcombe, Halligan and Paris, Kelly and others have demonstrated that in Australia, there was strong opposition to municipalisation and to any form of land taxation. Larcombe cites public apathy towards local government as the reason why the state

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181 Smith, above n 173, 47.
182 Larcombe, above n 128, 1. Larcombe also condemns the successive failures of colonial and state governments to provide constructive leadership. In Larcombe’s view, the leadership of government has been poor. He believes that ‘apathy has reduced vitally both popular interest and participation in government. The state, meanwhile, has become adept at taking advantage of this circular problem to tamper with local government politically and to damage its prestige.’ Ahmed, above n 108, captures the reality confronting the implementation of reform: ‘Unlike our Anglo-American cousins, local government in Australia has no firm roots. It rose haphazardly, lacks real authority and regularly endures corruption scandals.

183 Kelly and Stoianoff, above n 180, 8. As Kelly and Stoianoff note: ‘In view of the increasing functional burden, local government is becoming a legless horse, or at least a horse doing its best to remain standing.’ History continues to repeat itself. AJC Mayne, Fever, Squalor and Vice: Sanitation and Social Policy in Victorian Sydney (1982), 47 cites the comment of the City Solicitor, Richard Driver, to the NSW parliament in 1879 who was frustrated at the inability of the city council to address public health issues. In his view, the council was ‘crippled for want of power and money.’ Mayne attributes these frustrations to ‘basis inadequacies in the framework of municipal administration set down by parliament.’

184 G Cherry, The Politics of Town Planning (1982), 62-3. Commenting on the reforms enacted by the Housing and Town Planning Act, 1909 (UK), Cherry notes: ‘Had local government been weaker, and had not the spirit of local democracy been built into effective machineries of government at this level, British town planning would have followed a different course. The benevolent guiding hand of a local Council was a sure rock on which town planning could rest.’

McAuslan, above n 4, 238-245, suggests that following the reorganisation of Local Government in 1972, local government in Britain changed. He suggests that the impact of the reform process tended: ‘to centralise, professionalise and neutralise local government in the name of “efficiency” and “taking a wider view of government’s responsibilities.” It is not just the members of the public who can have no meaningful and effective participation, … it is most of the councillors too.’

185 Brown, above n 163, 23. As Brown notes, the development of local government was retarded ‘by resistance from colonial elites who saw local government as a threat to their own influence.’

186 Hirst, above n 51, 19. However, there may be evidence that Keane’s monitory democracy is impacting the polity. Paul Bibby, ‘People Power Teams’, Sun Herald (Sydney), 13 December 2009, 26, cites James Goodwin from the Department of Social and Political Change at the University of Technology, Sydney as observing that the modern approach of resident groups opposed to development ‘utilising social networking sites like Facebook and Twitter to raise awareness and keep the community engaged’ as operating at a new level of sophistication which is ‘natural and normal for people now, which it wasn’t five to 10 years ago.’
government became ‘adept at taking advantage’ of the political discourse to diminish the role and function of local government.  

It was opposition to participation that defeated successive legislative initiatives to introduce local government structures. As a consequence local government in Australia represents, according to Kelly and Stoianoff, one of the weakest municipal systems throughout the developed world. Because of apathy, the private property ideology is resurgent. Apathy is the antithesis of revolution. Left to the ravages of the market, the people may find themselves once again living in slums like their counterparts of Roman civilization and England discussed in chapters 3 and 4. It took only a hundred years of development for Sydney to create its own version.

Planning laws have no inherent social or moral content (although the contrary is arguable). Planning laws are simply a function of political power. Government assumes that it, and not the market or the people, is best placed to make the necessary strategic decisions. If there is to be

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187 Larcombe, above n 128, 1.
188 FA Larcombe, *The Stabilization of Local Government in New South Wales 1858-1906* (1973), 56-58. Larcombe notes that the roads trusts of the 1840s were ‘the first form of direct taxation experienced by the colonists and not relished by them. As they were purely voluntary organisations, it was quite easy to avoid the new impost simply by not forming trusts.’ Larcombe also quotes Alexander Berry’s opposition noting that he described the bill as “an extortionate measure on landed proprietors – an emanation of lawyers to serve their own purposes; in fact a mere legal barbarism.”

189 Kelly and Stoianoff, above n 172, 543.
190 Tom Bentley, ‘Morality versus ideology’ (2004) 16(1) *Sydney Papers* 10, 13. Bentley suggests that throughout the ‘industrialised world’ … ‘peoples willingness to identify strongly with any political party has collapsed more strongly.’

191 Erhard Berner, ‘The metropolitan dilemma: global society, localities and the struggle for urban land in Manila’ in Ayse Oncu and Petra Weyland (eds), *Space, Culture and Power: New identities in globalizing cities* (1997), 101. Berner notes that: ‘The concept of the quartered city has been conceptualised in urban sociology since the works of the Chicago School … against the background of globalization, it becomes essential to grasp the dynamic and conflictive quality of fragmentation processes.’

192 Mayne, above n 183, xiii. As Mayne’s preface observes: ‘Sydney shared with the cities of nineteenth-century Britain similar urban problems, both social and environmental, and shared similar responses to those problems. … the last decades of the nineteenth century were a period absorbed by the dilemma of how best to overcome the combined health and social problems associated with mass urban living.’

193 Sheehan and Garrick, above n 32, 6. Sheehan, citing Lord Devlin (1977), argues that: ‘contemporary English law eventually reduces to the moral position of the average “man on the Clapham bus” suggesting that while democracy will enact any law it chooses, the mandate to make law is ultimately grounded on the beliefs of the majority in the community and those beliefs are moral, one way or another.’

194 The ‘Austrian’ neo-liberal response would be that it is ‘beyond the capacity of public policy procedures’ and the community to manage such complex systems because of the absence of knowledge see Mark Pennington, ‘Citizen Participation, the ‘Knowledge Problem' and Urban Land Use Planning’ (2004) 17(2-3) *Review of Austrian Economics*, 219. Pennington argues that the better way of dealing with uncertainties ‘may not be to deliberately plan for an “optimal” urban form, but to permit a wider variety of experiments in urban living.’ (emphasis in original)
a participatory culture in New South Wales it is clear that it will take leadership from political parties to both create and foster it. It is true, as Hirst suggests, that in theory governments ‘can do anything.’ But expecting government to share power with the people is perhaps asking too much.

The ideation that the people of New South Wales are the government is a radical ideology. The 1970s was the last time when the state would explore the possibilities for participatory structures in planning law. This quasi-revolutionary moment occurred because of pressure from the people. Under political threat, the Liberal Askin government would institute a broad ranging enquiry into the planning system which would result in the ‘green book’ which advocated ‘public decision-making’ be incorporated into land use planning. The power sharing proposals advocated did not garner enough support to become law. The revolutionary moment for local government to lead the way passed. Following the 2011 state election the planning system is poised at the cross-roads again.

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195 Alessandro Colombo, ‘The 'Lombardy Model': Subsidiarity-informed Regional Governance’ (2008) 42(2) Social Policy & Administration 177, 183-4. Colombo argues: ‘Classical political theorists from Althusius, to Alexis de Tocqueville, to John Stuart Mill expressed an analogous thesis: democracy itself depends on an active engagement by citizens in community affairs. A common denominator of those theories is that the welfare of the political system streams from the free, responsible and cooperative action of individuals (single or associated), and not vice versa: it is not the political system which gives individuals their dignity and capability to contribute to welfare. Political authority has the duty and right to respect this priority, and therefore to intervene in helping autonomous initiatives of society members and, of course, it has the responsibility to guarantee equal opportunities, and respect for the rules.’

196 Hirst, above n 49, 128-30. As Hirst ironically notes in discussing the adoption of compulsory voting, the theory was that: ‘Governments could do anything – even make apathetic men and women into citizens.’ Citing the parliamentary debate in 1924 and the speech of Senator Payne, Nationalist: ‘We must force those who live under that form of government to see that it is democratic, not only in name, but in deed.’ The bill was passed by both houses on the voices. If government can compel the act of participation in a ballot, to force people to be ‘citizens,’ then government can compel our participation in planning. The reality is that there are no votes in doing so.

197 Standing Committee Report, above n 10, 21. As the report notes: ‘Prior to the commencement of the EP&A Act, land use planning was dominated by central government and assisted by technical experts, with limited opportunity for public involvement in planning. The 1970s saw the outcomes of post war planning being questioned – both the high rise housing and inner city freeways and the low density suburbanisation, in Australia and worldwide. At the same time, the rise of resident action groups, movements for social justice and participation in government, environment and heritage protection and green ban movements in Sydney and Melbourne, all shaped a new climate for planning.’

6.5 Conclusion: Should s5(c) be repealed?

Axiomatically, when implementing social policy the government must have a legitimate reason to interfere with the property rights of the people. Normally that legitimacy would come from having a mandate to implement a social policy put before the people at the time of an election. A slogan is not a policy. Empowering local communities means nothing without legislative force. McAuslan identified three ideologies of planning but not the sequential nature of their development. The age of the ideology of private property has passed. Whilst neo-liberalism is making in-roads to public policy decision-making, land use planning remains firmly in the age of the ideology of public interest. For neo-liberalism to succeed, the government would have to decide to leave the field of play. It shows no propensity to do so. As for the public, apathy prevails. In that environment, how likely is it that planning issues will win votes?199 As was indicated in the introduction, the framing of the thesis of this research as a call to consider the repeal of section 5(c) of the EP&A Act was deliberate. It brings into relief the issue of whether or not planning laws should be made to advance the public interest (as interpreted by the government of the day) or to advance the cause of public participation.

In 1980, McAuslan saw the attempt to conflate in legislation these two mutually exclusive ideologies as the reason for the ‘confusion and disarray’ in the administration of planning.200 Historical analysis suggests that nothing has changed to alter that view. Until the government is clear as to its strategy for planning law, the confusion will continue. The examination of the use of parliamentary power in land use decision-making supports the thesis posed by Arnstein. Participation is all about ‘citizen power’.201 McAuslan’s formulations of the ideologies of planning remain valid, though they are best understood as perhaps reflecting a sequential development of the ideation of governance. McAuslan’s public participation ideology is open to the observation that it requires for its attainment a parliament that would legislate to create the mechanism that permits the voice of the people to resonate in the deliberations of the decision-

199 The Save Our Suburbs organisation is now the ‘Save Our State’ party at the 2011 State election. It fielded only two lower house candidates but boasted a team of seventeen in the Legislative Council. As its website www.saveourstate.org.au at April 2011, explains: ‘The party decided it could no longer ignore the shocking incompetence, sleaze and corruption shown by the New South Wales Government. Its expanded aspiration became cleaning up politics in New South Wales.’ It was unsuccessful in its attempt. It did not get sufficient electoral support to gain a seat in the Legislative Council. Indeed, the ‘No Parking Meters Party’ received almost four times the number of votes as the Save Our State Party.

200 McAuslan, above n 4, 269.

201 Arnstein above n 21, 216.
maker. Such a participatory model is yet to see its fulfilment in legislation. All that remains of the optimistic exhortation of 1945 to ‘make planning democratic,’ is the reference to participation in the objectives of the EP&A Act. If the purpose of planning law is to promote the ‘efficient’ administration of planning policy, then the legislative scheme should not promote participation (which is seen to be the anathema to efficiency). Nor should the legislation merely pay lip service to the concept of participation because that is the cause of confusion. An invitation to participate is emblematic of democratic processes. The empty rhetoric in section 5(c) of the EP&A Act is meaningless when the legislation is silent as to how participation will be achieved as a matter of practical and legal reality. Under the EP&A Act, the functional role of the public is only to be consulted; and even then, only when invited. This is a role firmly situated in Arnstein’s realm of tokenism.

If that is the strategy to be adopted by government, then in any reform of the EP&A Act, Section 5(c) and any reference to participation in the new legislation should be removed. Omitting such provisions would not deny the people rights that they currently enjoy (because they do not exist). It would make the EP&A Act more honest in its intent. As Aaron Gadiel of the Urban Taskforce said in evidence to the Standing Committee in 2009:

‘I think there is a tendency, in dealing with the law legislation, to sort of gloss over the objects of the Act, saying, “Don’t worry about the statement of principles. Lets us worry about the substantive provisions.” In some legislation that is okay because the objects of the Act are not harmful. In the Environment Planning and Assessment Act they are seriously harmful. They are used as the touchstone every day in the planning

202 McAuslan’s sentiment on the meaninglessness of public participation is echoed in the EDO 2010 Report, above n 3, 45, where it is stated: ‘The community must therefore be able to participate in a genuine and meaningful manner in relation to all aspects of the planning system, ranging from plan-making to development assessment and post-approval monitoring.’

203 Uhr, above n 22, 11, references Fiskin’s experiments of 1991 and 1995 described as ‘deliberative democratic polling.’ He suggests this as a possible device to open the policy process to force ‘elected policy-makers to account publicly for their decisions to accept or reject various community proposals’ as a means of creating greater accountability via participatory mechanisms. These mechanisms echo those outlined in the Green book published by the NSW government in 1974. Until such participatory mechanisms are legislated, lip service is all that is achieved by the legislative mechanism.

203 This is highlighted by the recent decision of Justice Craig to overturn the Ku-Ring-Gai Town Centres plan –see *Friends of Turramurra Inc v Minister for Planning* [2011] NSWLEC 128. The court noted that there were more than 1800 submissions received in relation to the draft plan. Despite these submissions, what invalidated the plan was the making of amendments to the draft plan after exhibition by the panel and the Minister, without referring the amended plan back for exhibition. In the view of the court, the changes had the effect of making the plan, as made, different in ‘important respects’ thereby vitiating the plan as a matter of administrative law. Re-exhibition of the plan with those changes would have led to a validly made plan notwithstanding the submissions. The legal foundation for the challenge would have been taken away.
system for public servants, the Land and Environment Court, panels. They are constantly referred to and cited.\textsuperscript{204}

It would be lamentable if that is the outcome of any reform. Planning ought not to be the preserve of central administration. The functional operation of planning laws requires that the mechanisms for determining planning policy and decision-making reflect ‘the public interest’ and not self-interest of the political elite. Public participation in planning is not antipathetic to the concept of good planning. However, participation is radical in its ideology. Participatory mechanisms challenge the status quo. It is more than exercising a ‘veto’ over development that is to occur in the neighbourhood.\textsuperscript{205} Participation envisages open, accountable government. It involves the deliberate selection of the strategy of conscious choice over the abrogation of decision-making to the unconscious mechanism of the market. To implement participatory legislation, the government must alter its current strategy and determine that the present paternalistic approach to the exercise of planning powers should be changed to a model that favours citizen participation. The government must be prepared to trust the people and not just a committee of hand picked experts.\textsuperscript{206} It is recognised that such an approach is inconsistent with the government’s manifest intention to retain the power over planning within the discretion of the executive branch of government.\textsuperscript{207} Without political force (or courage), the current state of affairs will not be altered.\textsuperscript{208}

Where there is a concentration of power, it can be used ‘despotically’ in the sense that where it is the state which defines the public interest, those subject to the law may have no recourse to justice.\textsuperscript{209} Even where there is a sophisticated legal system, courts cannot make up for an

\textsuperscript{204} Standing Committee Report, above n 10, 35.
\textsuperscript{205} 2007 Discussion Paper, above n 12, 19:
‘There is sometimes an expectation that the community should be entitled to veto development even when such development complies with the planning and development controls of an area.’
\textsuperscript{206} Whilst this is the recommendation of the standing committee, there are alternatives. For example, Wiseman, above n 3, 59-60 suggests that: ‘A world of complex relationships requires learning a great deal more about new ways of involving and engaging citizens, communities, community organisations, businesses – and government – in making and implementing policy.’
\textsuperscript{207} Cavalier, above n 49, 56. Cavalier argues that in New South Wales, the Labor Party has: ‘elected to disconnect the parliamentary parties from the party membership so as to become a spaceship … to suspend democracy in favour of imposing liegemen in safe seats’ such that by patronage, ‘MPs possess a minimal connection to the ALP except as an acquired taste.’
\textsuperscript{208} Ahmed, above n 112, 11. Ahmed argues that ‘the continuing vigour of our democracy depends, in part, on local government playing a more important role in providing services and innovative solutions. Strengthening councils is crucial to reconfiguring our democracy.’
\textsuperscript{209} Aroney, above n 134, 219. Aroney cites Lord Acton’s aphorism in support of the argument that when power is consolidated into the hands of the few, ‘it tends to corrupt.’ Farrelly suggests that the system created by the former minister Sartor was ‘classic narcissism’ - see Elizabeth Farrelly, ‘A plan for more tinkering with rules’, \textit{Sydney Morning Herald} (Sydney), 28 November 2007, 13:
absence of laws made to advance the public interest. The role of the court is to uphold the laws made by the state. This creates a dilemma for the courts.\textsuperscript{210} Courts are subject to the rule of the state.\textsuperscript{211} As Gleeson and Low suggest, in those circumstances, resort to the court places the court in a position where it must support parliament to ‘control the threat of democracy.’\textsuperscript{212}

St Augustine is attributed with the pithy saying ‘and if justice is left out, what are Kingdoms except robber barons?’\textsuperscript{213} Unless the law, at a procedural level, provides a mechanism which enables those affected by the law to effectively engage the state and thereby to alter the outcome of a matter under consideration, then the state has taken rights both without consent and without compensation. Webster and Lai view this type of state action as a violence by the state against the individual citizen.\textsuperscript{214} McAuslan argued that a right to participate is meaningless if ‘the planning authorities [are] able to determine the extent and mode of participation.’\textsuperscript{215} If that is correct then the state, by stifling participation, takes from the people a most valuable right, the

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‘Construct a system to which you are personally central. Practise the rhythmic giving and withholding of your beneficence within that system and watch the ripples flow. Ensure that everybody else in the system has responsibility without power. Then when there are complaints, blame failures and delays on the total incompetence by which you are surrounded.’

The extent of this power is highlighted in Jano Gibson, Andrew Clennell and Alexandra Smith, ‘How donor’s project got Sartor’s ear’, \textit{Sydney Morning Herald} (Sydney), 28 February 2008, 1. It was reported that: ‘The Planning Minister, Frank Sartor, took control of a major Labor Party donor’s $51.7 million residential development in Burwood shortly before he appointed an independent planning panel to assess all other similar development in the suburb.’ Subsequently, six ‘major developments personally approved by former planning minister Frank Sartor’ were referred to ICAC - see Matthew Bens, ‘Greens push for ICAC to review Sartor deals’, \textit{Sydney Morning Herald} (Sydney), 14 September 2008, 1. Ms Hale of the Greens was quoted as saying: ‘Nearly $900,000 has changed hands between these developers and the NSW ALP. All of them have received favourable decisions from Mr Sartor or his department, in at least three cases against independent advice.’

\textsuperscript{210} Uhr, above n 22, 75-6. As Uhr says, ‘courts are only permitted to recognise rights which parliament itself has declared.’

\textsuperscript{211} As Wiseman, above n 3, 59, suggests:

‘the complex challenges of combining democratic legitimacy, social inclusion, environmental sustainability and economic prosperity will not be solved by a simplistic faith in competitiveness – any more than by a simplistic faith in central planning or local self-help.’

\textsuperscript{212} Gleeson and Low, above n 11, 143.

\textsuperscript{213} It is acknowledged that the planning system is not meant to deliver justice. However the system should have integrity and accountability. As Farrelly argues, see Elizabeth Farrelly, ‘Clean up this mess: put planning on a pedestal’, \textit{Sydney Morning Herald} (Sydney), 10 September 2009, 11: ‘The answer is not a new planning act. The answer is to elevate planning … to make a long term plan that only Parliament can change, and to apply it fairly and honestly.’ If we did that, maybe the people would be happier with the planning outcomes? Bagaric et al, above n 162, 4, have an alternate perspective on justice. They suggest:

‘Happiness is a more relevant and important benchmark than justice because, despite the thousands of years that have been spent examining the notion of justice, its meaning remains vague and indeterminate and hence provides little guidance on important issues. Moreover, justice is less important than happiness. Who needs justice if we are all happy?’

\textsuperscript{214} Webster and Lai, above n 3, 23. And see chapter 2.6 above.

\textsuperscript{215} McAuslan, above n 4, 20.
right to determine the nature and extent of development that is to occur in their
neighbourhood.\footnote{216}{It is axiomatic that planning laws override property rights and, in a de facto sense, suggest a taking of rights. When it comes to assessing the value of the right surrendered, the ‘compensation’ for the taking could arguably be said to be the right to participate in the collective decision about the nature and type of development to occur in the neighbourhood. Where the right to meaningfully participate is denied, then there has been a taking without consent.}

Roman civilization is historically acclaimed as a civil society. It operated under market conditions. But it was an unequal and tyrannical society. It denied the people a voice in its civic affairs. Nineteenth century England saw a flowering of libertine principles, but it could not be said to be a democratic society. Patronage and self-interest still ruled in the corridors of power. There is a difference between governance and participation.\footnote{217}{As Bentley, above n 190, 14 explains, one response of the people to globalisation is a ‘demand to know how government and the public realm will help them to face the exposure and insecurity that [globalisation] creates’. … It is why the politics of the community is now taking centre stage.’}

The successive reforms to the EP&A Act have entrenched an exclusionary dynamic in the land use planning system of New South Wales. Until this state of affairs is redressed by law, a tyranny of sorts prevails, at least that is what media commentators suggest.\footnote{218}{The Hon Brad Hazzard MP, Minister for Planning & Infrastructure, ‘Overhaul of the Planning System heralds a new era in NSW’ (Media Release, 12 July 2011): ‘The removal of legal recourse is packaged as providing cheaper dispute resolution for “mum and dad developers”. But Sartor has been at war with councils and the Land and Environment Court since his lord mayoral days. He’s really replacing a system of arbitrators he cannot control – councillors and judges – with a system of hired consultants, summarily sackable by him, no reason given.’}

The new government has announced an overhaul of the planning system.\footnote{219}{Manning Clark, above n 54, 408. We can look to history for local examples. Clark cites Alfred Deakin, one of the architects of federation and Prime Minister from 1903-1908, who is said to have told the delegates to the Federation Convention of 1897 that: ‘they were faced with a difference between those who had faith in the wisdom of the people and those who believed in the right, perhaps the divine right, of the few to rule.’}

\footnote{220}{To legislate for participatory mechanisms, the same sort of vision is required.}

But to sever the Gordian knot to create a participatory process the people will need a champion in parliament. Like Wilberforce did with slavery, the people need a politician to challenge parliament to embark on a process of engagement that creates a participatory culture.\footnote{221}{As Kenneth Clark It is axiomatic that planning laws override property rights and, in a de facto sense, suggest a taking of rights. When it comes to assessing the value of the right surrendered, the ‘compensation’ for the taking could arguably be said to be the right to participate in the collective decision about the nature and type of development to occur in the neighbourhood. Where the right to meaningfully participate is denied, then there has been a taking without consent.}

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\footnote{218}{Wendy Frew, ‘Warning: Sartor’s new laws invite graft’, \textit{Sydney Morning Herald} (Sydney), 2008, 2. Quoting John Mant, ‘an eminent urban planner,’ the report suggested that the 2008 reforms ‘will increase the risk of corruption and leave communities with less control over planning decisions.’ And see Elizabeth Farrelly, ‘It’s D-day for democracy, developers and design’, \textit{Sydney Morning Herald} (Sydney), 11 June 2008, 11: ‘The removal of legal recourse is packaged as providing cheaper dispute resolution for “mum and dad developers”. But Sartor has been at war with councils and the Land and Environment Court since his lord mayoral days. He’s really replacing a system of arbitrators he cannot control – councillors and judges – with a system of hired consultants, summarily sackable by him, no reason given.’}

\footnote{219}{The Hon Brad Hazzard MP, Minister for Planning & Infrastructure, ‘Overhaul of the Planning System heralds a new era in NSW’ (Media Release, 12 July 2011): ‘The review will also create a planning system that protects local communities from overdevelopment and conserves our environment.’}

\footnote{220}{Manning Clark, above n 54, 408. We can look to history for local examples. Clark cites Alfred Deakin, one of the architects of federation and Prime Minister from 1903-1908, who is said to have told the delegates to the Federation Convention of 1897 that: ‘they were faced with a difference between those who had faith in the wisdom of the people and those who believed in the right, perhaps the divine right, of the few to rule.’}

suggests, civil society requires the confidence of the people in the state.\textsuperscript{222} If the state wants to give the people confidence that they can participate, then the legislative scheme needs to reflect that deliberate strategy of government. The task is formidable.\textsuperscript{223} In order for the powerless to succeed in this struggle, the mechanisms created by planning laws will need to ensure, as Gleeson and Low suggest, that the ‘voices which are normally silent are heard.’\textsuperscript{224}

But the corollary to this proposition is that in order for the people to ‘rise up’ they must decide to actively participate in the affairs of governance. Yes, that may seem like the mob will rule; but isn’t that the ‘beauty’ of democracy?\textsuperscript{225} Arnstein argued that power is not given by city hall. Sharpe posits that the people will have to ‘learn how to take that freedom.’\textsuperscript{226} The people of New South Wales await their own republican moment – ‘an extraordinary moment when broad segments of the public are intensely involved with an issue.’\textsuperscript{227} If the people of New South Wales truly want increased opportunities for public involvement and participation in planning, then they will need to stop blaming politicians.\textsuperscript{228} The people need to decide to abandon the rate-payer ideology. They need to become ‘self-conscious citizens.’\textsuperscript{229}

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\textsuperscript{222} Kenneth Clark, \textit{Civilization}, cited in T. Cahill, \textit{How the Irish Saved Civilization} (1995), 59.: ‘Civilization requires a modicum of material prosperity – enough to provide a little leisure. But, far more, it requires confidence in the society which one lives, belief in its philosophy, belief in its laws and confidence in one’s own mental powers.’

\textsuperscript{223} See Ted Mack, 'Electoral system provides only an illusion of democracy', \textit{Sydney Morning Herald} (Sydney), 20 August 2010, 15. Mack despairs of the democratic process: ‘the shocking fact [is] that improving democracy has few champions – certainly not political parties or their partisan supporters; their only interest is in winning and preserving the political duopoly. Not big business; it spends vast quantities of money and lobbyists to subvert democracy. Not the media, dominated by journalists who have become celebrities.’

\textsuperscript{224} Gleeson and Low, above n 11, 153.

\textsuperscript{225} Keane, above n 33, 581. Keane quotes the 1947 House of Commons parliamentary debate over the future powers of the House of Lords. In this debate Churchill famously states: ‘No one pretends that democracy is perfect or all wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time; but there is the broad feeling in our country that the people should rule, continuously rule, and that public opinion, expressed by all constitutional means, should shape, guide, and control the actions of Ministers who are their servants and not their masters.’

\textsuperscript{226} Sharp, above n 74, 78: ‘The oft quoted phrase “Freedom is not free” is true. No outside force is coming to give oppressed people the freedom they so much want. People will have to learn how to take that freedom themselves. Easy it cannot be.’

\textsuperscript{227} Faber, above n 221, 66. See also Pope, above n 16, 293: ‘Not only do republican moments upset systems-thinking, they also violate the axiom that ours is a system of representative government in which, according to Publius and others, the people have no direct role. During republican moments, social movements exert direct popular power on governmental and private institutions.’

\textsuperscript{228} Bentley, above n 190, 17. As Bentley suggests, ‘we need to pay attention to the ways in which the everyday acts of citizenship contribute to the cumulative possibilities of politics, and to the quality and transparency of the public domain.’
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Demanding the repeal of section 5(c) may not be the clarion call, but its repeal will signal that unless voices are raised, the government will own the neighbourhood and define its umwelt.

229 Hirst, above n 51, 27: ‘Australia still awaits the moment when its natural democrats will become self-conscious citizens.’
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