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Amenity enhancement and biodiversity conservation in Australian suburbia: Moving towards maintaining indigenous plants on private residential land

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Abstract

Purpose – The purpose of this paper is to critically explore the historical background and current approach of the most common statutory instrument to maintain green landscapes in private residential gardens in cities and townships in suburban New South Wales (NSW), Australia.

Design/methodology/approach – The narrative presents a transdisciplinary study. While its emphasis is on law and town planning, it also encompasses local government and legal history while touching upon environmental management and ecological science. This panoply of areas reflects the sheer complexity of the topic. While the presentation is initially descriptive, it moves on to a critique of the NSW Government's recent statutory approach.

Findings – The paper demands that further attention must be paid to improving the design and architecture of statutory plans and underlying policies to not only improve urban biodiversity but also retain, as far as practicable, the visual beauty of the suburban landscape. This means reliance on local government to devise their own acceptable approaches. Flexibility rather than rigidity is warranted.

Originality/value – The amount of scholarly material on this topic is relatively rare. The majority of information relies on excellent on-ground research and experience on the part of local experts, namely council employees and consultants. Academic and practical material must be drawn together to improve biodiversity conservation at both the local and regional spheres.

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Amenity enhancement and biodiversity conservation in Australian suburbia

Moving towards maintaining indigenous plants on private residential land

Introduction

Effective management and conservation of Australian urban bushland is paramount. It deals with both amenity and biodiversity conservation. After early European settlement (Frawley, 1992; Heathcote, 1972), however, maintenance of native vegetation was seen as needless. Land clearance for agricultural purposes to feed the burgeoning colony of New South Wales (NSW) was far more critical. Indigenous trees remained in gullies and sideslopes which were difficult to develop (Schoer, 1983; see also Ives *et al*, 2010; Ives *et al*, 2005; Burgin, 1995). These areas often became public reserves. This suited residents in affluent suburbs who were able to view spectacular indigenous tree species, such as the angophora costata (Sydney red gum) nestled into steep Hawkesbury sandstone, from their front porches. They were at a safer distance from dangers such as falling branches or brown snakes. At the same time, householders could also reproduce their own picturesque and safer English-based gardens on their own land as an extension to their residential buildings (Hall, 2010).

Since the late 1960s, 'modern environmentalism' challenged the above perspectives by a raft of potentially protective law, policies, community action and public education. But the results have been far from uniform. Consider the difference, for example between environmental eruptions (Powell, 1983), such as building dams and coal mining, to protecting suburban ecology on street verges. Yet as Kirkpatrick (1994: 47) observes, 'some of the rarest plants are now confined to bush remnants in cities' (see also Ruming *et al*, 2012; Ives *et al*, 2011; Hall, 210). There is also a constant onslaught of weeds (McKinney, 2002). It is the suburban sphere administered by local government, especially private open space – i.e. residential gardens - that is the nub of this paper. Of course, residential occupants can use their front and backyards according to their preferences (Head and Muir, 2007), such as

planting vegetables, establishing playgrounds and creating and/or maintaining their gardens with a mixture of indigenous and exotic plants. The aim is to explore one statutory means to preserve vegetation on private open space, namely the regulatory 'Tree Preservation Order' (TPO).

TPOs provide a key mechanism in attempting to maintain 'green amenity' throughout Australian suburbs and townships. Discussion is limited to NSW; the nation's most populous of the six States with Sydney, the first British settlement, as its capital. As will be seen, TPOs have derived from UK legislation. Yet each Australian jurisdiction has its own formulae to protect residential vegetation. While the same basic principles apply across the continent, each State or territory has its own regulatory details and idiosyncrasies. For instance, TPOs in NSW have recently been rebadged as instruments for 'Preservation of trees or vegetation' (PTV) (see *Environmental and Planning Assessment Act 1979* (NSW) (EPAA), section 33A; Standard Instrument – Principal Local Environmental Plan, Preservation of trees or vegetation, clause 5.9). Its statutory objective is 'to preserve the amenity of the area, including biodiversity values, through the preservation of trees and other vegetation' (see clause 5.9(1)). As a result, it aims to embrace *both* enhancement of amenity and biodiversity conservation. The language suggests that the two very different concepts can coincide.

As the narrative concentrates on residential lands, there are various related ways in which front and back-yards can conserve local vegetation. For example, the approval of a new (or extended) building or residential subdivision might demand the retention of allocated trees on the site. This is likely to lead to certain vegetation being marked or even fenced for protection as indicated on the site plan. Alternatively, the plan might indicate where new specified trees must be planted as a result of others being destroyed. The consent might involve both situations. In contrast, the TPO/PTV arises when a tree or vegetation is intended to be removed or damaged, or even after this has unlawfully occurred. It crops up at a different stage, often when a dwelling was built some time ago. It relates to approval of vegetation 'loss' rather than the perceived 'benefit' of new development. At the same time, built development tends to reduce land for economic improvement. As cities expand, residential front and back-yards are becoming smaller while houses are larger (Hall,

2010; Hall, 2007). At the urban periphery, the relentless 'urban sprawl' marches onward 'across far-flung suburbia' with scant opportunity to maintain green amenity let alone encouraging biodiversity (Kelly and Little, 2011: 174). This adds further fuel to the need to consider the potential role of TPO/PTVs.

This article contains several limitations. Firstly, the paper does not cover rural areas where the *Native Vegetation Act 2003* (NSW) (NVA) overrides the TPOs and PTVs (see Ogle, 2011; Farrier *et al*, 2007). The NVA provides a far more complex and complex system than TPOs with its potential for offsetting biodiversity conservation and property vegetation plans to avoid the approval process. In contrast, TPOs are an almost ancient device relating to local urban landscapes alone. Secondly, there is no reference to the role of the Commonwealth due to its narrow express legislative powers in the environmental field. As a result, the paper focuses on *local* government, which is not only the creature of State Parliaments but is closer to the environmental coalface.

Historic Background

Exploration of current local government law demands consideration of the past (Wilson and Game, 1998). This is certainly the case with Britain's wartime *Town and Country (Interim Development) Act 1943* (UK) (T&CD Act 1943) which, for the first time, presented the option for local governments to adopt TPOs (Booth, 2003). This arose well over thirty years since planning law was introduced in 1906, which then launched the preparation of 'Planning Scheme Ordinances' (PSOs) containing land-use controls. But the T&CD Act 1943 at section 8(1) enabled an authority to insert provisions under an 'interim protection order' into an existing PSO for 'preservation of trees or woodlands'. In relation to a situation where a PSO was incomplete, TPO provisions could be added into the compulsory interim plan. In both circumstances under section 8(1)(a), the instrument prohibited, subject to exemptions, 'the cutting down, topping, lopping or willful destruction of trees' without consent. As will be seen, a similar version was soon grasped by Australian urban local authorities. Other than addressing war-time urban destruction, the T&CD Act 1943 commenced amenity-based provisions by protecting 'historic buildings' and 'introduction of the list as a means of identifying buildings of significance' (Booth, 2003: 95-6). In

considering the Bill, the House of Lords paid minimal attention to the TPO provision. The Lord Chancellor ranked it as falling into the basket of clauses that needed no explanation. Accordingly, its introduction must have been widely acceptable.

Prior to the T&CD Act 1943, a series of statutes had already embedded land-use planning law. The first was the *Housing, Town Planning, etc Act, 1909* (HTP Act 1909) which, despite its emphasis on improving housing, introduced zoning provisions to Britain for the first time (Booth and Huxley, 2012). Whilst its application was limited, it embraced the elusive term of *amenity* into the planning equation with the 'general object' being to 'secur[e] proper sanitary conditions, amenity and convenience in connection with the laying out and use of the land' (see section 54(1). Amenity has not been defined in British legislation (Booth, 2003; Cullingworth, 1967), which has carried through to Australia. It has always been glued in evaluation of developments (Stein, 2000; Punter, 1986; Smith, 1974) despite its elusive nature (Kelly and Little, 2011; Smith, 1974; Wilcox, 1967; Minister of Local Government and Planning, 1957).

In introducing the Bill, John Burns, the President of the Local Government Board, asserted that the impending legislation would 'secure, the home healthy, the house beautiful, the town pleasant, the city dignified and the suburb salubrious' (Parliamentary Debates, UK House of Commons, *Hansard*, 960-61, 12 May 1908). Such promises received mixed praise (Booth, 2003; Cherry, 1996; Herbert-Young, 1988; Sutcliffe, 1988). Ashworth (1954: 234) goes as far as describing the HTP Act 1909 as suffering from 'still-birth'. Notwithstanding this, the HTP Act 1909 was a pioneer in providing the first step towards the *Town and Country Planning Act 1932* which extended planning regulation to cover existing developed areas as well as those handpicked for growth (Cherry, 1996; Cullingworth, 1967). While introduction of TPOs waited until 1943, the system was substantially rewritten by the *Town and Country Planning Act* of 1947 (while retaining the TPO). Australian jurisdictions, however, were to cling to Britain's *pre-1947* regulatory approach in setting up their own individual planning systems (Wilcox, 1967).

Fogg (1985: 260) regards planning schemes made under the UK's 1925 and 1932 Acts as the 'progeny' to Australian zoning plans. Auster (1985: 6) tracks the

beginnings of statutory zoning plans to the pioneering Acts of 1909 and 1919 that comprise 'part of Australian planning history'. But three further facets influenced the notion of urban amenity in early NSW planning law. Firstly, in 1909 the NSW Government instituted the *Royal Commission into the Improvement of Sydney and Suburbs* which, according to Gibbons (1980), was inspired by aspects of the HTP Act 1909. While improvement of roads and railways represented crucial factors, town planning and beautification were close to the top as well. This emphasis on aesthetics is also raised by Sandercock (1975), in addition to social and hygienic improvements (Winston, 1957). Whilst these issues might be regarded as minimal in contrast to the burgeoning British cities, especially London, early Sydney endured similar problems writ-small. All these issues assisted the subsequent underpinning of a planning system encompassing TPOs.

Secondly, although the NSW Parliament initiated compulsory municipal incorporation over most of NSW under the *Local Government Act 1906* (NSW) (LGA 1906) (apart from the arid Western Division excluding several townships; see Bains and Miles, 1981), it was the *Local Government Act 1919* (NSW) (LGA 1919) lasting for over seventy years where the State Government handed over fundamental tasks such as subdivision and building control (Wilcox, 1967). One important feature hailed by Spearritt (1978) as the most admired clause was section 309 which enabled proclamation of 'residential districts' (see also Proudfoot, 1992). Freestone (2010: 19) describes the residential district as a rudimentary type of zoning that could prohibit unwanted land-uses. Whilst it did not explicitly control vegetation, it introduced a theme of green residential amenity. Interestingly, the LGA 1919 was introduced by John D. Fitzgerald, the Minister for Local Government, who was a key political champion for town planning across the nation (Freestone, 2010; Freestone, 2000). Both this and the previous issue manifested aspects of the Garden City movement (Freestone, 1989).

Thirdly, in wealthy and leafy local government areas such as Ku-ring-gai on Sydney's green North Shore, some citizens took part in establishing vegetated parklands (Curby and Macleod, 2006; see also Mathews, 1978). Wahroonga Progress Association, for instance, inaugurated a voluntary property tax scheme for amenity purposes before the Ku-ring-gai Shire Council was incorporated under the

LGA 1906 (Curby and Macleod, 2006). Sandercock (1975: 202) argues that 'protecting residential amenity of upper-middle-class suburbs' was encouraged by a conservative State legislature. Members of the municipal electorate were able to enmesh amenity into their neighbourhoods in parallel with the arrival of voluntary TPOs when more solid planning legislation arrived in 1945. The *Local Government (Town and Country Planning) Act 1945* (NSW) inserted 'Part XIIA Town and Country Planning Schemes' into the LGA 1919 (Part XIIA), enabling NSW councils to prepare their own draft PSOs following the English tradition. Of particular interest is that the opportunity to prepare TPOs in NSW arrived very soon after the T&CD Act 1943 was enacted. The English TPO badger was soon translated into the NSW TPO bandicoot.

Early Planning Instruments and Tree Preservation Orders in NSW

According to Wilcox (1967), the first local instrument in the Sydney basin was the 1960 Penrith PSO at Sydney's western edge at the foot of the majestic Blue Mountains. Not only was there a general lack of aldermanic interest in town planning but inadequate staff expertise (Burdess, 1984; Ross, 1966). Any momentum had to rely on the keenness of local individuals within or outside local councils this was despite the Minister Cahill's statement to Parliament that '[t]he need for adequate town and country planning machinery is now so insistent, having regard to the need for the orderly regulation of post-war development and for the correction of the evils of the largely haphazard and uncontrolled development of our cities, towns and villages in the past, that satisfaction of these needs can no longer be denied' (Parliamentary Debates, NSW Legislative Assembly, *Hansard*, 8 February 1945, 1720). Part XIIA did little more than authorise preparation of PSOs which, similar to the English experience, were to become inflexible 'two-dimensional zoning plans' (Ledgar, 1976: 204; see also Colmon, 1971).

Notwithstanding the above, a *regional* PSO was produced under the *Local Government (Amendment) Act 1951* (NSW) known as the County of Cumberland Planning Scheme Ordinance (CCPSO). This was 'never ... intended ... [to] be the ultimate scheme' but a statutory document to restrict land-use until individual councils prepared their own PSOs (Wilcox, 1967: 191; see also Winston, 1957). Of

specific interest is that the CCPSO contained the first TPO clause in NSW. Clause 40(1) authorised that '[w]here it appears to the responsible authority that it is expedient for the purpose of securing amenity or of preserving existing amenities it may for that purpose make an order (hereinafter referred to as a tree preservation order)...'. Furthermore, shadowing the UK terminology reasonably closely, clause 40(2) stated that the TPO 'may prohibit the ringbarking, cutting down, topping, lopping, removing, injuring or willful destruction of any tree or trees specified in such [an] order'. The emphasis was clearly on strict regulation to maintain amenity. Whilst the Cumberland County Council was dissolved in 1963 due to State political discomfort (Harrison, 1972), the CCPSO was to apply to patches of land for many years. It served to shape zoning patterns and other controls in subsequent plans (Whitmore, 1981). In addition, the CCPSO contained the controversial Green Belt Area Zone around Sydney's periphery which emphasised aesthetics and scenery. Freestone (1992: 72) describes it as an 'antidote for promiscuous urbanisation'. But while the green belt was to be gradually eroded away, TPO provisions were to persist.

The CCC was replaced by the State Planning Authority (1964: 19) which, in its first Annual Report, referred to the forthcoming power of local councils to 'issue and enforce' TPOs. There is little surprise that Part VI of Penrith PSO, called 'General Amenity and Convenience', contained provisions for 'Places of scientific or historic interest', 'Foreshore building lines' and, at clause 44, 'Preservation of trees'. The provision was a virtual facsimile of clause 40 of the CCPSO which itself followed Britain's basic methodology. Another similar example is City of Sydney PSO made in 1971, wherein Part VI 'General Amenity and Convenience' held sections on 'Foreshore Scenic Protection Areas' and, unsurprisingly, 'Preservation of trees'. Whilst a handful of rural PSOs had already been gazetted outside the County of Cumberland, interest in amenity and TPOs was generally minimal outside townships.

Similar if not identical versions were later enshrined in pre-1980 PSOs and Interim Development Orders (IDOs). The IDO, again reflecting British planning language, was designed to be a standard zoning instrument laid down by the Minister if preparation of a PSO was moving too slowly or not at all. Despite its name, the IDO became an almost permanent form of control in many areas (Sorensen and

Cunningham, 1985). It provided a convenient vehicle for the State Government to impose land-use regulation on uninterested councils. One feature of these IDOs was TPOs that adhered to the CCPSO formula. Throughout residential suburbia, TPOs became entrenched as a 'green' planning sub-tool.

Arrival of the *Environmental Planning and Assessment Act 1979* (NSW)

The *Environmental Planning and Assessment Act 1979* (NSW) (EPAA) was the direct result of 'modern environmentalism'. Whilst it overrode Part XIA of the LGA 1919, countless PSOs and IDOs were to remain until overtaken by novel planning instruments made under the EPAA. The new local instrument was the 'local environmental plan' (LEP). The novel statutory flavour was *environmental* planning. Toon (1984: 185) refers to a language of 'environmental conservation' (see also Stein, 1998). In introducing the EPA Bill, Minister Landa emphasised broadening the 'scope of planning effectively to embrace ... ecological considerations in the preparation of environmental plans and development control' (Parliamentary Debates, NSW Legislative Council, *Hansard*, 21 Nov 1979, 3346). In one of the pre-discussion papers, Minister Fuller (1974: 8, 10) observed that PSOs had 'tended not to consider adequately the environmental consequences of land-use decisions, and the strong connection between the development and environmental conservation'. The aim was to move beyond strict land-use zoning provisions to consider environmental factors. Improvements included submission of 'environmental impact statements' in certain circumstances, wider opportunity for public participation and the ability for all citizens to seek judicial review against a council's decision before a specialist Land and Environment Court (LEC).

This 'modern environmentalism' paradigm did not, however, extend to TPOs. There is no evidence of any TPO review at that time. The amenity-based formula was set in stone. Fresh TPO clauses were either contained in a convenient set of standardised 'Model Provisions' made in 1980 (pursuant to EPAA section 33), which was the most common and easiest approach, or injected into the LEP itself. If the second option was chosen, councils could invent their own instruments 'often with minor or indeed major variations' (Whitehouse, 2012: 270). Unless a council was enveloping

indigenous plant conservation into its LEP, including its TPO, in addition to other mechanisms, the green outlook was dismal. Furthermore, despite any devotion to modern environmentalism, TPOs based on the Model Provisions were aimed to enhance amenity alone. Clause 8(1) of the Model Provisions which directly related to TPOs followed its predecessors, again going back to the CCPSO (Kelly, 2006). The 1980 and 1951 provisions were almost indistinguishable.

Curiously, more flexibility occurred in designing other clauses in LEPs. For example, in Wagga Wagga - Australia's largest inland city other than Canberra - the first LEP contained no prohibitions at all within its zonings (see Wagga Wagga LEP 1985). As a result, the council could lawfully approve a tannery in the main street. But this, of course, was highly unlikely. Prevention of a tannery relied on a Development Control Plan (DCP), a *policy* instrument made pursuant to the EPAA to add more details to the LEP. Despite professional interest, the concept of such elastic plans was not to last (see Dawkins, 1985; Auster, 1983). Construction of local plans is now far more rigid.

Environmental planning concepts moved well beyond the 'environmental eruptions' (see above) that helped spark the EPAA and its counterparts across the country. Beder (1993: 18) refers to sustainability, or the Australian version of 'ecologically sustainable development' (ESD), as the 'second wave' of modern environmentalism. ESD has since made its way into statute (see, for example, Stein and Mahoney, 1999). Interestingly, it has not been defined by legislation in NSW. Instead, it is outlined by four sub-principles, including biodiversity, which states simply that 'conservation of biological diversity and ecological integrity should be a fundamental consideration' (see *Protection of the Environment Administration Act 1991* (NSW), section 6(2)), which has been readily adopted by other statutes including the EPAA). More recently, environmental paradigms have graduated to become more global in nature, especially in global warming. Despite increased attention to conserving biodiversity, scant attention has been paid to redesigning TPOs until more recently. The reference in Boyd's well-known manuscript *The Australian Ugliness* (1960: 95) to 'aboraphobes' with the 'municipal axe and saw' and 'the subdivider wreck[ing] his little piece of Australia' was to survive but on a thinner rope. While there has been an

attitudinal shift at the broader scale, sad decisions are still made at the local level especially in outer Sydney.

In the late 1980s, the State Government considered redesigning the Model Provisions where TPOs were directed at *both* amenity and nature conservation. Draft clause 28(2) was to require consent for 'any action [to] ringbark, cut down, top, lop, remove, injure or destroy a tree' together with 'an assessment of the importance of tree or trees' with respect to, *inter alia*, 'scenic or environmental amenity' and 'vegetation systems and natural wildlife habitats'. This indicated confidence that two aspects could coincide. Unfortunately, the draft failed to reach policy or law. Instead, devoted individual councils had to take the lead.

Opportunity for creative and ecologically focused TPOs surfaced with some councils who chose not to follow the archaic Model Provisions. An example is Sutherland Shire LEP 2006 (SS LEP 2006) in Sydney's south, situated between the Georges River that flows into Botany Bay and the Port Hacking. Clause 56(1) of SS LEP 2006 cites its objective as 'to ensure the protection of trees and bushland vegetation that are fundamental to the conservation of biodiversity'. The provision contains no reference to amenity at all. Nevertheless, it echoes the regulatory nature of early TPOs by declaring that one 'must not ringbark, cut down, top, lop, remove or willfully destroy any tree or other vegetation' without permission (clause 56(3)). The items of vegetation listed for protection are listed in a DCP. Sutherland Shire Council's general approach is scarcely unique. The emergence of environmental officers across urban local government since the mid to late 1980s with sufficient resources and community support has assisted the planning system to stretch beyond its English origins. Yet the beauty of Sydney's indigenous flora, such as the Sydney red gum, undoubtedly adds to the amenity in the Sutherland Shire and elsewhere. The strength of emerging ecologically based TPOs depends, of course, on staff expertise, adequate financial support and a willingness to take legal action against disturbance or destruction of listed trees and vegetation. Good architecture of TPOs/PTVs is vital if suburban biodiversity is to be achieved.

The Inflexible LEP Template

Unfortunately, the flexibility of TPO provisions as exhibited by advocates such as Sutherland Shire Council has been stifled as a result of insertion of section 33A into the EPAA in 2006. It sets down a slab of standard provisions that each council must adhere to in preparing its draft new LEP. This instrument, cited as the 'Standard Instrument – Principal Local Environmental Plan', is generally known as the 'LEP template'. It is the modern version of the Model Provisions of 1980. The LEP template was preceded by a discussion paper issued in 2004 including a proposed clause entitled 'Preservation of trees' (Department of Infrastructure, Planning and Natural Resources, 2004). Apart from a small mention in relation to pruning, there was no reference to amenity notwithstanding eleven other references throughout the instrument. Neither was there any specific referral to biodiversity conservation. While there were proposed provisions on 'heritage conservation areas' and a council's 'Significant Tree Register', these scarcely addressed management of local of ecological communities. Moreover, the regulatory phrases reflected its antecedents by banning a person to 'cut down, top, lop, prune, remove, injure or willfully destroy at tree' subject to consent. As usual, exceptions applied.

The 2006 LEP template substantially reframed the draft 2004 model. The title of (the then) clause 32 that commenced the new PTV widened the protective net to shrubs and saplings. Perhaps this was accelerated by progressive councils that had been willing to move beyond the traditional formulae. There was no reference at all to TPOs. Yet clause 32(1) stated the objective as 'to preserve the amenity of the area through the preservation of trees and other vegetation', thereby embedding amenity as the main goal. The instrument stated that a person 'must not ringbark, cut down, top, lop, remove, injure or willfully destroy any tree or other vegetation' as prescribed in a DCP, without consent (former clause 32(3)). Insertion of the provision was originally subject to the whim of each council. The wording, however, if adopted, remained fixed. Any council that was eager to adopt a 'greener' type of amenity had to convince the Minister to amend the 2006 LEP template to suit its own circumstances. But in terms of PTVs, this does not seem to have been the case. It appears that the PTV has become a poor conservation cousin of previous conservation-oriented TPOs.

Former clause 32 of the LEP template has been translated into a fresh clause 5.9. The overall objective is to 'preserve the amenity of the area, including biodiversity values, through the preservation of trees and other vegetation' (clause 5.9(1)). This recognises that biodiversity conservation and amenity enhancement might be able to coincide. But again, in order to achieve this, a council needs sufficient skills to implement the PTV. A further issue is that adoption of clause 5.9 is mandatory, subject to specified exceptions. This was a major step forward for communities who are keen to see greater protection of local vegetation and fauna on private land. But it does not go far enough. At the time of writing, clause 5.9 of draft Sutherland Shire LEP 2013 which has been submitted to the Minister for endorsement is no different from the bare bones of the template provision. It appears that the Minister is averse to use his or her whip hand to encourage if not demand imaginative biodiversity-oriented PTVs.

A curious provision of the LEP template is clause 5.9(5) (formerly 32(5)), which obliquely refers to biodiversity conservation (Kelly, 2006). It asserts that clause 5.9 'does not apply to a tree or other vegetation that the Council is satisfied is dying or dead and is not required as the habitat of native fauna'. In other words, hollow logs where species such as possums and birds, including kookaburras and cockatoos, can receive special attention (Department of Sustainability, Environment, Water, Population and Communities (Cth), 2008). It is clear that this fragment of a sub-provision moves away from amenity. Species living in fallen or burnt logs will be invisible to passers-by apart from scientists and interested citizens including school groups and volunteers. Whilst it heads in the right direction towards biodiversity, its scope could go further. For instance, what is precisely meant by 'habitat of native fauna'? What about places other than 'hollow logs'? Does a council have the resources and skills to apply it? Even if a council ecologist is adamant to conserve and improve biodiversity on private open space, what might be the view of the elected representatives? After all, most residents may not desire dead logs in their front yards or next door. Furthermore, the sub-clause impliedly suggests that other parts of the site are of less biodiversity interest. The answers are far from clear cut.

The Awkward Nature of TPOs/PTVs

TPOs and PTVs have always provided an odd sub-system within the overall and ongoing NSW planning regime. It was uncertain until the late 1990s whether seeking permission under a TPO comprised an application for full development consent under the EPAA. This question was settled by Lloyd J of the LEC in *Meriton Apartments Pty Ltd v Ryde City Council* (1998) 198 LGERA 252 and *Cameron v Lake Macquarie Council* (2000) 107 LGERA 308 (see also Kelly, 2006). The first judgment related to a TPO provision in a PSO whilst the second involved a TPO clause in the 1980 Model Provisions adopted by an LEP. It was made clear in both situations that applications pursuant to the TPOs were fully-fledged development applications that warranted sufficient environmental assessment under section 79C(1) EPAA. This means that an array of factors, such as 'social and economic impacts in the locality' and the 'public interest' (sections 79C(1)(b), (e)), had to be considered in the evaluation process. Accordingly, any assessment was no longer limited to matters such as branches overhanging garages or falling into swimming pools. Whilst this should then lead to a broader compass in evaluating applications under TPOs/PTVs, the original aim of these mini-instruments – i.e. plans within plans - concentrated on amenity and, more recently, biodiversity. The balancing of these issues might now be lost in a far larger and complicated quagmire.

Another issue under the LEP template is that it gives landholders who wish to damage vegetation a choice between seeking a development consent or 'a permit' (clause 5.9(3)(a)&(b)). This is peculiar. There is no express definition of 'permit' in this particular context within the EPAA, its associate subordinate legislation (i.e. the *Environmental Planning and Assessment Regulation 2000* (NSW)) or the template itself. But one factor is that a decision under a PTV by a council to reject a proposal to remove a tree may be appealed to the LEC whether it was made in response to either a development application or seeking a permit. Perhaps gauging the extent to which councils have adopted the 'permit' option would be worthwhile. This would help to consider its usefulness or otherwise. Further questions can be prodded. Should fees be imposed for consideration of applications under PTVs? Might separate fee sub-systems apply between development applications and permits? More importantly, how differently might councils deal with applications under permits? Is the sub-system designed to improve efficiency via a simplistic 'tick the box' pseudo-methodology which is becoming more and more frequent throughout

the wider planning system? Due to the sheer complexity of measuring biodiversity, such an approach can only be viewed with concern.

Another related topic is that most court cases refer to a citizen's failure to comply with a TPO/PTV rather than dealing with an application against a council's refusal to grant consent to disturb vegetation under a TPO or PTV. In the first situation, the failure is a legal breach, i.e. an offence subject to a penalty unless subject to reasonable honest mistake. A relatively recent and helpful example provided by Ogle (2011: 207) is the removal of two ecologically valuable trees in Pittwater Council at the north-eastern edge of Sydney by a 'professional arborist and landscaper': see *Pittwater Council v Scahill* (2009) 165 LGERA 289 ('Scahill'). The species were not only listed under the *Threatened Species Conservation Act 1995* (NSW) but their elimination was contrary to the TPO. The person who eradicated the trees was fined A\$11,000 in addition to even higher court costs. The emphasis here is clearly on biodiversity conservation. An earlier example raised by Kelly and Little (2011) is *Holroyd City Council v Skyton Developments Pty Ltd* (2002) 119 LGERA 225, in which a person was found guilty in removing two trees, including a towering Queensland Fire Wheel in Sydney's western suburbs. The penalty was A\$15,000. In contrast to Scahill, the Court paid most attention to visual impact by referring to the 'existing amenity' and 'colour, shade and screening' of the Fire Wheel tree. The two cases perhaps crudely reflect a growing interest towards biodiversity conservation beyond amenity alone.

Conclusion

In her survey of TPO provisions in the Sydney region completed more than two decades ago, Mather (1990: 10) submitted that TPOs were 'not simply the protection and preservation of trees' but 'also the enhancement or reservation of the human environment'. This arguably appears to be early recognition of retreating from amenity. If similar research was carried out today, the reference would undoubtedly refer to biodiversity. The crucial role of local government in conserving biodiversity received critical attention in the late 1980s at both global and local levels. At the Rio Earth Summit in 1992, in addition to the Biodiversity Convention, a statement of intent named 'Agenda 21' adopted by 170 nations, including Australia, raised the

vital role of local government in conserving biodiversity (see chapter 28). At the local level, the Australian Local Government Association and the Biological Diversity Advisory Council (1999) produced the *National Local Government Biodiversity Strategy* for all councils across the nation. In addition, high level strategic national and State instruments, plus the *Biodiversity Planning Guide for NSW Local Government* (Fallding *et al*, 2001) have encouraged councils to embrace biodiversity in their local plans.

TPOs and PTVs can immediately play a key role in conserving biodiversity at the local level. But they represent only one of a suite of potential conservation mechanisms. Others include, *inter alia*, utilising local 'state of environmental reports', improving management plans for vegetated council reserves, designing buffer zones at the boundaries of passive recreation reserves, offering education programmes and coordinating with neighboring councils. In this mass of conservation approaches, PTVs present a mere fragment. This does not mean, however, that their potential should be overlooked. They must be integrated into the larger bundle.

The architecture and application of PTVs warrants close reconsideration. It is time for biodiversity conservation to come closer to the statutory forefront. Of course, there will be exceptions, such as bushfire prone vegetation. The aim is for amenity and biodiversity conservation to coincide as far as practicable. Notably, some pre-2006 LEPs were far more superior to the State Government's 2006 LEP template. It is argued that in order to avoid suffocation of local inventiveness, clause 5.9 should be regarded as the start of the design journey. Many councils will already have well designed strategies dealing with managing local vegetation.

Local government should be trusted to respond to local conservation needs on private open space. Councils are closer to the ground than other spheres of government. Application of the subsidiarity principle is recommended. Councils with sufficient resources might be bestowed greater power to draft their own PTVs. But should a council fail to achieve this, the Minister might step in with her or his green iron fist.

Many of the problems might be softened by having larger urban local government areas with stronger professional knowledge and improved infrastructure. This issue

has been ignited by a recent independent paper (Independent Local Government Review Panel, 2013) and various preceding documents. Some might raise concern that the current document makes no reference to biodiversity, amenity, TPOs, PTVs and only one mention to 'vegetation' in terms of 'eroding stream banks' (at 20). But there are several references to 'natural areas', 'green spaces' and, interestingly, larger councils serving 'regional agencies for natural resource management' (at 46, 56). The report cannot cover everything. But it might enliven local citizens to be involved in designing and implementing improved PTVs and convincing the Minister to alter the fixed template when conservation of biodiversity can be achieved. Furthermore, good PTVs should be integrated with other green conservation mechanisms. The NSW Department of Environment and Heritage (2011) observes 'one of the last strongholds of bandicoots in the Sydney Region' survives along the northern beach suburbs. Perhaps a larger local authority with an inspired PTV might help to preserve not only the bandicoot but other worthwhile flora and fauna while enhancing green amenity. Improved PTVs should be one of the diverse range of devices aimed to restore suburban ecological assemblages.

Postscript

Readers should be aware that the EPAA is currently under major review. In April 2013 the NSW Government released a discussion paper entitled '*A New Planning System for NSW: White Paper*' ('White Paper'). Despite its sheer length of over 200 pages, it contains no reference at all to 'biodiversity', 'ecology' or 'amenity'. There is only one specific notation of 'trees' despite recognition of streetscapes. The term 'vegetation' receives two obscure references. Whilst the paper deals with a vast array of planning issues, the emphasis appears to be on development, efficiency and loosening the scope for community participation in the local development application process. The White Paper is also accompanied by two Bills, including the Planning Bill 2013. LEPs are to be replaced by 'local plans'. Clause 3.19 is to replace section 33A EPAA with 'standardisation of planning control provisions of local plans', with voluntary and mandatory provisions. The reviewed PTV provisions in relation to amenity and biodiversity remain to be seen.

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