

Tree Preservation Orders: A New Vision?

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Enhancing Amenity and Conserving Biodiversity via a Revision of Tree Preservation Orders in Urban NSW, Australia

The purpose of this paper is to explore the history of tree preservation orders (TPOs) in New South Wales (NSW), Australia, commencing with early British legislation leading to a standard set of clauses set down by the NSW State Government. Until recently, TPOs provided a perfect example of slavishly following the British approach. The relevant sphere here is local government. The paper examines the original emphasis on the notion of amenity, which still prevails. It then moves on to opportunities for local government to embrace biodiversity conservation. It will be argued that the current statutory instrument that lays down the TPO provisions that councils must adhere to, demands revision. If the TPO is to serve as a worthwhile tool amongst a suite of conservation mechanisms, significant change to statutory instruments and policy is required.

Keywords: Local government, native vegetation, tree preservation orders, amenity, biodiversity conservation.

1. Introduction

There are various related ways in which private urban open space, namely front and back yards, can conserve local vegetation in residential areas. For instance, the approval of a new building might demand the retention of certain trees on the site. Another example is the replacement of trees that are cut down on the same site or elsewhere. A third approach is utilising the regulatory 'tree preservation order' (TPO) mechanism. This paper focuses on the third notion in New South Wales (NSW), Australia, exploring its historic emergence and current approaches. A major theme will be its evolution from an archaic device to enhance amenity to one that might embrace biodiversity conservation.

TPOs are a hybrid statutory mechanism implemented by local councils under the current *Environmental Planning Assessment Act 1979* (NSW). Their legal history, however, relates to early English legislation. This is no surprise as our planning law structures derive directly from Britain. Original ideas were mostly introduced by British expatriates, such as architect John Sulman who wrote the first book on town planning in Australia, and Denis Winston who held the first Chair in Town and Country Planning at Sydney University (Wright, 2001; Freestone, 1988). Winston was also the first president of the Australian Planning Institute set up in 1951 (Wright, 2001; Freestone, 1988). This first part of this narrative relates

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significantly to statutory history. As Wilson and Game (1998) claim in relation to planning law, 'it is just not possible properly to understand the present without at least some appreciation of how ... it developed out of and differs from the past' (p41). But the paper will then move on to the current nature of TPOs in NSW with attention paid to the differences between the initial motives and recent trends.

The context of the paper relates to cities, suburbs and rural townships. It does not extend to the countryside. As a result, the focus is on one small albeit significant aspect of planning law in NSW. It does not extend to either the *Native Vegetation Act 2003* (NSW), which does not apply to cities or towns, or any legislation applying to public land. Nor is there any reference to Commonwealth law whose scope is limited by the Australian Constitution.

2. Historic Background

When it comes to Australian planning legislation, all jurisdictions still reflect the *pre-1947* British zone-based statutes and plans. Fogg (1985) pinpoints planning schemes made under the UK's *Town Planning Act 1925* and *Town and Country Planning Act 1932* as the 'progeny' to Australian zoning plans (p260). Auster (1985) tracks the beginnings of statutory zoning plans to the pioneering Acts of 1909 and 1919 that comprise 'part of Australian planning history' (p6). The key inspiration, however, was the more ambitious 1932 Act which provided the planning model for Australian State Parliaments to duplicate (Colman, 1971; Whitmore, 1981). Yet several related points must not be overlooked. Firstly, the initial *Housing, Town Planning, etc Act, 1909* (HTP Act 1909) introduced zoning to Britain for the first time (Booth and Huxley, 2012). Whilst many contemporary British commentators and Australian planners might regard it as an almost forgettable statute, it nevertheless provided the initial step of controlling the use of private land. Secondly, a major element of the 1909 statute was introduction of the vague term 'amenity' (Punter, 1986). Thirdly, neither the 1909 nor 1932 Acts created the concept of amenity-based TPOs. As Booth (2003) emphasises, it was the wartime *Town and Country (Interim Development) Act 1943* (UK) (T&CD Act) that presented the option for local governments to adopt TPOs. As will be seen, these mechanisms were soon grasped by Australian local authorities.

The first issue is that the 1909 Act pioneered the making of statutory based 'town planning schemes'. These plans loosely translated early planning movements into law, especially the 'garden city' ethos devised by Ebenezer Howard whose intention involved 'reforming society through environmental improvement' (Freestone, 1989, p15). The phenomenon backed a form of 'green amenity'. This was reflected in the oft-stated pledge by the President of the Local Government Board, John Burns, to the Parliament that the forthcoming Act 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*, Vol clxxxviii, 960-61, 12 May 1908). Such promises received mixed praise. Sutcliffe (1988), for instance, refers to 'tensions' between the garden city and town planning movements (p289). Yet in 1907, the Garden City Association, established in 1899, was transposed into the Garden Cities and Town Planning Association in 1907, which urged for legislative institutionalisation (Beevers, 1988). There nevertheless remained a level of political loyalty *against* regulation of private land. As a result, the HTP Act 1909 was relatively weak. Ashworth (1954) goes as far

as describing it as suffering from 'still-birth' (p234). The plans were voluntary with very few reaching fruition. Furthermore, they were limited to areas in the course of development. Yet scholars (see, for example, Herbert-Young, 1988; Sutcliffe, 1988; Ashworth, 1954) observe that contemporary critique of the HTP Act 1909 can be gagged by a temporal perspective. While Cherry (1996) describes the HTP Act 1909 as essentially a 'house building' statute (p36), it nevertheless laid down the beginnings of planning law for both Britain and Australia. After a parade of amending statutes, it was the *Town and Country Planning Act* 1932 that enabled planning regulation to cover existing developed areas as well as those handpicked for growth (Cherry, 1996; Cullingworth, 1967). The war-time T&CD Act 1943 went further by bringing land beyond a planning scheme made under the 1932 Act, or subject to the making of such a plan, into 'interim-development control' (Wilcox, 1967). In other words, development control was spread across the country. As will be seen, it took a little longer for NSW to follow suit.

The introduction of 'amenity' in the HTP Act 1909 is the second point. One member of the House of Commons viewed it as carrying 'some vagueness and mistiness' (HC Deb 05 April 1909 vol 3 cc 733-98 at 795). An official report by the UK Minister of Local Government and Planning (1951) depicted it as the 'hardest-worked word in planning language' (p138). The term has never been delineated in British statutes (Booth, 2003; Cullingworth, 1967), which is also the case in Australia. Despite this, it is cemented in town and rural planning (Kelly and Little; 2011; Punter, 1986; Smith, 1974). As Cullingworth (1967) observes, 'amenity is easier to recognize than define' (p132). The HTP Act 1909 referred specifically to the making of town planning schemes 'with the general object of securing proper sanitary conditions, amenity, and convenience in connexion with the laying out and use of the land, and of any neighbouring lands' (s 54(1)).

The third issue the TPO. In the UK, this did not emerge in 1909, 1932 or in between but via an 'amending' Act made during the Second World War, namely the T&CD Act 1943. Booth (2003) highlights that unlike common belief, this statute with its several new mechanisms, including TPOs, arose *before* the enactment of the substantial and innovative *Town and Country Planning Act* of 1947. Other than addressing war-time urban destruction, the T&CD Act 1943 introduced amenity-based provisions on protecting 'historic buildings' and 'introduction of the list as a means of identifying buildings of significance' (Booth, 2003, pp95-6). Yet 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. Most attention was given instead to interim development control pending the making of planning schemes (Heap, 1991). Power was granted to 'interim development authorities', including local councils, to prepare zoning plans subject to Ministerial approval. Previously, the 1932 Act had raised interim control as a voluntary and somewhat complex mechanism (Heap, 1991). The insertion of TPO provisions in planning provisions after the 1943 Act was nevertheless optional. This is also the case in contemporary NSW.

The T&CD Act 1943 at s 8(1) enabled an authority to insert provisions under an 'interim protection order' into an existing planning scheme for 'preservation of trees or woodlands'. In relation to a pre-scheme situation, TPO provisions could be added into the compulsory interim plan. In both circumstances, at s 8(1)(a), the instrument prohibited, subject to

exemptions, 'the cutting down, topping, lopping or willful destruction of trees' without consent. This was the birthplace of TPOs in NSW and other Australian jurisdictions.

While the subsequent Act of 1947 was more policy-oriented than its predecessors, it granted local government considerable discretion in determining development proposals (McAuslan, 1985). The stranglehold of zoning provisions was largely left behind. Yet in NSW and other Australian States, it was the stringent *pre-1947* Acts that clung to restrictive zones and prohibited uses that provided the basis for local plans. These included references to voluntary TPOs.

3. Early Endeavors in NSW

In the same year that the HTP Act 1909 was enacted, the Royal Commission for the Improvement of Sydney took place. Gibbons (1980) observes the substantial influence of the UK's HTP Act 1909. Improvement of transport infrastructure, such as roads and railways, town planning and beautification comprised the key factors (Gibbons, 1980). The sheer 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 writ-small in contrast to the burgeoning British cities, Sydney suffered profoundly from similar problems.

The first comprehensive local government legislation in NSW demanding compulsory municipal incorporation was the *Local Government Act 1906* (NSW), described by Purdie (1976, 137) as serving a 'limited range of works and services'. Councils had to wait until the *Local Government Act 1919* (NSW) (LGA 1919) for a particular provision on urban amenity. Section 309 and subsequent amendments enabled Ministerial proclamation of 'residential districts' (RDs) that prevented obnoxious uses, such as trades, business and advertising hoardings, in designated areas (Wilcox, 1967). Whilst the provision related to uses of land rather than regulation over trees, it served to enhance residential amenity. Green aesthetics coincided easily with protection and planting of trees, especially in Sydney's wealthier suburbs. This is demonstrated by Proudfoot (1992) in her recognition of RDs as a direct lineage from garden city principles.

The earliest statutory provision relating to TPOs arose from insertion of Part XIIA, entitled 'Town and Country Planning Schemes', into the LGA 1919 in 1945. This enabled the first comprehensive land-use system in NSW. As in the UK, preparation of PSOs suffered from lack of interest. The first was the regional County of Cumberland Planning Scheme Ordinance (CCPSO) arising from an amendment to the LGA 1919 in 1951. It related to the geographically extensive Cumberland basin surrounding and including Sydney. The CCPSO was the first and last statutory regional plan of its type. But according to Harrison (1972), the regional Cumberland County Council (CCC) which represented 69 councils was 'regarded as an agency of the State rather than as a representation of local interests' (p188).

One crucial feature of the CCPSO illustrated by Freestone (1989) was its 'classic planning statement in the garden city tradition in post-war Australia' (p235). Provisions in the CCPSO related to, inter alia, 'foreshore scenic protection areas', 'places of scientific or historic

interest' and, at cl 40, 'Preservation of trees'. Clause 40(1) enabled the making of a TPO 'for the purpose of securing amenity or of preserving existing amenities'. Furthermore, shadowing the UK approach, cl 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 enhancing amenity. Perhaps this was the product of strict adherence to Britain's planning laws. Whilst the CCC 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) describes it as an 'antidote for promiscuous urbanisation' (p72). 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) which, in its first Annual Report, referred to the forthcoming power of local councils to 'issue and enforce' TPOs (p19). According to Wilcox (1967), the first local Planning Scheme Ordinance (PSO) was the 1960 Penrith PSO at Sydney's western edge at the foot of the Blue Mountains. 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 cl 44, 'Preservation of Trees'. The provision was a virtual facsimile of cl 40 of the CCPSO. Whilst a handful of rural PSOs had already been gazetted before 1960, interest was generally minimal. This might be because planning was then mostly carried out by engineers who suffered 'very low status' (Burdess, 1984, p65). Otherwise, it was due to limited financial resources, community indifference and unwieldy processes.

The State Government reacted to this sluggishness by devising a standard instrument to apply to each council area. The new instrument, in similar fashion to Britain in 1943, was deemed an 'Interim Development Order' (IDO). At the beginning of November 2012, seventeen council areas were fully or partly covered by these prehistoric instruments made before 1980. Walget Shire in outback NSW, for example, still administers an IDO, with TPO provisions that are almost identical to those others raised above.

4. NSW in the 1980s and Beyond: A Fresh Approach?

As a result of the rise of environmentalism, the *Environmental Planning and Assessment Act* 1979 (EPAA) was enacted in 1980. Whilst it overrode Part XIIA of the LGA 1919, countless PSOs and IDOs – such as in Penrith and Walget – were to remain until overtaken by novel planning instruments made under the EPAA. The new local instrument was the 'local environmental plan' (LEP). Considerable discretion was granted to councils in framing their LEPs, subject to Ministerial approval. Some local authorities devised their own TPO clauses to be placed within their LEPs. The majority, however, adopted the *Environmental Planning and Assessment Model Provisions 1980* ('Model Provisions'). These comprised a blanket of sub-clauses put together by the State Government to maintain consistency across the board, including provisions on TPOs. At cl 8(1), the regulatory approach and emphasis on amenity directly followed its predecessors (Kelly, 2006). The emphasis on amenity remained steadfast.

In the late 1980s, the State Government considered redesigning the Model Provisions where TPOs were directed at *both* amenity and nature conservation. Draft cl 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, 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 at Sydney's southern suburban edge, where cl 56(1) 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. Nevertheless, it echoes early TPOs by declaring that one 'must not ringbark, cut down, top, lop, remove or willfully destroy any tree or other vegetation' without permission (see cl 56(3)). The items of vegetation listed for protection are listed in a 'Development Control Plan', which adds detail to the LEP. Sutherland Shire Council's general approach is scarcely unique. The emergence of environmental officers across local government 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 angophora costata (or Sydney red gum) that often nestles into the Hawkesbury sandstone, 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. The construction of the relevant clauses is paramount.

Unfortunately, the flexibility of TPO provisions has been stifled as a result of insertion of s 33A EPAA into the EPAA in 2006. It sets down a slate of standard provisions that each council must adhere to in preparing its draft new LEP. This instrument, cited as the 'Standard Instrument (Local Environmental Plans) Order 2006', is generally called the 'LEP template'. It is a 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 document. 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 or ecological communities. Moreover, the regulatory language reflected its antecedents by banning a person to 'cut down, top, lop, prune, remove, injure or willfully destroy a tree' subject to consent. As usual, exceptions applied.

The 2006 LEP template substantially reframed the draft 2004 model. The title of (the then) cl 32 was 'Preservation of trees and vegetation', thereby widening the net to shrubs and saplings. Perhaps this was accelerated by progressive councils keen to move beyond traditional formulae. The term had no reference to TPOs. Yet former cl 32(1) stated the objective as 'to preserve the amenity of the area through the preservation of trees and other

vegetation', thereby entrenching amenity as the main goal. The instrument stated that an individual 'must not ringbark, cut down, top, lop, remove, injure or willfully destroy any tree or other vegetation' as prescribed in a DCP, without consent (cl 32(3)). Insertion of the provision was subject to whim of each council. Inclusion of cl 32 was, as usual, totally voluntary. But the prescription, if adopted, remained firm. Any council that was eager to adopt a 'greener' type of amenity had to seek Ministerial approval to amend the 2006 LEP template to suit its own circumstances. The extent of success here, if any, is worthy of further research. Evidence exists of some beneficial and well designed provisions.

Recent alteration to the LEP template appears positive. Clause 32 has been translated into a fresh cl 5.9. The revised overall objective is to 'preserve the amenity of the area, including biodiversity values, through the preservation of trees and other vegetation' (cl 5.9(1)). This recognizes that biodiversity conservation and amenity enhancement might be able to coincide. But in order to achieve this, a council needs sufficient expertise and resources. Many councils are achieving this. A further issue is that adoption of cl 5.9 is no longer voluntary but mandatory, subject to specified exceptions. This is a major step forward for those councils who are keen to see greater protection if not improvement of their local vegetation and fauna.

A curious provision of the LEP template is cl 5.9(5) (formerly 32(5)), which obliquely refers to biodiversity conservation (Kelly, 1996). It asserts that cl 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 the conventional notion of amenity. Creatures living in fallen or burnt logs will be invisible to passers-by apart from scientists and interested citizens. Whilst it heads in the right direction towards retaining biodiversity, its scope is restricted. For instance, what is meant by 'habitat of native habitat of local fauna'? 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. The answers are far from clear cut.

5. Conclusion

In her survey of TPO provisions in the Sydney region completed more than two decades ago, Mather (1990) submitted that TPOs were 'not simply the protection and preservation of trees' but 'also the enhancement or reservation of the human environment' (p10). This appears as an early recognition of moving beyond amenity. If similar research was carried out today, the reference would undoubtedly refer to biodiversity conservation. The crucial role of local government in conserving biodiversity was receiving 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 ch 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 their modern-named counterparts can play a key role in conserving biodiversity at the local level. But several issues arise here. Firstly, TPOs represent only one of a suite of potential mechanisms. Others include, inter alia, implementing local 'state of environmental reports', improving management plans for vegetated council reserves, designing buffer zones at the boundaries of State reserves, giving saplings to local citizens, carrying out education programmes and coordinating with neighboring councils. In this mass of conservation approaches, TPOs present a mere fragment. This does not mean, however, that their potential should be overlooked. Secondly, residential front and back yards are becoming smaller due to bigger houses (Hall, 2010). At the urban periphery, this is permitted by policy and law. The result, according to Kelly and Little (2011), is 'urban sprawl' pressing 'across far-flung suburbia' (p174) with scant opportunity to maintain green amenity let alone encouraging biodiversity. In established residential areas, infill development applies economic pressure for removal of vegetation. Thirdly, the breach of a TPO (or tree preservation control) is an offence (Ogle, 2011). But clear evidence that a particular person has committed the offence can be difficult to obtain. This demands sufficient resources to support compliance officers and lawyers.

Notwithstanding the above issues, the architecture and application of TPOs warrants change. It is time for biodiversity conservation to come closer to the 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. After all, conservation of urban biodiversity is essential (Ives et al, 2009). Notably, some pre-2006 LEPs are superior to the State Government's 2006 LEP template. There is evidence that in some circumstances, the Minister for Planning has approved LEPs that differ from the norm. It is argued that in order to avoid suffocation of local inventiveness, cl 5.9 should be regarded as the start of the design journey. While the Minister can use her or his power to check against any major intra-regional disparity and assist impoverished remote councils, 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. Indeed, councils with sufficient resources might be bestowed greater power to draft their own TPOs. But should a council fail to achieve this, the Minister might step in and employ the whip hand.

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