Major Infrastructure Projects—The answer is the Planning White Paper. Now, what was the question?

Howard Bassford

Introduction: We are all experts now

When I was first asked to present this paper I fondly believed that the invitation resulted from some small expertise in the promotion of quite large projects and their consent regimes. At the time, the Barker and Eddington Reports were already in existence and the Greenpeace Case[1] in relation to the Energy Review[2] had recently been decided. We knew roughly when the Government was to publish a White Paper reform of major infrastructure project planning, but did not know exactly when[3]. Since that time, the Government has published its White Paper, *Planning for a Sustainable Future* in May 2007. Unsurprisingly, the White Paper accepts the main recommendations of Barker and Eddington and seeks to give them effect.

However, the result of the Government publishing its White Paper is that we are all experts now. Colleagues the length and breadth of the country have produced memorable copy for journalists on the subject of major infrastructure project consents[4]. This is hardly surprising, given that the White Paper will almost certainly lead to a very important piece of legislation for our clients and for the professions gathered together at the Joint Planning Law Conference[5]. We must have something important to say on this subject: many of us will have responded to the White Paper or assisted others to do so. It is we who will have to live with, and operate, any new system. We ought to have a view on it and also to have an idea of what it will mean in practice.

If I was going there, I wouldn't be starting from here

The White Paper proposals are the product of interpreting the advice of an economist and a businessman: albeit very eminent leaders in their fields. They have listened to industry, the public and practitioners. Importantly, we know that—very sensibly—they spoke to one another. When persons of considerable consequence produce such weighty reports, it is difficult for the Government to ignore them[6]. As professions, we have been asking for reform in these areas for a very long time and that the fact that reforms are promised must be welcome.

Therefore, rather than seeking to put forward alternative proposals, this paper will be a practitioner's view of what the White Paper has proposed. First, I shall look at what a major infrastructure project is—not necessarily at what the White Paper considers one to be. I will then look at the present system for authorising infrastructure projects. I will consider the criticisms of the system reported by

[1] R. (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry [2007] EWHC 311 (Admin).

[2] "The Energy Challenge: Energy Review Report 2006".

[3] I didn't mind when, but hoped it would be soon so that I would not have to write this paper in too much of a hurry!

[4] Notable mentions go to Simon Rickets of S.J. Berwin "Good for ports and Porsches" and to Herbert Smith by way of *Top Gun*.

[5] Prime Minister Gordon Brown announced on 1 July 11, 2007 that the legislative programme for the next year would include a planning bill, a housing bill, a planning gain supplement bill, a climate change bill, an energy bill and a local transport bill.

[6] White Paper para.2.11—the Government confirms that it supports the overall approach put forward by Eddington.

[2007] J.P.L., DECEMBER © SWEET & MAXWELL AND CONTRIBUTORS

Barker, Eddington and the White Paper and test the validity of some of those. I will look at the proposed system: National Policy Statements and the Infrastructure Projects Commission, including the types of project that they will need to process. This will include an examination of some aspects of new procedures and what they would mean in practice. I will test this against experiences in some recent cases. I will make some suggestions as to what the proposed system must be capable of doing if it is to be successful.

In preparing this paper I lack two, mutually exclusive, luxuries. I do not have the luxury of sound-bite brevity enjoyed by other commentators. Similarly, I do not have the benefit of a legion of researchers enjoyed by Messrs Barker and Eddington. Thus, if some criticisms are missed or some benefits of the proposals unreported, I will plead this as an excuse.

Very hard to describe but you know exactly what it is when you see one

A major infrastructure project is like an elephant for the reason set out above. The Barker and Eddington Reports and the White Paper are somewhat vague about what they understand by major infrastructure projects. They use a variety of terms for the type of project they intend to be addressed: ''nationally significant''[7], ''major''[8], ''infrastructure development''[9], ''large transport cases''[10]. These qualitative and subjective terms do not really help to define the type of project, so the White Paper sensibly sets out the nature of the projects that it seeks to address:

> ''. . . infrastructure such as major airport and port projects, and improvements to the Strategic Road Network; nationally significant energy infrastructure such as major new power generating facilities and facilities critical to energy security; and nationally significant water and waste infrastructure such as major reservoirs and waste water plant works.''[11]

However, the type of project that should be the subject of concern is not necessarily identifiable by size alone. I suggest that the type of project that is susceptible to the type of consideration advocated by the White Paper is identifiable by other means. Thus, whether a matter is a major infrastructure project can be defined as much by the cocktail of applications that it requires as its controversy and the nature of its effects. To understand this, some history as to what constitutes a major infrastructure project is useful.

What was and is a major infrastructure project?

Among the things that have made the English free are their rights in property and their freedom of movement within the Kingdom. The right to pass and repass is at the very core of this. A person may use a highway as of right on land and is free to navigate within our territorial and tidal waters, save in each case to the extent that Parliament prescribes. A law-abiding person may not usually be deprived of property, especially real property.

Thus, the turnpike road and the harbour are the precursors of the modern infrastructure project. In either case infrastructure of so basic a nature as a mean and muddy thoroughfare or a simple sea wall

[7] White Paper, para.2.11.
[8] See above fn.7, para.2.6.
[9] See above fn.7, para.3.26.
[10] Barker Report, p.69, para.3.1,
[11] White Paper, para.2.11. It is fair to say that the White Paper goes on to consider the projects it intends to capture in more objective terms later. This is discussed later in this paper.

required a mechanism by which it could be funded. Inevitably, the providers of such infrastructure would look to the user to pay. However, the imposition of a toll for the use of a thoroughfare, or harbour dues for a vessel to lie at anchor in safety,[12] would contravene the rights of the public who might otherwise have used them free of charge. This means that the authority of Parliament is required if such rights are to be curtailed by the imposition of tolls or other levies. Parliament's authority is also required in order to provide immunity from suit for nuisance, which would occur if physical works are placed in tidal waters or obstructions such as barriers placed in highways.

Constraining the freedom to use a highway by the imposition of tolls and requiring the payment of harbour dues (a similar imposition upon the mariner, who hitherto had been able to navigate and lie at anchor freely) required the intervention of Parliament. Why Parliament should trouble itself with the construction of a harbour in a remote corner of the Kingdom is directly related to these impositions. In the absence of any other means of securing the authority for such works and such impositions, Parliament would have to intervene in determining whether powers for such works should be granted. The use of Parliament for such purposes was neither onerous nor inappropriate. By-and-large the promoters were drawn from the same socio-political group as legislators so it was appropriate for proposals to be determined by the promoter's peers. Similarly, the size and complexity of projects did not pose too much of a burden upon the promoter or Parliament.

The turnpike road and the harbour are essentially pre-industrial infrastructure, major for their day, but insignificant in comparison with that which was to follow. When the industrial age ushered in first canal and then railway mania the infrastructure authorisation requirements were to change dramatically. At the very height of the reign of the ''Railway King'' George Hudson there were a vast number of railway bills before Parliament annually. So many were in fact promoted that relatively small towns like Loughborough, Northampton or indeed Oxford found themselves with multiple railway connections provided by different railway companies to different stations (three in each case).

The projects promoted in this way ranged in size from the relatively minor to the very large. The usual means of promotion was the private bill, promoted by a railway, canal, harbour, or turnpike company. The objective was to secure powers to acquire land compulsorily, but also to provide immunity from suit for nuisance. The main characteristic of the process was time in Parliamentary committee, typified by a forensic approach to the determination of the issues before the promoter. This in turn could lead to blocking tactics on the part of major interested parties, and not just in committee[13]. However, once an Act of Parliament had been secured, a full suite of powers was conferred. Land could be acquired, surveys carried out, trains run, canals built, navigation interfered with, charges levied, other conflicting legislation could be overridden, roads closed or diverted, criminal offences could be created and action taken if offences were committed. Until the 1940s, planning permission was not, of course, required. An Act was—and in many cases remains[14]—a panacea for every promoter's ill.

The incidence of extra-Parliamentary tactics may have declined since the early nineteenth century. However, the manner of promoting major infrastructure projects has been largely the same until

[12] The exception to this constraint is proved by the term ''any port in a storm'', which implies that if a vessel can physically enter a port, this is allowed if its safety depends upon it.

[13] ''. . .tinctured by the impending ruin which he foresees to his own property'', the Earl of Ellesmere was not above setting gun-wielding servants upon the surveyors of the Liverpool and Manchester Railway in order to protect the monopoly that his Bridgewater canal enjoyed.

[14] If it is available—see below.

the last few decades, subject to a few refinements, which centre on nationalisation of utilities. Thus, until the post-war era electricity and gas may very well have been supplied by local concerns with local legislation. However, the post-war era saw nationalisation of utilities and the first opportunities for national projects. This meant that ministers newly responsible for state industries could see the advantage of concentrating power for such matters in their hands. Meanwhile, rail and marine projects remained matters for Parliament.

The final changes, bringing Parliamentary projects into line with the other infrastructure projects, occurred following the King's Cross Railway Bill in 1988. After the proceedings, members forced to deal with the project stated:

> ''The length of proceedings and nature of the evidence presented to us has, however, convinced us that the present procedure for authorising major railway projects is deeply flawed. Four laymen with a multitude of other commitments are not best placed to make the complex and technical decisions that are required.''[15]

The response of the then government to this criticism[16] was the Transport and Works Act 1992. This enables a statutory instrument to be used to promote a rail (including light rail), inland waterway or marine project. It also varied the Harbours Act 1964[17] to allow the use of Harbour Revision Orders and Harbour Empowerment Orders for the same, wider purposes than previously. Hitherto, an Act of Parliament had been required for that purpose.

In light of the above, it seems to me that it has been the controversy attached to a project—as much as its size—as well as the complexity of the matters that lie behind it that make an infrastructure project ''major''. Sheer size alone will not necessarily determine the need for a reformed system. Controversy—and how best controversial questions relating to projects are addressed—is part of what defines a major infrastructure project. This is considered in further detail below.

The existing system: If it ain't broke

Having considered the history of the present system, a brief analysis is necessary to determine the flaws—such as they are—that it displays. Having done so, the need for reform should be clearer, as well as whether the White Paper proposals are likely to improve matters.

The White Paper lists the Transport and Works Act 1992, the Highways Act 1980, the Harbours Act 1964, the Gas Act 1965, the Electricity Act 1989 and the Pipelines Act 1962 as being the principal regimes with which it is concerned[18]. The Town and Country Planning Act 1990 is also a relevant procedure, particularly in the case of airports. Some of these regimes are governed by size thresholds[19], with development below those thresholds falling within the Town and Country Planning Act 1990 procedure. However, what is perhaps more important in promoting a major infrastructure project are the ancillary consents that are required to allow it to proceed.

[15] Report of the Committee into the King's Cross Railway Bill 1988, para.73.

[16] Anticipated criticism—the system had already received a mauling at the hands of the committee into the Felixstowe Dock and Railway Bill which took from 1984 to 1988 to receive royal assent. A green paper had already been published by the time the King's Cross Committee reported.

[17] Additional paragraphs were inserted in ss.14 and 16 and in Sch.2 of the Harbours Act 1964.

[18] Para.5.13 on p.78. A much more comprehensive list is provided in the Barker Report at p.80, table 3.1.

[19] The Electricity Act 1989 applies to onshore power stations over 50MW, offshore power stations of greater than 1MW in territorial waters and of over 50MW (REZ).

Thus, based upon the Felixstowe South Reconfiguration[20] proposal, at least the following will be required to authorise a major infrastructure project:

- Harbour Revision Order (HRO) under the Harbours Act 1964 to authorise the construction of works in Harwich Haven.
- Planning Permission—this is granted in respect of landside works to the rear of the harbour works at the port upon application and in respect of the works authorised by the HRO as permitted development rights.[21]
- Powers to divert footpaths within the site.
- Coast Protection Act 1949 consent.
- Scheduled Ancient Monument Act consent.
- A licence under the Food and Environment Protection Act 1985.[22]

The similar Shell Haven/London Gateway proposal and the Dibden Bay port proposal added to this mix the need for a Transport and Works Act 1992 application to create or improve a rail link to the port in each case. The twin application to Felixstowe South Reconfiguration—at Bathside Bay[23]—also included an application for planning permission for replacement habitat and an application for Listed Building Consent for demolition of part of a listed structure. Thus, it is conceivable that a project might involve all of these consents.

In beginning to understand the type of application that is major and seeking uniformity, we can at least be thankful to Brussels. If no-one else has done so, the European Commission's collective mind has identified the all-encompassing concept of the development consent in the EIA Directives. Practitioners will be aware that the need for EIA is uniform for almost all consent procedures. This means that by far the weightiest application document is consistent from procedure to procedure. It is not difficult to produce a single volume (or set of volumes) that encompass all applications relating to a given proposal. However, the uniformity in the need for EIA contrasts unfavourably with the other application documents and pre-application procedures where the risk of omission or error has most scope to arise. Thus, under the procedure for a harbour empowerment order or harbour revision order, notice must be given to the Secretary of State in advance of the application, requesting a screening and scoping direction if the proposed harbour works are likely to be EIA development. The application cannot then be made until—having consulted fairly widely—the Secretary of State has issued a direction[24]. A planning application will be relatively straightforward in comparison. If the applicant under the Transport and Works Act 1992 is a public body then a formal resolution of that body is required, suitably advertised, both before and *after* the application has been made[25]. Application procedures for gas storage facilities under the Gas Act 1965 actually require the Secretary of State's consent before the application may be made[26]. Thus, an additional procedural step is inserted, slowing the process and also meaning that the process is exposed to the vagaries of the political process at more than one stage (pre-application and consent).

[20] A project comprising a new marine container terminal with associated landside facilities, including a new quay 1350m in length as part of the existing Port of Felixstowe.

[21] Pt 11 of Sch.2 to the Town and Country Planning (General Permitted Development) Order 1997 grants planning permission for all works specifically described in an HRO, a harbour empowerment order or a Private Bill.

[22] Interestingly, on application the Department of the Environment, Food and Rural Affairs declined to have this application conjoined with the other applications that were subject to inquiry.

[23] An application for an altogether new container terminal adjacent to Harwich International Port including a new quay 1400m in length.

[24] Sch.3, paras 5 and 6, Harbours Act 1964.

[25] S.20 Transport and Works Act 1992 and s.239 Local Government Act 1972.

[26] S.4 and Sch.2, Pt II.

Once made, applications are treated with a degree of uniformity. The procedures for more than one application in relation to the same project can be conjoined. Indeed, it is possible for more than one competing application to be considered at the same public inquiry. With some fleet footwork Government Offices and the Planning Inspectorate can usually be persuaded that a single inspector should hear all matters. This is only sensible, because if separate inquiries were held into different consents for a matter, and hence a greater number of inspectors reported on that matter, a greater the risk of inconsistency and therefore of error would arise. Indeed, if more than one inspector is involved it is conceivable that mutually contradictory outcomes could result. Ultimately, if inquiries are required then all matters tend to be heard in parallel at one conjoined set of proceedings. I consider the problems that have been identified in relation to inquiries below.

An important point to note here is the assumption that an inquiry will be required. It is conceivable that some proposals may be largely uncontroversial, notwithstanding their large size. In these cases, under the present system the role and status of objectors is important. For instance, a person whose land or interest in land may be the subject of compulsory acquisition or interference is a statutory objector. Even though their concern may be unfounded or their objection may be doomed to fail, they are still capable of forcing a major project to public inquiry. In the Harbours Act 1964 regime *any* objection, validly made, in time on whatever ground is capable of bringing a matter to inquiry, provided it is not frivolous or vexatious[27]. As a result of these risks the prudent promoter inevitably includes an inquiry in their programming.

In this environment the practitioner's art is to identify all of the consents that are needed and, so far as possible, to draw all together into a single application process. The risk of failing to do so is that the project will attain all of the consents it is anticipated will be required, but then find that others are still required. With all consents in place the effect of delay whilst a process is repeated to deal with some newly discovered application process, or to deal with a new designation, is inevitably costly for promoters. For instance, fluctuations in the price of raw materials in the course of any delay can be very costly indeed. The price and availability of raw materials (and credit) in the current market is very volatile. Similarly, skilled technicians are in very limited supply. Therefore, the timing of consents for a project and delay to its implementation can have serious consequences for its budget and deliverability.

It cannot be denied that these types of application do represent a complex cocktail of procedures. Even assuming that all applications have been captured in a suite of applications, the sheer number of procedures can still enhance the risk associated with a project because of the increased likelihood of omission or error by a decision maker. This means that if different tests apply under different application regimes, then different considerations must be brought out. For instance, under the planning regime, the test is the familiar test of being required to grant planning permission for proposals that comply with the development plan unless material considerations dictate otherwise. For a Harbour Revision Order the test is set out in the Harbours Act 1964 and is markedly different[28]. The Transport and Works Act 1992 requires the Secretary of State to be satisfied that the making of an order is expedient, but requires him also to consider if the same ends could be better achieved by other means.

[27] In practice even a fairly frivolous or vexatious lay objector can manage to force a public inquiry. The relevant parts of government departments tend to err on the side of caution for objectors rather than expose decisions to challenge later on the slam-dunk ground of having ignored an objection.

[28] S.14(2)(b) Harbours Act 1964 requires the appropriate minister to be satisfied that the making of an order is "desirable in the interests of securing the improvement, maintenance or management of the [relevant] harbour in an efficient and economical manner or of facilitating the efficient and economic transport of goods or passengers by sea or in the interests of the recreational use of sea-going ships".

Even assuming the various statutory tests are negotiated successfully there remains the risk of challenge. Here, the various consent procedures are inconsistent as to even the challenge periods that apply. Thus, for example, planning permission granted on appeal or call-in can be the subject of a statutory challenge within six weeks of the grant of planning permission[29], which is itself granted upon the issue of a Secretary of State decision letter. A Harbour Revision Order must be challenged within 42 days of the order coming into force[30] and a Transport and Works Act Order must be challenged within 42 days of the notice of the making of an order, not the order itself[31]. Undoubtedly, there is scope to tidy this up as part of the White Paper proposals.

Size isn't everything, is it?

The other way of looking at the system and what constitutes a major infrastructure project is the different approaches to applications of different sizes. It does not follow that proposals for reform should be directed at matters based on size alone.

As I noted above, some proposals in relation to infrastructure projects fall within the Town and Country Planning Act 1990 regime even though they are very large indeed. For instance, a 45MW onshore wind farm would be likely to extend to a considerable area and comprise numerous turbines. This is not a small project by any means. It may very well be controversial and may very well be the subject of lengthy proceedings in inquiry. Along with other proposals in a decentralised electricity supply system it may also be of extensive geographical importance. In light of this, the system currently provides a series of broadly similar processes for applications, as follows:

- Smaller proposals and proposals that are the subject of the Town and Country Planning Act 1990 regime in any case are dealt with by application to the local planning authority.
- Larger Town and Country Planning Act 1990 projects may be the subject of reference to the Secretary of State and call in because:

  (a) they do not accord with the development plan;
  (b) they are of greater than local significance;
  (c) because (following the Planning and Compulsory Purchase Act 2004) they are major infrastructure projects[32]; or
  (d) because the local planning authority itself decides that a matter is too big or controversial to deal with and asks for call in, encourages an appeal for non-determination or refuses planning permission.

- Certain types of project are addressed directly to ministers—rail, light rail, harbours, inland waterways, large generation projects, large water projects, trunk roads. The procedural implications of this are discussed above.
- Private legislation remains available. However, for a private bill to remain available it is necessary to "prove the short title". This requires a promoter to attest that there is no other means of achieving the same legislative end. This cannot be done if another statutory process exists.

[29] Town and Country Planning Act 1990, s.288.
[30] Harbours Act 1964, s.44.
[31] Transport and Works Act 1992, s.22.
[32] Town and Country Planning Act 1990, s.76A as inserted by s.44 of the Planning and Compulsory Purchase Act 2004.

- Hybrid Bills can be used as in the case of the Channel Tunnel Act 1987, the Channel Tunnel Rail Link Act 1996[33] and as is being used for Crossrail. The bill is called ''hybrid'' because in nature it is akin to a private bill, but it is promoted by the government and concerns a project of national significance.

As can be seen from the list above, aside from the complexities of the various ministerial procedures, the choice of routes for application is very straightforward. This is not a long list.

Private and Hybrid Bills: Something left out of the White Paper?

It is worth considering the use of private and hybrid bills here, although the White Paper does not address these consent procedures. Both have attractions to promoters that are not necessarily in the interests of all participants in a process[34]. It is probably as well in light of these that the procedures are not readily available.

The private bill process is begun by depositing a petition with the Private Bill office of the House of Commons. This must be done by a Parliamentary agent, of whom there are currently 13 living examples[35]. The private bill must be deposited before late November each year, otherwise it is necessary to wait again until the following year. As noted above, a hybrid bill is promoted by the government. They are only really available for the very largest projects with government support because government must give up its own Parliamentary time in order to allow them to proceed.

However, the private bill and hybrid bill procedures do have real advantages for promoters. First, objections must be lodged by way of petition. Any person who lodges a petition on behalf of another must sign the Parliamentary roll to become a sort of temporary Parliamentary agent, if they are not a parliamentary agent already. This must be done in person. The petition is couched in very arcane language—even in its more modern form. If the petition is lodged on behalf of a company or other corporate body, then it must be supported by evidence of a resolution authorising its deposition. If the company is not given to holding meetings this may be very difficult or inconvenient to achieve.

When the petition against a bill is lodged, it is considered by a committee of members of Parliament appointed to examine the bill. This takes place at the Palace of Westminster, which can hardly fail to be intimidating to a lay petitioner. The members in question should not be connected with the subject matter of the bill and, therefore, will have very little interest in its outcome. In theory, this is a good thing but, given the members of the committee might not be consistent for each hearing of the committee, it can produce inconsistencies. The format is highly formal. The petitioner's witnesses sit in a committee room in front of committee members, with advocates behind them. Sometimes they will not be able to see questioners. Members of the committee are the only tribunal and as Parliamentarians, they are not bound by the same rules of evidence as other courts, tribunals or inquiries.

Importantly, the environmental statement for a hybrid bill will be tested by committee members, not an inspector and court. The committee member may never have seen such a document before in

[33] Worryingly, the Eddington report refers to this act with a 1998 date. One of us is wrong.

[34] This was a specific criticism levelled at the King's Cross Bill where parliamentary procedure was used to exclude English Heritage as an objector via the Court of Referees.

[35] It is not easy to become a Parliamentary agent, because to do so requires the approval of the speaker, which is achievable having demonstrated familiarity with Parliamentary procedure—something which is not available unless one works for a firm of Parliamentary agents of which there are six. Therefore, this is a fairly closed shop. A useful reform that could be undertaken as part of this review is to remove this closed shop so that all barristers and solicitors could promote bills. This would deregulate the system and should improve it by opening the service to competition.

their life. The decisions of the Court cannot really be used before committees because their decisions will not usually be tested before domestic courts. If they get it wrong, there is no appeal to the Court[36].

In light of this, it is hardly surprising that the odds are heavily stacked in favour of promoters or—in the case of a hybrid bill—the government. Where possible a promoter may be well advised to use such an approach.

What's up, Doc?

It is true that there are inconsistencies and shortcomings in the existing consent procedures. However, just how accurate are the criticisms of Dr Barker and Sir Rod Eddington? The application processes available to the promoters of major infrastructure projects can undoubtedly be improved, not least for the reasons set out above. There are wider, more significant concerns at large as well. Kate Barker identified four main issues:

- the *length of time* to make a decision on projects that are outside the statutory timetabling framework;
- the *uncertainty* that this brings for developers as well as for local communities involved in the delivery of national infrastructure;
- the *increased costs* to both the public and the developer which delay and complexity bring; and
- the *lost investment* if schemes are not brought forward because of the perceived difficulties in obtaining consents.[37]

These criticisms are major concerns, if they exist, and need to be addressed. However, the extent that they hold true is important in identifying the solutions that government ought to bring forward. This section of the paper looks at some of the concerns and considers if they are entirely justified by reference to the four areas of concern that Dr Barker identifies.

Length of time

The need for a quicker system was identified early in the life of the current system. As early as February 1975 George Dobry Q.C. wrote:

> "Regrettably, the system is slow, even at times desperately slow, because its procedures are . . . too cumbersome."[38]

Needless to say, Dobry was writing in the context of the town and country planning system. He was not discussing a system burdened with very many airports, with other infrastructure proposals and where private and—in the case of nationalised industries—government/hybrid bills were still in use. Nonetheless, as his conclusions illustrate, there was still a need for speed in planning that participants found lacking.

The Barker Review emphasises the need for quicker decisions. Similarly, the Eddington review produced a bar chart of recent infrastructure proposals and the time taken from application to

[36] Human rights challenges are possible, but limited in scope. They do not present an alternative means of appeal.

[37] Barker Review of Land Use Planning—Final Report, p.69, para.3.1. Emphasis in original.

[38] Review of the Development Control System, Final Report, George Dobry Q.C., February 1975. Para.1.11 at p.5. It is interesting to note as an aside that at the time of *all* applications in England "not much more than 50% . . . were decided within the statutory period of 2 months".

decision.[39] The Eddington review bar chart is adopted by the government as well.[40] Kate Barker identified the stages of an application: information gathering, submission of applications, consultation, inquiry, writing the inspector's report and the issue of a ministerial decision. Nevertheless, the bar charts adopted identify that the biggest delays lie at the level of the ministerial decision[41].

Practitioners can usually identify the time likely to be required for a project with a fair degree of accuracy except for the time taken for the ministerial decision. Time taken to an application will be finite—the project manager will demand this. However, the amount achieved in this period and the documents produced will depend on the nature of the project and its anticipated effects. This is important later, because it affects the amount of data with which others must contend. After an application an objection period will be finite, specified by statute. The government seldom takes more than one month to decide if an application is to be the subject of a public inquiry and thereafter, the time to the inquiry should not ordinarily be more than 22 weeks.[42] Practitioners can usually forecast the likely duration of an inquiry.[43] After the inquiry, the inspector is given two writing days for every sitting day of the inquiry. Thus, it is easy to predict how long this period will last. The Planning Inspectorate will take about one month in normal circumstances before passing the paper to central government. Therefore, it can be seen that the uncertain periods are the inquiry and the ministerial decision stage.

It may therefore assist to consider what happened in the case of some of the projects considered in the bar chart and why the processes took the length of time that they did. A point to bear in mind in this circumstance is that by-and-large the more controversial a proposal is, the longer it will take.

- London International Freight Terminal: This application related to a project to construct a distribution centre and rail head west of London. It was refused consents because the Transport and Works Act 1992 was used for the proposal (including for land assembly using powers of compulsory acquisition), which was not the correct application process. The project was *ultra vires* the procedure used to promote it. The proposal was also vigorously opposed by the local authority, Slough BC.
- West Coast Main Line 1 and 2: This improvement of the nation's principal rail transport artery took almost exactly the same time in inquiry as in reporting and decision-making mode. It is notable that the inquiry was peripatetic: it had to move the length of the country. As such, it is hardly surprising that this took so long. It is notable that the second inquiry was much shorter.
- Dibden Bay: This project had a very lengthy public inquiry. The promoters were forced to contend with opposition from bodies as diverse as their competitors, English Nature (as was), pressure groups such as the RSPB, local residents, statutory bodies and many others. They had areas of law before them that had been untested and in respect of which they

[39] Figure 5.8, p.326 of the Eddington Report, Vol.4.

[40] White Paper, p.32, para.2.8.

[41] Of the projects identified in the White Paper eight out of eleven have a longer time for the post-inquiry procedures than for the inquiry itself.

[42] In any case, the period is not idle and resourcing issues can arise if this timescale is telescoped inwards by too great an extent. The case that will have to be made out in any public inquiry will not be known in full until all objections have been received and reviewed, and the Secretary of State has issued a statement of matters in relation to which he/she wishes to be informed. If a large witness team is needed—as at Bathside Bay with 19 witnesses—this time can be needed to deal with the sheer volume of data.

[43] The planning inspectorate will also do this and advocates are usually asked to give time estimates at pre-inquiry meetings.

had to feel their way, including in relation to the Habitats Regulations[44]. In relation to this and in a number of other areas (including in relation to the availability of alternatives) the promoters had to change tack in relation to the application in the course of the inquiry. Ultimately, this somewhat controversial project failed to obtain consent. In this scenario, a lengthy inquiry was inevitably forced upon the promoters.

- Bathside Bay: I am able to write about this proposal with some degree of expertise having acted for the promoter. The inquiry length stated omits two important aspects: it straddled a summer break in August and also included time for the inquiry to resume in order to hear closings after the signing of a s.106 Agreement. Without these elements, the duration of the inquiry is much shorter. The ministerial decision period is also understandable when it is noted that Bathside Bay and Felixstowe South Reconfiguration are located either side of the same estuary and the two inquiries took place ''back to back''. As such, the Bathside decision could be expected to wait for the Felixstowe decision to reach such a stage as would allow both to be in the minds of the Secretaries of State.
- Felixstowe South Reconfiguration: This seems to have taken an amount of time which would meet with the approval of the Eddington report[45] and as such, this requires little further discussion.

As can be seen from this discussion the major delay lies at the ministerial decision level. Therefore, it must be right that this is the appropriate stage for the main adjustments to the system. However, to examine two applications shows how valuable the post-inquiry, post-report period can be. It allows refinements to be undertaken to render the application acceptable.

One of the projects listed in the Eddington Report as being a somewhat lengthy post-inquiry period is the Tyne Tunnels. This proposal to dual the existing Tyne Tunnel (currently a single bore tunnel under the River Tyne) was the subject of a Transport and Works Act 1992 Application[46]. Following a six-week inquiry where the principal opposition was led by local residents with few resources at their disposal, the matter was reported to the Secretary of State. Essentially, the inspector was content with the proposal, although the tolling provisions were not fully fledged even though the inquiry had taken place. The tolling unit of the Department for Transport expressed itself to be unhappy with the proposed tolling regime and hence the Secretary of State addressed the matter by way of a ''minded to'' decision, followed by negotiation of the tolling provisions with the Department for Transport. The majority of this period was concerned with satisfying one part of the Department for Transport that another part should authorise a project.

Another recent project with a very lengthy gestation at the ministerial decision stage is London Gateway Port. This proposal was taken from application to inquiry very rapidly and new environmental information was published throughout the course of the public inquiry. The transport impact of the proposal was particularly controversial. The ministerial consideration stage here was used to carry out an examination of certain elements of the project by written representation after the inquiry had ended. Therefore, this period represents a period having more in common with an

[44] The Conservation (Natural Habitats, &c.) Regulations 1994

[45] See bar chart Figure 5.11 on p.345. The red line indicates the length of time that should have been taken had the minister's report not been included.

[46] The Transport and Works Act 1992 is not normally available to authorise the construction of road tunnels. This is because first, the procedure is not available if another procedure can be used—most often s.106 Highways Act 1980. However, here the tunnel is not a highway, but a private road albeit owned by a public authority. As such, it does not benefit from the use of the Highways Act 1980. The second reason why the 1992 Act is not usually available is because it only authorises works that interfere with navigation. A *bored* tunnel does not interfere with navigation, but an immersed tube tunnel at the New Tyne Crossing will have that effect. Hence, the 1992 Act procedure was available.

inquiry than ministerial decision. It also illustrates the sheer length of time that can elapse in dealing with issues other than orally in an inquiry. The matter could perhaps have been disposed of more swiftly by means of a reopened inquiry.

To this point I have not referred to Terminal 5 at Heathrow Airport. This is discussed further below.

Uncertainty

In the case of a number of these proposals it can be seen that a lack of certainty bedevils the process. Would the Dibden Bay or London International Freight Terminal proposals have begun if they had known they were likely to fail? It has been very expensive for promoters to find this out for themselves. Perhaps as importantly, projects can be so closely allied to the prosperity of a business that they can be highly damaging for the company and/or its officers should they fail. If the outcome could not be foreseen before embarking on the process, one must have great sympathy for the people involved.

In this sense the Dibden Bay and London International Freight Terminal experiences are instructive. Any improvements in certainty must cut in two directions—on the one hand they should show which projects should succeed so that applicant promoters know that they can safely invest funds in the expense of environmental impact assessment, consultation and procurement. On the other, they should make it clear where a new entrant is not likely to advance.

A consideration of Terminal 5 is relevant here. This is not an exhaustive examination of that inquiry process—my insufficient familiarity with the project precludes this. However, it is interesting to note that the case is highly anomalous in recent years in terms of the duration of the inquiry. It is much longer than its nearest comparator and so should be judged in a class of one. Nonetheless, the length of the inquiry provides the yardstick that is used to beat the planning system.

What caused the inquiry to run for so long appears difficult to identify. However, it did undoubtedly include technical matters of great importance and complexity. It was highly controversial. The cases of some parties changed in the course of the inquiry, and it appears that considerable uncertainty arose in relation to the position of at least one statutory body. The standards and policies applied to roads in the vicinity of the site (including the M25) changed during the course of proceedings. Given the outcomes in relation to other applications with comparatively long inquiries (see above) it would seem most likely to fall within the set of applications likely to be refused consent, again making it unusual because it was successful. In light of this, it is a credit to the application teams who managed to guide it through this procedure.

However, the main point that can be gathered from the Terminal 5 experience is the vacuum in which it existed in relation to policy. Although John Gummer was to remark after leaving office that everyone knew that Terminal 5 was needed and, presumably, he had not changed his mind since leaving it, no-one in Government was prepared to state this before the process began. Furthermore, whilst pronouncements in relation to matters such as roads can often take place on the floor of the House of Commons, silence prevailed in relation to airports. Doubtless this was justified as not being a prejudging of a matter that was *sub judice*. The government was scrupulous, but put a lot of people to a lot of trouble and expense by its silence.

In terms of the benefit of certainty and the approach of the Government to policy it is also salutary to examine the proposal known as Central Railway. This project was the subject of a unique application using a unique procedure as the last Conservative administration waned. Central Railway was/is a

proposal to build a dedicated freight railway from the channel tunnel to the North of England. It was designed to take freight off the road system, be built to a continental loading gauge so as to take the largest trains possible and would link to the national railway network. It was to have been privately funded.

The Central Railway proposal was not a government initiative and hence could not proceed by way of a hybrid bill. Because the Transport and Works Act 1992 exists, the use of a Private Bill was not available. However, being so large in extent the proposal fell within the provisions of the Transport and Works Act 1992 relating to schemes of national importance. Such projects are required to receive the approval of Parliament before being allowed to proceed with the benefit of in-principle approval. Any ensuing public inquiry would then be able only to consider the local effects of a project. Here, the impact of political involvement became most acute. The matter fell to be promoted in Parliament by the then minister of state, Roger Freeman, this taking place in the very dying days of the administration when the Major government knew it needed every vote it could get. As the project would run through a large number of marginal Conservative constituencies, the main opponents of the proposal in the Commons were Conservative MPs. Unsurprisingly, the promotion of the project lacked some gusto on the part of the minister and was resoundingly defeated when the subject of a vote.

Probably as a result of the experience with Central Railway there have been no more schemes of national significance promoted under the Transport and Works Act 1992. This somewhat extreme example illustrates the impact of political involvement in a process. However, it also illustrates the power of vested interests. Notable among those opposing Central Railway was Railtrack[47], who would have had to deal with the consequences of the new competitor.

Increased Costs/Lost Investment

The Barker report rightly identifies this as a product of delay although, delphically, also attributes it to complexity. The cost consequences of delay are widely known in terms of raw materials. Costs of consultants and lawyers also tend to escalate where a process takes longer than expected. However, the example that the Barker report gives of the Dibden Bay case is not a result of delay, but of uncertainty. It is also true—and a helpful reminder that major projects are not just an end in themselves—that regeneration and employment rely on getting these schemes right. Lost investment refers to lost catalytic and regenerative effects of new infrastructure.

However, certainty and prescriptiveness must not be confused in terms of cost. If the effect of injecting greater certainty into a process is to constrain a development, this may be counter-productive in terms of the process. Where an application process constrains a development, certainty is given as to the form of a development. However, in practical terms this may mean that scope for design innovation on a project is reduced or removed. This will push up costs and decrease the likelihood of project delivery.

You don't wanna do it like that, do it like this (as Harry Enfield might have said)

It is almost a truism that other countries deliver major infrastructure projects more swiftly than we do in England. Sir Rod Eddington drew unfavourable comparisons between delivery of infrastructure

[47] Now, of course replaced by Network Rail, but effectively being the same organisation.

projects in continental Europe and delivery of Terminal 5 and port projects[48]. Nevertheless, different approaches have been, and are being, tried in the British Isles. I now consider some of these as precursors and comparators to the White Paper proposals.

George Dobry's suggested solution in 1975 was reassuringly familiar to us today. Again, dealing with the planning system he warned that applications will ''tend to move at the pace of the complex or controversial few''.[49] He proposed a solution:

> ''Development proposals should be divided into two categories. It is, therefore, suggested that applications should be divided into two categories: those that are minor and uncontroversial . . . and those that are major or controversial or both . . . Applications would be streamed accordingly.''[50]

Dobry was not intending a wholesale separation of the system and went on to describe a similar approach to appeals and inquiries. He then set out items where he considered there was a need for ''Action by Central Government''. He advised:

> ''Sometimes what the circumstances really require is a decision on issues of planning policy in advance of decisions on specific applications . . . . I therefore suggest that the Secretary of State should sometimes appoint Pilot Inquiries to look at such policy issues in advance. This course would obviate repetitive inquiries into competing applications, all involving similar issues of principle. . . . Such pilot inquiries *into* issues *of planning policy* would more appropriately use the ''examination in public'' procedure . . . Once the Secretary of State has, with the help of the Pilot Inquiry, resolved the issues of planning policy, the field would be clear for ordinary local inquiries to consider the merits of any applications for particular sites.''[51]

The emphasis is clear, relying as it does on the need for a clear statement of policy from central government and the need for a two-speed process, capable of addressing more complex applications.

Scottish approaches

The English are not alone in these islands and neither is the English planning system. Similarly, we are not alone in dealing with the need for major infrastructure projects and these self-same issues have also been grappled with in Scotland and in the Republic of Ireland very recently.

Since devolution the Scottish Parliament has found itself dealing with a spate of private legislation that must have seemed more akin to railway mania in the nineteenth century than it had been expecting. The amount of Parliamentary time allocated to the scrutiny of transport projects persuaded the Procedures Committee of the Scottish Parliament that a fundamental review of its own Private Bill procedures was required. The review led to the Transport and Works (Scotland) Bill , which was passed on February 8, 2007 and received royal assent on March 14, 2007.

The Scottish solution to this problem is to require applications for orders for major projects to be made to the Scottish Ministers. They should approve those projects that accord with Scotland's

[48] Eddington Report, para.5.64. However, very fairly, he also points out at para.5.70 of his report that even France is finding it increasingly difficult and highly costly to deliver major infrastructure projects.

[49] It is to be noted that Dobry was concerned about the uniformity of the procedure applying to all planning applications, but he nevertheless identified the problem of complexity in delaying major projects.

[50] Dobry Report, p.63, para.7.7.

[51] Dobry Report, p.96, para.8.36–8.40. Emphasis in original.

National Planning Framework. The principle is that only those projects of sufficient scale to appear in the National Planning Framework will be the subject of this procedure. Schemes deemed by ministers to be worthy of approval will require approval by the Scottish Parliament under a positive resolution procedure. As well as schemes in the National Planning Framework, there is also an ability for ministers to call in a scheme which is not recognised in that document for approval by this route. The process allows a number of application procedures to be conjoined and directed towards a single affirmative resolution in Parliament. Thus, rail, road, harbour, tunnel, bridge and navigation projects have a home in a relatively uniform procedure. Needless to say, these projects do not include energy, waste, water and similar projects that remain the subject of other consent regimes.

If you see SID, tell him

Our neighbours across the Irish Sea have addressed the same issues as the Scots in a more root and branch fashion, leading to the Planning and Development (Strategic Infrastructure) Act 2006. The short title of the 2006 Act makes its purpose plain:

> ''An Act to provide in the interests of the common good, for the making directly to An Bord Pleanála of applications for planning permission in respect of certain proposed developments of strategic importance to the state; [and] to make provision for the expeditious determination of such applications. . .''

The 2006 Act amends the Planning and Development Act 2000. It inserts a new Schedule[52] that sets out the private sector development to which it is to apply, although certain other applications are also the subject of this procedure.[53] The Seventh Schedule developments can be grouped into Energy Infrastructure,[54] Transport Infrastructure and Environmental Infrastructure. These developments, described as Strategic Infrastructure Development, are the subject of direct applications to An Bord Pleanála (the Board), which is the Irish equivalent of our Planning Inspectorate.

Applications to the Board must be preceded by consultation with the Board, who must certify its opinion that the application falls within its powers if the application is to proceed[55]. At the same time the Board carries out a screening and scoping exercise. There is not a statutory pre-application consultations with the public at large, but the 2006 Act requires the publication of notice of the application and a minimum six-week period for ''submissions and observations'' to be made.[56] The guidance to the public then makes the statement

> ''Persons who make submissions to the Board will not normally be allowed to elaborate or make further submission requested by the Board. It is important therefore that persons making submissions should refer to all issues of concern to them in relation to the proposed development.''[57]

[52] Sch.7.

[53] These include development by local authorities requiring EIA; development by the State and requiring EIA; major gas pipelines and associated infrastructure; high voltage electricity transmission lines and interconnectors; motorways and other major roads; development by or on behalf of a local authority on the foreshore requiring EIA; railway works including light rail and metro systems and certain associated commercial development on adjacent land; and compulsory acquisition associated with certain of these developments.

[54] Interestingly, the threshold for a wind farm is an installation of more than 50 turbines or having a total output greater than 100MW.

[55] Planning and Development Act 2000, s.37A(2) (as amended). A review of the Board's recent activity reveals that much of its caseload to date has included deciding if matters are within its ambit or are what we would term EIA development. It has had to look at matters as diverse as a new caravan park and a 450MW Combined Cycle Gas Turbine gas-fired power station.

[56] See above fn.55, s.37E(3).

[57] Essentially, this is akin to the 42 day objection period under the Transport and Works Act 1992. However, in that case the ability to introduce grounds of objection later is not always rigorously enforced.

The Board may decide to hold a ''meeting'' or an oral hearing in its absolute discretion. Its guidance states that it will normally do so ''unless the issues are clear-cut and can easily be dealt with by written submission. Any hearing must be conducted ''expeditiously and without undue formality''. The Board has extensive powers to seek additional information.

Applications for Strategic Infrastructure Development must be determined in accordance with normal planning appeals and having regard to the full range of material considerations. The decision may contravene provisions of the development plan. Developments can only be changed after authorisation with the express approval of the Board. The actual consents given by the Board depend upon the regime in which it is operating. Thus, it may grant a permission in the same manner as a planning permission or, for instance, make a railway order[58].

I hold in my hand a piece of paper, it will bring us. . . .

With real and perceived problems identified with England's planning system for major infrastructure projects, the White Paper is the Government's prescription. What it will bring in time is a matter which requires careful scrutiny.

When the Planning and Compulsory Purchase Act 2004 was enacted, some commentators wondered as to the point of the reforms—did they really change anything? In relation to the current White Paper proposals there is clearly a point. There *are* definite areas in relation to which there is scope for improvement. The process can take a long time. Certainty of policy is lacking, so expensive processes are begun at risk. Some processes are innately arcane. There are procedural risks associated with multiple and inconsistent application routes. The worst performing application in terms of timing—Terminal 5—was characterised by the need for clarity in relation to the principle of the application, but not necessarily by a defective process. Similarly, the process must be sound to some extent if it led to the grant of permission without a successful legal challenge.

On the other hand, applications can work well—this is a system run by experts (including the attendees of the Joint Planning Law Conference). The range of application routes is basically straightforward. There are good reasons for the time taken for some major projects to be delivered. Time is used purposefully in bringing a matter to inquiry and—in some cases—in useful tidying-up exercises after decisions, and before orders, are made.

This is the climate in which the Government has brought forward its White Paper proposals for major infrastructure projects. There is a public will—and a push from business—to make the planning system work faster. It must also work better. Expectations are high, because the system currently operates quite satisfactorily in many instances, so any new system must be an improvement, not just a change for the sake of change.

I have a little list: National Policy Statements

National Policy Statements (Statements) would set the policy case for infrastructure cases as well as establishing the national case for decisions. They would be the primary consideration for the determination of infrastructure project applications. They would be the sole point in which ministers were involved in the determination of proposals for major infrastructure projects.

[58] Under the Transport (Railway Infrastructure) Act 2001.

So far, so good: this is a real step forward in relation to the promotion of major schemes. George Dobry would recognise his ''pilot inquiries'' and doubtless applaud this approach. This would address the concerns brought about by Terminal 5 in that applicants would know if their project was favoured—as in that case—and if it was unlikely to proceed—as in the case of Dibden Bay Port. National Policy Statements can deliver certainty in relation to technologies: if ministers have said once that they consider nuclear power to be safe and necessary, then it should not be necessary for this to be tested every time an application is made. Similarly, if ministers consider air travel to be desirable, it ought not to be necessary to examine if better use of the Channel Tunnel would be an alternative or if restricting air traffic growth could remove the need for a new runway.

Whilst these are excellent starts, there are certain things that a Statement must also achieve if it is to attain the objectives sought by the Government:

Responsibility: The separation of decision-making from policy means that ministers will be removed from the decision-making process. They will no-longer be responsible for the outcomes of the policy they promulgate. The actual decision makers—the Infrastructure Projects Commission—may find themselves vulnerable to ministerial criticism. It is notable that the judiciary, which is a tribunal separate from ministerial control—is often the butt of complaint when it deals with the consequences of ministerial policy and law-making by parliamentarians. The separation of functions is in the best tradition of Montesquieu, but the new decision-makers must be robust and their decisions defensible. Similarly, as the City of London Law Society has noted, after the Statement stage ministers should be removed from any position where they may be influence decisions, either directly or indirectly.

Consistency: With more than one Statement to be produced, they must not be the subject of ministerial turf wars. For instance, conflict could arise between a tidal barrage proposal supported by energy ministers and a new port installation desired by the Department for Transport. There must be a clear way of ensuring that contradictions do not arise.

Speed: The first statements will be needed in short order. Some precursor documents already exist[59] and the gestation of others has clearly begun[60]. These need to be capable of speedy translation into National Policy Statements. Delay will need to be avoided: it would be very disruptive if in the absence of a Statement allegations of prematurity were levelled at a project. Any interim position will need to be made quite clear.

Flexible: Statements will be reviewed regularly according to the White Paper[61] and the timescale for that review is stated to be at 3–5 yearly intervals. At any given time Statements should look forward between 10 and 25 years. In this respect, the approach the Government takes to adopting Statements will be important. If these must be the subject of a complicated consultation and endorsement procedure this may be a very onerous timescale. This point is considered further below in relation to Examination.

The competitive effects of Statements must also be in mind. If Statements are very specific as to locations, economic power is essentially placed in the hands of existing industries. Thus, a new market entrant like Central Railway may very well find itself struggling to get its proposals included

[59] The Airports White Paper *The Future of Air Transport* is a very good example. This document already sets out the locations where the Government will look sympathetically at growth at airports.

[60] The Energy White Paper is a distinct hint as to what is likely to follow and the interim report on the Government's review of the Ports sector has indicated that a similar approach to that used for airports is likely.

[61] Paras 3.29–3.33.

in a Statement and—if the Statement is the principal planning consideration—would struggle to obtain a consent if they had not achieved the inclusion of a project in a Statement.

The Statements must be sensitive as to sectors within their broader subject matter. This means that in relation to energy it would be necessary to have an overarching approach, which might address the proportionate need for nuclear, gas, renewable, and other generation technologies. Then, sector-specific sections of any Statement (or even sub-Statements) could address these sector-specific matters. This brings three benefits: first, flexibility would be engendered because it would not be necessary to review all sectors together—each could be reviewed separately, even on different timescales; secondly, the government proposes that Statements should be capable of being subject to statutory challenge. With separate sub-Statements it would be possible for the sub-Statements to be subject to separate challenges whilst leaving an overarching policy in place and whilst leaving other sector-specific sub-Statements unaffected. This gives more procedural robustness. The third benefit is that different sectors may demand different approaches—nuclear power may require the identification of locations for plants, whilst renewables may refer instead to a national target for generation, leaving the market to determine locations.

Compliant with European Law: The Strategic Environmental Assessment Directive (the SEA Directive)[62] applies under English Law. This Directive is designed to ensure that where a strategic document is likely to restrict options for development consents at a later stage an environmental impact assessment is carried out at an appropriate level. This makes sense because if options are discarded at the strategic planning stage then the alternatives assessment required under ordinary environmental impact assessment will never capture such considerations. The SEA Directive applies where the plan or programme—a somewhat opaque description—will ''set the framework'' for later development consents[63]. It is quite likely that if principles, including locations at a general level, are specified then the SEA Directive will apply to Statements. This will entail extensive work at the Statement stage, which must be borne in mind in relation to the requirement of speed in putting Statements in place and the need for scrutiny. It must also be borne in mind that the process would need to be reviewed every three–five years if the review of Statements is to take place at such intervals. Parliamentarians must be confident that this is achievable as they will be involved in such reviews.

It is also quite possible that the Habitats Directive will affect locationally specific Statements. This Directive and the need for appropriate assessment will be addressed by others at the Joint Planning Law Conference this year. However, as the Habitats Directive bites on ''plans and projects'', a plan such as a National Policy Statement would be likely to be caught and its contents require an appropriate assessment in the same way as an application for a development consent. Care will be needed in this respect: the standards of proof are high if appropriate assessments are needed and, if those standards are not met then the aspirations in a Statement may be unimplementable because the Statement cannot be adopted[64].

Consultation: This is perhaps the hardest part for Statements to address. They are, by their nature, national but will have local effects. If a Statement is to be given effect in a certain local area, then

[62] The Directive on the Environmental Assessment of Certain Plans and Programmes (SEA Directive 2001/42/EC)

[63] See above fn.62, Art.3, 4.

[64] Since the *Waddenzee* case C-127/02, [2004] Env. L.R. 243 it has been necessary to carry out appropriate assessment from the mere possibility that habitats in European Sites may be affected by a plan. In determining the likelihood of effects, high degrees of scientific certainty are required.

local residents and other local stakeholders will need to have a right to be heard. This will be particularly pertinent in relation to airports and nuclear generation, I suspect. However, ports and railway projects are not without controversy.

This is the point at which one of the greatest risks of democratic deficit will arise. Ministers will be able to promote proposals, perform consultation (note that this is not the same as a right of objection, giving a right to be heard) and then to adopt policies. At this point, subject to any scrutiny that applies there may be little to stop a Statement taking effect.

What the government intends by consultation is not at all clear[65]. The word ''consultation'' is used in the White Paper without any qualification so it is not possible to understand what it would mean for the relevant local authority, residents or lobby groups. It is not clear as to meaning for general industry bodies either. Thus, the manner in which market participants—and particularly aspirant market entrants—could be engaged is not expressed.

Examination and Scrutiny: It is suggested in the White Paper that Statements should be the subject of parliamentary scrutiny[66]. This needs some care so as not to fall foul of either of the concerns I have raised in relation to parliamentary processes. First, this will reintroduce parliamentarians into the process—it would be disappointing to find Members of Parliament concluding once more that they were ''not best placed'' to determine these matters as they did for the King's Cross Bill. Before Parliament agreed that this was an appropriate way to consider a matter, it should be content that it had sufficient resources to act as a national planning committee in respect of what may be several Statements per year.

Next, the process has to deliver democratic accountability for everyone at every level: consultation is not the same as a right to be heard and there may also be a circumstance where local communities affected by a Statement should be heard. It is not necessarily enough to say that parliament will represent the interests of the electorate as a whole through the ballot box at elections. If everyone is to have their ''day in committee'', then the procedure for adopting Statements needs to have the flexibility to bring the committees to the stakeholders so as to avoid the intimidating surroundings of the Palace of Westminster and procedures need to be run in an accessible manner. Consultees have responded favourably to the idea that parliamentary select committees would be good decision makers at this stage, but would a parliamentary commission with Members of Parliament considering its recommendations be a better mechanism?

Care is also required so that conflicts of interest do not arise for members on committees. It will be recalled that members do not usually sit on bill committees where their constituencies are affected directly by the proposals. For a set of projects such as a new build programme for nuclear power stations or the next series of airport runway extensions, this may require care to arrange. Given the number of communities involved will this always be possible? Furthermore, it is possible that the West Lothian question may prove a source of criticism if Scottish M.P.s are the decision makes on Statements relating to English projects.

Finally, the role of the committees needs to be made clear. It is stated in the White Paper that there will be an ''opportunity for Parliament to consider proposed national policy statements before they are finally adopted''. However, what is meant by this is again not stated: whether Select

[65] White Paper, paras 3.21–3.26.
[66] See above fn.65, paras 3.27–3.28.

Committees could reject a Statement or if the minister would simply have regard to their views must be established.

All projects are equal but some are more equal than others: The new application procedure and the Infrastructure Planning Commission

The first point to consider in relation to the new procedure is whether it will be directed at the correct projects and whether, as the Government hopes, it will simplify matters. The National Policy Statements will affect many areas of planning, no doubt. The Infrastructure Planning Commission (the Commission or IPC) will only deal with certain applications: are they the right ones?

The new applications matrix following enactment of the White Paper proposals will not be simpler than the existing applications matrix set out above. The new matrix of application procedures could well be something like the following:

- Smaller proposals and proposals that are the subject of the Town and Country Planning Act 1990 regime in any case are dealt with by application to the local planning authority. Appeal ordinarily lies to the Secretary of State.
- Smaller proposals that are the subject of appeal (minor appeals) may be dealt with by a Local Member Review Body[67].
- Larger Town and Country Planning Act 1990 projects may still be the subject of reference to the Secretary of State and call in because (a) they do not have the specific support of policies within the development plan[68]; (b) they are of greater than local significance; or (c) because the local planning authority itself decides that a matter is too big or controversial to deal with and asks for call in, encourages an appeal for non-determination or refuses planning permission. The Secretary of State intends there to be fewer call-ins. Presumably the ability to call in major infrastructure projects will be removed as these would be before the IPC.
- "Very large" planning projects would remain to be progressed under the 1990 Act, but should be the subject of a Planning Performance Agreement to allow them to move swiftly through the application stage.[69]
- Certain types of project will still be addressed directly to ministers—rail, light rail, harbours, inland waterways, large generation projects, large water projects, trunk roads—to the extent they do not constitute projects before the IPC. These could be very large in practice.
- Major Infrastructure Projects will be addressed by the IPC.
- Private legislation will remain available.
- It is likely that hybrid bills will remain available. It is difficult to see Government surrendering such a useful tool.

Thus, it can be seen that the routes to be chosen for applications will be greater in number than under the existing system. The IPC is supposed to operate more swiftly. Therefore, there will be a temptation for promoters to use the IPC route if available. This brings us to the proposed indicative thresholds for the IPC application route[70]. Although the IPC route will be one route for projects of a given size or description, there will be additional procedures under the development consent system

[67] White Paper, para.9.53.
[68] See above fn.67, para.7.46.
[69] See above fn.67, para.8.45.
[70] See above fn.67, Box 5.1 on p.75.

generally. Although there will be a single application for a number of different types of project, whilst each has its own procedure at present, in future there will be a need to ensure the application to the IPC encompasses all powers needed. It will be crucial to ensure that for a given type of project the correct consultees are first identified and then consulted. There will still be pitfalls to catch the unwary promoter.

I will not consider each threshold and whether it is appropriate. However, there is no reason to believe that a 45MW onshore wind farm will be any less controversial than a 50MW onshore wind farm. Promoters are likely to seek bigger projects to avail themselves of the IPC procedure. As a result the divisions seem arbitrary even though based on existing legislation—why not use the Irish threshold for generation of 100MW?

Having examined this, it seems more sensible to adopt a more flexible approach to thresholds. Numeric, objective thresholds are very useful, but it would seem sensible for a form of call-in to the IPC to be available. Thus, applications begun by the 1990 Act route could perhaps be moved to the IPC at the appeal or call-in stage, even if less than the indicative threshold[71].

Two other aspects of this consideration are important: treatment of railways and the treatment of revisions to schemes authorised by the IPC.

Railways

In relation to railways, the Government states that it does not propose to include indicative thresholds[72] because proposals are either so small as to fall outside the IPC remit or to be deliverable by Network Rail's permitted development rights. This has a number of implications. First, it assumes that Network Rail will be the sole body delivering IPC-susceptible projects. This apparently leaves bodies such as transport for London or Passenger Transport Executives with the existing application routes. Secondly, the carrying out of major works to a Network Rail station using compulsory powers of its own is not envisaged, let alone a new high speed rail link[73]. Similarly, no new market entrant in rail is envisaged. Finally, light rail projects are excluded for now. This all suggests that a review of this aspect of the indicative thresholds should be undertaken at this stage.

Variations

The second area of interest and concern is the treatment of variations to projects authorised by the IPC. Variation of conditions attached to a consent issued by the IPC is proposed to be a matter for the IPC in the same way as in Ireland where they are dealt with by the Board. However, thought must be given to how presently existing or authorised projects would be varied. Would the IPC be given authority over variations of orders and applications that would have been within its remit had it been in existence when the original consent was given? How far should this go?

The Euston Sidings case[74] in 2000 is important in this regard. This case related to changes to the rail approach to Euston station. Railtrack carried out works which residents claimed were so large

[71] Something of this nature is suggested at White Paper, para.5.1 by way of an ability for ministers to refer projects to the IPC.
[72] See above fn.71, footnote on p.75.
[73] Which must be capable of being envisaged within the life of a National Policy Statement.
[74] See commentary at para.3B-2130/2 of the Encyclopaedia of Planning Law and Practice.

as to require an Environmental Impact Assessment. However, Railtrack relied upon its permitted development rights, which are excluded from the need for EIA if they rely on pre-existing private legislation[75]. The relevant area had been authorised to be built as a railway under nineteenth century private acts, incorporating the Railway Clauses Consolidation Act 1885. The Secretary of State concluded that the railways legislation preceded the EIA Directive and hence was not bound and, if he was incorrect on that point, that the Acts included all the elements which might be relevant in assessing the environmental impact of the project. The point was never litigated but the outcome may be very different today.[76] The matter is relevant to the IPC because it would need to grapple with the issue of whether this type of amendment were a matter for it. If it were—as may be more likely nowadays—then the type of project before the IPC may include variations to works authorised by pre-1988/pre-EIA private legislation as well.

Pre-application

This will be a very important part of an application process. Some of the better run processes such as Transport and Works Act 1992 applications are very effective in dealing with this part of procedural element and the IPC would have much to gain from modelling pre-application procedure on their practice. This ought to go further than the Irish system, which is founded on discussions between the Board and the promoter. As many documents and procedural elements as possible should be agreed with the IPC in the interests of advancing later stages efficiently. Thus, screening and scoping EIA exercises would be important here. If consultation is to be mandatory, an agreed consultation/community involvement plan agreed by the IPC could also be a pre application requirement. Any draft orders required should also be supplied at this early stage, if possible. This would be the point at which an application is ''accepted'' into the IPC route, rather than actually made just as in Ireland. This would reduce the risk of *ultra vires* applications being made. However, a right of appeal or a challenge mechanism would be required in case the IPC wrongly excluded a project form its jurisdiction[77].

Written evidence and public inquiries

When an application is made it will have been the subject of consultation, but consultees will inevitably not have formed concrete views: the application will not crystallise as to its form until it is actually made and consultees will reserve their positions until then. The data and resources available to promoters will outweigh that of even statutory undertakers and statutory consultees.

This points to the need for a short objection period because a quick objection to preserve a position will be more effective than a lengthy consultation after application, which may still result in an objection. Many consultees will object even if only to maintain a position for negotiating purposes. It is important that written evidence procedures at this stage are not too onerous: objectors with legitimate concerns that are capable of being addressed by agreements will not wish to be pressed into producing evidence so as to avoid cost escalation. Furthermore, time spent on evidence could be better spent on negotiation, so it would be unhelpful to push towards

[75] Town and Country Planning (General Permitted Development) Order 1995, Sch.2, Pt 11 and Art.3.

[76] Particularly in light of the Barker case law on EIA, which now requires EIA to be considered at the reserved matter and subsidiary consent stage.

[77] However, it would seem sensible that the acceptance of a project ought not to be capable of challenge on a procedural ground by a third party because the same considerations would apply before the IPC as before any other decision maker. Hence the third party ought not to be disadvantaged.

written evidence too soon by means of a trammelled timetable. The danger of exposing too many areas of contention to written representations is illustrated in the length of time taken to dispose of the London Gateway decision after the original ''minded to'' decision from the Secretary of State.

If objections are made, the current default setting is that most application processes lead to a public inquiry. In Ireland the Board states that it will usually hold a ''meeting''. Inquiries should remain the default setting with a major project. The White Paper states that ''the majority of evidence, given its likely technical nature, should be given in writing''. This is how planning inquiries work today—proofs of evidence are ''taken as read''. However, under the White Paper the discretion to call oral evidence is to be reserved to the IPC.[78] The ordinary exercise of discretion should be to call for evidence by public inquiry. Otherwise pressure to identify and address real issues of difference will be lost.

Matters that must be addressed in this regard relate to the tendency of written representations to be iterative and lengthy. Although Terminal 5 was a lengthy inquiry, in contrast many months have passed in written representations in relation to the London Gateway Port proposal between the ''minded to'' decision and the ultimate decision in relation to a relatively short list of subjects The length of time that might be required to address a greater range of subjects is daunting. Sufficient time must be given for exchanges and their consideration, particularly if technical data is involved and if one or more parties is less well resourced. Thus, written representations could protract rather than shorten matters.

A public inquiry focuses evidence and makes it more likely to reach a final form (if only during the inquiry itself). Reaching agreement to avoid giving evidence orally is not always easy unless parties have the discipline imposed by the threat of cross-examination. It would be easy (and perfectly understandable) for a planning inspector[79] to conclude that a round table session and agreed statements can remove the need for cross examination on the basis of a civilised round table session in the midst of an otherwise torrid planning inquiry. However, it is frequently the case that the threat of cross examination concentrates minds and is the psychological reason behind a civilised round table session.

The right to cross examination is proposed to be removed. Instead it is suggested that the IPC acts as inquisitor. However, the burden that this will place on Commissioners should not be underestimated. Cross examination is a skill learned and honed by advocates over many years and preparation for cross examination takes many hours. This would be an additional burden placed upon Commissioners, who may not all have been professional advocates. The IPC would need either to maintain the threat of cross examination itself, by retention of advocates to an inquiry, or to rely on adversarial proceedings for the same effect. To rely on Commissioners to work out the key issues may mean that points are missed: they will be considering their own questions, not necessarily all of the points that should be asked.

Conversely, the involvement of lay objectors in a public inquiry can be beneficial. The inquiry can act as a safety valve and can also be very disciplined, provided inspectors (and hence Commissioners) maintain good order. An open floor session can be important in many large inquiries today, but lay objectors may be involved throughout a lengthy inquiry as full participants too. It is not the case that

[78] White Paper, para.5.30

[79] and through him or her the Government and the IPC.

a well resourced and prepared party that is led by lay participants is "shut out"[80] by the employment of professional advocates. The Bathside Bay inquiry was a good example of this: a perusal of the transcript reveals the constant presence and involvement of articulate, lay objectors. An "open floor" approach is not a panacea for community involvement, neither is the replacement of lay questioning with Commissioner questioning. A Commissioner would not necessarily ask the questions desired by a lay participant[81]. In this sense, replacing questioning with an open floor session may increase the risk of statutory challenge if a lay objector felt concerns had not been addressed by a Commissioner, or not addressed with sufficient vigour[82].

Timing

A further burden placed upon the IPC is the requirement to deliver decisions within a statutory time period. Nine months is suggested. This also constrains promoters and objectors. With a very complex and large project—which will be the case for almost all matters before the IPC—I have explained above that the period of 22 weeks up to an inquiry is extremely useful in assembling evidence even before it is tested. The allocation of six months for this evidence to be prepared, submitted and tested—whether or not by inquiry—is very ambitious indeed. This runs the risk of consideration of applications and objections being no more than superficial.

It may be argued that foreshortening this process is a legitimate approach because the main principles will have been established at the National Policy Statement Stage. However, this does not necessarily follow: in a non-locationally specific Statement the consideration of alternative locations or routes may be time consuming. Even in a relatively locationally specific Statement the degree of specificity may not be sufficient to prevent competing schemes or detailed discussions of alternatives at a scheme-specific level. Very many matters may still be in play, because as the White Paper makes clear, the IPC may still reject an application even if it is consistent with a National Policy Statement.

Also, in this sense, the need for drafting expertise at the IPC is clear. Considerable time tidying up statutory orders is often required even after decision letters have been issued. If this period is curtailed then there is a risk of procedural or drafting error. This could have serious consequences for projects once authorised. This drafting capability could be housed within or procured by the IPC secretariat, but would need to be of the highest calibre.

Lord Astor

From the above, it would seem that there is much in the White Paper to inspire hope. However, the balance is not quite right, it seems to me. There is real benefit in promoting National Policy Statements and also in conflating application processes, although care must be taken not to introduce too many potential application routes and outcomes. Care must also be taken in the manner in which parliament is involved in these Statements.

Nevertheless, the approach to application procedures in the White Paper is drastic. It takes existing procedures and attempts to foreshorten them when practical experience suggests this will be difficult

[80] White Paper, para.5.33.

[81] An open floor or general objectors/supporters session can also be cathartic in assuaging lay objectors' concerns that they are not being given a chance to be heard.

[82] These comments in respect of lay objectors apply equally in relation to competitors and properly represented objectors including such parties as local planning authorities themselves.

to do. It may also be disproportionate: we saw above that most time is lost at the ministerial decision stage, not at the application stage. There are risks in moving too far away from the inquiry process, which—even considering Terminal 5—is not performing badly.

In light of this, I believe that there is still scope for the White Paper consultation to incorporate more of what is good about the present system alongside some innovation. But then, as a lawyer others might point out that I would say that, wouldn't I?