

## THE THREE TIERS OF GOVERNMENT

### #300 INTRODUCTION

The present systems of government progressed from the original penal settlement, self governing colonies, and then the creation of the Commonwealth on 1 January, 1901.

### #310 A BRIEF HISTORY

- (a) NSW was settled by Governor Phillip in 1788
- (b) The Governor ruled by proclamation with very wide powers
- (c) The Supreme Court of NSW was established in 1824
- (d) The Legislative Council was established in 1825, and expanded in 1828.
- (e) The Legislative Council was expanded further in 1842, and 2/3 of the membership was elected.
- (f) The first parliament, and constitution for NSW in 1815
- (g) The NSW parliament enacted its own constitution in the Constitution Act, 1902

### #320 FEDERATION

Federation was achieved through the Australian Constitution Act, 1900. This act was passed by the British parliament and is therefore one of a number imperial acts which affect Australian law today.

The states of the Commonwealth are subject to the Colonial Laws Validity Act, 1865.

Federalism is a "union without unity" as there is division of powers between the Commonwealth and the states. This is important to an understanding of the powers of the 3 tiers of government.

The Constitution vests some powers exclusively in the Commonwealth. The states are therefore deprived of any power to legislate on those powers vested exclusively in the Commonwealth by the Constitution.

### #330 COMMONWEALTH POWERS

Commonwealth powers are in s51 and other sections of the Constitution. For example, power to impose uniform customs and excise duties. See also s90, and s52.

S51 confers the power to make laws for the peace, order and good government of the Commonwealth with respect amongst other things;

- (a) Trade and commerce with other countries, and among the States.
- (b) Taxation, but so as not to discriminate between States or parts of States
- (c) Borrowing money on the public credit of the Commonwealth
- (d) Postal, telegraphic, telephonic, and other like services
- (e) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.
- (f) Quarantine
- (g) Fisheries in Australian waters beyond territorial limits
- (h) Census and statistics
- (i) Currency, coinage, and legal tender
- (j) Banking, other than state banking; also state banking extending beyond the limits of the State concerned, the incorporation of banks and the issue of paper money.

- (k) Bills of exchange and promissory notes
- (l) Bankruptcy and insolvency
- (m) Copyrights, patents of inventions and designs, and trade marks.
- (n) Naturalization, and aliens
- (o) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.
- (p) Marriage
- (q) Divorce and matrimonial casuses; and in relation thereto, parental rights, and custody and guardianship of infants.
- (r) Invalid and old age pensions
- (s) The provision of maternity allowances, widow's pensions, child endowments, unemployed, pharmaceutical, sickness and hospital benefits, medical and dental services (but no so as to authorise any form of civil conscription), benefits to students and family allowances.
- (t) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the State.
- (u) Immigration and emigration
- (v) External affairs
- (w) The relations of the Commonwealth with the islands of the Pacific.
- (x) The conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state.
- (y) Matters incidental to the execution of any power vested by the Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any departure or officer of the Commonwealth.

Although the above heads are not expressly exclusive to the Commonwealth if there is a conflict between state and federal law the federal law is paramount  
-s109 -Jackson v R (1976) 9ALR65

The powers of the Commonwealth have expanded over the years with some important High court decisions;

#### (a) Financial Powers

The states and the Commonwealth agreed in 1927 that the states would give up their power to borrow moneys and would in future be controlled by the Loan Council. Further, a Commonwealth Grants Commission was set up in 1933 to help the more needy states.

The effect of these agreements were that more control over money was put in the hands of the Commonwealth.

The states lost the power to impose their own income tax in 1942. -s96 -Uniform Tax Case.

The states therefore are dependant on the Commonwealth for funds, and the Commonwealth can impose terms and conditions onto the grants.

#### (b) Statute of Westminster Adoption Act 1942

The act accepts the Statute of Westminster as applying to Australia. It allows the Commonwealth to pass laws which may be in conflict with British laws and legislation.

#### (c) Other Restrictions on the Commonwealth

- (i) Prohibited from acquiring property other than on just terms (s51(xxxi)).
- (ii) Cannot tax the property of the states
- (iii) Cannot interfere with religious freedoms
- (iv) Both the states and Commonwealth must allow free trade between the states-

s92

(d) Amendment of the Constitution

The Constitution can be amended by way of referendum. The proposal must be approved by the majority of voters in each state.

#340 STATE GOVERNMENT

The state government has those powers not granted exclusively to the Commonwealth eg defence, and those powers shared with the Commonwealth. The shared powers will be validated if they do not conflict with Commonwealth law. For example, if both laws can be followed without conflict.

The State has delegated authority for local government to local councils under the Local Government Act 1919.

#350 LOCAL GOVERNMENT

Local government is the 3rd tier of government, and closest to the "grassroots" electorate. Councils and aldermen are responsible to the Minister for Local Government.

(a) The Minister

The Minister has overriding powers on most local government matters. This is considered necessary by parliament to make sure that local government remains responsible and acts within the law.

The Department of Local Government have Inspectors of Local Government Accounts who directly report on the fiscal management of councils. However the Department will not intervene in the domestic affairs of a council. It is only considered necessary where the law is being infringed and the council does not appear willing to rectify the matter.

(b) Legislation

Most of the law pertaining to local government is contained in the Local Government Act 1919. The Act is expanded by way of ordinances, regulations, and amendments. Other acts which directly apply to local government include;

- (i) Public Health Act
- (ii) Public Parks Act
- (iii) Mains Roads Act
- (iv) Commons Regulation Act
- (v) Environmental Planning & Assessment Act

(c) Ordinances

An ordinance is in the nature of a regulation or by-law. It is made by the Governor, and upon proclamation in the Government Gazette it has the force of law- ss575, 577 LGA.

Ordinances may be made for the purposes of and in relation to the Local Government Act or any other acts applying to a council.

(d) City Councils

The provisions of the Local Government Act may apply to city councils (such as the City of Sydney) as they do to municipal councils. However where the city has

been incorporated by a special statute then the general provisions of the Local Government Act are read together with the statute.

(e) Shire and Municipal Councils

Municipal councils deal primarily with towns. A municipality is compact and closely settled. On the other hand a shire is generally a large area with low density of population. Generally, the constitution and powers are the same. However, shires receive greater assistance from the government by way of endowment and grants for their development.

The difference becomes meaningless when settled urban areas such as Hornsby Shire is compared to an inland country shire.

(f) Council

The Council is a body corporate created by statute. It cannot exceed those powers allowed it under the Act (ultra vires). For example, if the council authorises the expenditure of money on activities or works outside its jurisdiction the Minister may force those who approve the ultra vires expenditure to pay the amount spent by way of a surcharge on their private moneys.

The council has a continuous existence which is not affected by changes in membership.

(g) Council Area

Each council must restrict its activities to within its own area except for one or two special cases. The boundaries are defined in the Government Gazette.

(h) Constitution of Councils

A shire council consists of councillors, and a municipal council of aldermen. The number of aldermen may be determined or altered by the Governor. The number of councillors in a shire council cannot be less than 6 or more than 9.

Shires are divided into ridings for electoral purposes, whereas municipalities may be divided into wards.

(i) Council Meeting

Decisions of council must be made at a properly constituted council meeting. For example, there must be a quorum of members. The members of the council must be disinterested. That is, not having any pecuniary interest in the matter at hand.

(j) Committees

Councils can delegate powers to committees. Committees are essential for large councils but smaller councils may only have "open" committees. Committees may or may not be open to the public. This is a decision of the committee.

(k) Mayor or President

The Mayors of Sydney, Newcastle, and Greater Wollongong are elected to office by the vote of the people. Other councils may also decide to have the ratepayers elect the mayor. Otherwise the mayor is elected by the councillors.

The mayor or president has many duties and powers under the act. Further, he may be delegated other powers by the council.

Means a state environmental planning policy, or regional environmental plan, or a local environmental plan, and except where otherwise expressly provided by this act, includes a deemed environmental planning instrument.

(g) Local Environmental Plan (LEP)

Means a plan made by the minister under s70 that is in force.

(h) Objector

In relation to a development application to carry out designated development, means a person who makes a submission by way of objection under s87.

(i) Regional Environment Plan (REP)

Means a plan made by the minister under s51 that is in force.

(j) State Environmental Plan (SEP)

Means a policy made by the governor under s39 that is in force.

#492 EXTENDED DEFINITIONS IN S4(2)

(a) Erection of a building

Includes a reference to the rebuilding of, the making of structural alterations to, or the enlargement or extension of a building or the placing or relocating of a building on land.

(b) Carrying out of a Work

Includes a reference to the rebuilding of, the making of alterations to, or the enlargement or extension of a work.

(c) A Work

Includes a reference to any physical activity in relation to land that is specified by a regulation to be a work for the purposes 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.

(d) Subdivision

Of land is reference to-

(i) (without limiting the following provisions of this paragraph) the subdivision of land within the meaning of the LGA, 1919.

(ii) any other division of land into 2 or more parts which, after the division, would be obviously adapted for separate occupation, or disposition; or

(iii) the redivision of land, by such a subdivision or by any other division, into different parts which, after the redivision, would be obviously adapted for separate occupation, use or disposition,

and includes a reference to a subdivision effected under Division 1 or Part II of the Strata Titles Act, 1973.

(e) Carrying out of Development

Includes a reference to the erection of a building, the carrying out of a work, the use of land or a building or work, or the subdivision of land, as the case

may require.

- (vi) any endangering of any species of fauna or flora
- (vii) any long term effects on the environment
- (viii) any degradation of the quality of the environment
- (ix) any risk to the safety of the environment
- (x) any curtailing of the range of beneficial uses of the environment.
- (xi) any pollution of the environment
- (xii) any environmental problems associated with the disposal of waste.
- (xiii) any increased demands on resources, neutral or otherwise which are or are likely to become in short supply.
- (xiv) any cumulative environmental effect with other existing or likely future activities.

#### #450 CONTROLS ON DEVELOPMENT

##### (a) Residential Districts s309

One of the earliest and rudimentary controls were Residential District Proclamations. Such proclamations have no force or effect in respect of any land to which an Local Environment Plan (LP) applies -s 309(5).

Otherwise the proclamation will apply. A proclaimed area shall be restricted to the erection and the ordinary use of dwelling houses -Underhill v Calder (1951) 51 SR 300.

##### (b) Building Lines

The council has the power to fix building lines for the whole street, or for a single lot- Dunlop v Woollahra /1975/ 2 NSWLR 446 -s308

No building can be erected between the building line and any public place, or public reserve. If the road is less than 20m wide the building line must be at least 10m from the middle line of the road.

The building line must be clearly described in a council resolution, or marked on a plan, and available for public inspection -0 70(11).

When considering a building application the council can fix the building line further back for a particular lot. For example, the preservation of views -Ku-ring-gai M C v Edwards (1957) 57 SR 379.

#### #460 SCHEDULE 7

Schedule 7 under the Local Government Act sets the minimum control on the size of flat development. Most councils have a more stringent code than Schedule 7 but it is worth considering as many of the new codes have grown from it.

Schedule 7 also explains many of the 1950s and 1960s flat developments in residential areas. Generally, there was a development backlash because of the poor quality of the buildings, high site coverage, no carparking, and no landscaping.

#### #470 TOTAL AREA OF THE SITE SCHEDULE 7

##### (a) Inside Lot

The area of the site plus a rectangle which is equal to the road frontage x 1/2 width of the road. The maximum allowable for the 1/2 width of the road = 10m.

##### (b) Corner Site

As above with a rectangle to both roads.

(c) Total Floor Plan Area

Total Floor Plan Area = gross floor plan x no. of storeys

#480 CLASSES UNDER SCHEDULE 7

(a) Class A

Class A is the most stringent class;

Maximum allowable site coverage

1 storey 50%  
2 storey 40%  
3 storey 35%

Minimum distance of side walls from boundaries: 6.1m

(b) CLASS B

Maximum allowable site coverage as for Class A. NB the maximum number of storeys for both classes A & B is 3 storeys. Minimum distance of side walls from boundaries;

1-2 storeys

1 side : 3m  
Other side : 2.3m

3 storeys

1 side : 3m  
Other side : 2.7m

(c) Class C

It is possible to build more than 3 storeys under Class C.

Maximum allowable site coverage

1 storey : 50%  
2 storey : 40%  
3+ storey : 35%

Minimum distance of side walls from side boundaries;

1- 2 storeys; both sides: 2.3m  
For each extra storey : add 0.45m

For example, 6 storeys with side setbacks:  $2.3m + (4 \times 0.45) = 4.1m$ . NB "Stepped" construction is possible to obtain maximum site coverage. However, for practical purposes it is assumed that the site coverage is that for the topmost floor.

#490 DEFINITIONS S4(1)

(a) Control

In relation to a development or any other act, matter or thing, means-

- (a) consent to, permit, regulate, restrict or prohibit that development or that other act, matter or thing, either unconditionally or subject to conditions; or
- (b) confer or impose on a consent authority functions with respect to consenting to, permitting, regulating, restricting, or prohibiting that

development or that other act, matter or thing, either unconditionally or subject to conditions.

(b) Designated Development

Means any class or description of development that is declared pursuant to s29 or 158 to be designated development for the purposes of this act.

(c) Development

In relation to land, means-

- (i) the erection of a building on that land
- (ii) the carrying out of a work in, on, over or under that land;
- (iii) the use of that land or of a building or work on that land; and
- (iv) the subdivision of that land,

but does not include any development of a class or description prescribed by the regulations for the purposes of this definition.

(d) Development Standards

Means provisions of an environmental planning instrument in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of-

- (i) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point;
- (ii) the proportion or percentage of the area of a site which a building or work may occupy.
- (iii) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work.
- (iv) the cubic content or floor space of a building
- (v) the intensity or density of the use of any land, building or work.
- (vi) the provision of public accesss, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment.
- (vii) the provision of facilities for the standing, movement, parking, servicing, manouevring, loading or unloading of vehicles.
- (viii) the volume, nature and type of traffic generated by the development.
- (xix) road patterns
- (x) drainage
- (xi) the carrying out of earthworks
- (xii) the effect of development on patterns of wind, sunlight, daylight or shadows.
- (xiii) the provision of services, facilities and amenities demanded by development.
- (xiv) the emission of pollution and means for its prevention or control or mitigation; and
- (xv) such matters as may be prescribed

(e) Environment

Includes all aspects of the surroundings of man, whether affecting him as an individual or in his social groupings.

(f) Environmental Planning Instrument (EPI)

## PLANNING

### #400 INTRODUCTION

Unlike England central government was established in Australia before local government.

### #410 A BRIEF HISTORY

#### (a) Municipalities Act 1858

This act allowed 50 property owners to form a municipality with the council responsible for public roads, bridges, and other services.

#### (b) Next 60 years

A number of acts were passed in the next 60 years setting up local councils. The councils were responsible to manage, build and maintain public land, roads, bridges, and sewerage systems.

Money was raised through rates levied on the unimproved value. This favoured further development

#### (c) Local Government Act 1919

The various local government acts were consolidated into the Local Government Act 1919. It established county councils, localised controls over building and subdivision.

It allowed councils to proclaim land for trade purposes. That is, areas were segregated for various industrial purposes by proclamation in the Government Gazette.

#### (d) Local Government Amendment Act 1945

This amendment included a more systematic and wider ranging approach to development including the town and planning sections- Part XII ss342A- 342AT.

These sections introduced the terms town planning, planning schemes, and created schemes. The act introduced town planning schemes as coloured maps.

Council could make specific requirements and consents concerning subdivisions, buildings, factories etc. Further, the council obtained wide powers over road building.

#### (e) Cumberland County Council Plan- "Sydney's great experiment"- 1948.

#### (f) The greenbelt approach failed -1959

#### (g) Local Government Amendment Act 1962

This amendment introduced interim development orders (ido's).-s342U Interim development orders are a "mini scheme" designed to allow councils to control development until their scheme is prescribed.

#### (h) Establishment of the State Planning Authority- 1963/4

Sydney's Regional Outline Plan- SR0P- 1960s

### #420 NEW LEGISLATION

The town planning law pre-1973 was too narrowly based. Criticisms included;

- (a) Concerned too much with Land use
- (b) Inflexible and rigid plan
- (c) Over centralised
- (d) Little room for local involvement

The Environmental Planning & Assessment Act 1979 tried to overcome these deficiencies. The new legislation had the following objectives;

- (a) Many minor but necessary improvements
- (b) The introduction of one form of local planning control. Therefore, schemes, IDOs were abandoned.
- (c) Town planning was separated from the Local Government Act.
- (d) More equitable treatment of resumees
- (e) Both the minister and councils have total power of delegation.
- (f) Objectors not subject to a property test. Class actions.
- (g) The Land and Environment Court to deal with planning matters.

#### #430 ENVIRONMENTAL & PLANNING ASSESSMENT

- (a) Environmental Impact Assessment (EIA)

In previous years complementary urban and regional planning functions were the responsibility of the Planning & Environment Commission (PEC). The Commission liaised with local and state authorities. However, it became apparent that the public should have a greater interest in planning. For example, expressway proposals by the DMR, expansion of Kingsford Smith Airport, and Cumberland Oval.

The new legislation emphasised the role of EIA statements in respect of designated development, and as part of the environmental planning process. Such statements are necessary as councils are required to consider the environment, social, and economic impact of development proposals.

- (b) Part V

Part V requires that government development not already controlled and which could affect the environment are to be assessed in respect of environmental factors. This covers works by public utilities which have been traditionally exempt.

#### #440 ENVIRONMENTAL FACTORS

- (a) Environmental Planning & Assessment Regulations

The regulations provide details on the role of environmental assessment and lists the likely effects on the environment. These include;

- (i) any environmental impact on a community
- (ii) a transformation of a locality
- (iii) any environmental impact on the ecosystems of the locality.
- (iv) a diminution of the aesthetic, recreational, scientific, or other environmental quality or value of a locality.
- (v) any effect upon a locality, place, or building having aesthetic, anthropological, archaeological, cultural, historical, scientific, or social significance, or other special value for present or future generations.