environmental defender's office new south wales

Submission on the Discussion Paper: Improving the NSW Planning System

8th February 2008

The EDO Mission Statement

To empower the community to protect the environment through law, recognising:

- *the importance of public participation in environmental decision making in achieving environmental protection*
- *the importance of fostering close links with the community*
- *that the EDO has an obligation to provide representation in important matters in response to community needs as well as areas the EDO considers to be important for law reform*
- *the importance of indigenous involvement in protection of the environment.*

Contact Us

Environmental Defender's Office Ltd

Level 1, 89 York St

SYDNEY NSW 2000

freecall 1800 626 239

tel (02) 9262 6989
fax (02) 9262 6998
email: edonsw@edo.org.au
website: www.edo.org.au

For inquiries on this matter contact Robert.ghanem@nsw.edo.org.au

Submitted to planningreform@plannning.nsw.gov.au

Contents

Executive Summary

Part One - Introduction

Part Two - Changing Land Use and Planning
- Gateway approach
- Streaming into different paths
- Expansion of section 73A
- Concurrence
- Mandatory timeframes
- One stop shop
- Direct amendment of LEPs by Department of Planning
- Public participation
- Temporary rezoning
- Stremline and reduce number of SEPPs
- Guidelines for DCPs
- Summary

Part 3 - Development assessment and review
- Panels
- Arbitrators
- Information required for Das
- Appeals to the court
- Agency referrals
- Standard conditions of consent
- Statutory assessment periods
- Community consultation
- Summary

Part 4 - Exempt and Complying development
- Complying development Experts Panel
- Complying development Codes
- 'Non-complying' complying development
- Environmentally sensitive areas
- Electronic database
- Summary

Part 5 - Building and Subdivision certification
- Addressing conflicts of interest
- Clarifying responsibilities and sanctions
- Certification of land subdivisions
- Mandatory training and reporting
- Monitoring performance
- Summary

Part 6 - E-planning

Part 7 - Resolving paper subdivisions

Part 8 - Miscellaneous amendments
Lapsing of development consents
Amendment of the standard instrument
Exhibition and amendment of planning agreements
Compulsory mediation
Statement of Environmental Effects
Tailored assessment for Part 3A

Part 9 - Recommendations
Best practice planning principles – alternative planning vision
Summary of recommendations relating to the reforms.

Executive Summary

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to provide comment on the Department of Planning Discussion Paper entitled *Improving the NSW Planning System.* The EDO is a community legal centre specialising in public interest environmental law. The EDO has 20 years experience in litigating environmental matters and participating in environmental law reform processes. EDO functions include legal advice and representation, law reform and policy work, scientific advice and community legal education.

As with previous reforms, the EDO remains deeply concerned at the side-lining of public participation, transparent decision-making and rigorous environmental assessment. These are essential elements of a good planning system. Good process leads to good outcomes, whereas a rushed and discretionary process does not guarantee good outcomes for the environment or the community. Our broad comment on the five main themes of the reforms are summarized below.

The EDO generally opposes the proposed changes to **plan-making**. The existing process in Part 3 of the Act should be maintained as it is clear, methodical and guarantees public participation. No empirical evidence is provided that the current system is unworkable. Although the EDO supports a strategic approach to plan-making, the changes proposed in the Discussion Paper are lacking in detail and do not guarantee public participation, nor comprehensive environmental assessment. Furthermore, the proposed amendments are based on the mistaken assumption that the potential impacts of plans are proportional to their size and value. Our view is that potential impacts can only be determined after an assessment has been undertaken, not before. The Department should focus on increasing resources and training for councils and addressing administrative inefficiencies in order to improve plan-making in NSW.

The EDO believes that the existing system of **development assessment** should be retained. No valid case has been made to take away the majority of development assessment away from councils. Unlike planning panels councils are accountable to the people, are familiar with local issues and are experienced in making value judgements consistent with the character of their local areas. Further, the EDO does not support the drafting of community consultation guidelines that tailor public participation to the size and complexity of applications. A proposed development that could be considered to have 'minor' impacts of the community may in fact have significant impacts that may only come to light once the community is consulted.

The EDO is strongly opposed to the Discussion Paper's recommendations that will considerably expand **exempt and complying development** in NSW. A percentage-based target of 50% is inappropriate and unachievable. The reforms are based on the mistaken premise that developments which are 'minor' or of 'low value' have minimal or no impacts on the community and the environment. Furthermore, there is a failure to take into account the significant differences

between local government areas. Hence, the EDO is concerned that "minor" developments that potentially have environmental and social impacts will not be subject to any assessment. The resultant increase in the activity of private certifiers is strongly opposed, as is the suggestion that certifiers should be able to endorse minor variations to complying development codes. Further, complying development categories should not be extended in application to environmentally sensitive areas. Lastly, the community will be effectively shut out of the majority of residential developments as no merits assessment will be conducted. The EDO believes that categories of exempt and complying development should only be determined at the local level, after the environmental character and social fabric of the local government area is considered.

Currently there are significant problems with the **private certification** system that relate to the independence, performance and integrity of private certifiers. There is a real perception in the community that the private certification industry is neither impartial nor accountable. Therefore the EDO supports any measures taken to improve the communities' confidence in respect of the industry, although these may not completely remove the inherent problems. Increased training, reporting, auditing, the clarification of council responsibilities for enforcing conditions of consent, the increase in the powers of the BPB to discipline certifiers and limiting the number of certificates per client are all positive suggestions. The EDO recommends that an effective means of addressing conflicts of interest may be to require clients to apply for a certifier from an independent third party, who would then select a certifier for the client at random from a pool of registered certifiers. This would sever the direct link between certifiers and developers.

The EDO generally supports the recommendation to expand **ePlanning** throughout NSW. However, there is a need to ensure public accessibility and quality of information. Furthermore, ePlanning should not be seen as an alternative to other forms of community engagement, especially in rural and regional areas where technological access may be difficult.

Planning reform should be based on the principle of achieving ecologically sustainable development with comprehensive public participation in the planning process.

Part One - Introduction

In commenting on the Discussion Paper, the EDO has endeavoured to go beyond a simple desktop analysis. We have sought 'on the ground' experiences of the planning system in practice and the likely impacts of these reforms on the community, councils and the planning industry. We have engaged with a wide variety of stakeholders including planners, academics, local councils and members of the community. The EDO also held a public forum on 22 January 2008 which was attended by over 80 people from NGOs, councils, members of parliament and the community. Furthermore, we conducted 10 in-depth interviews with expert planners, environment groups and councils. We also received over 30 written submissions from community groups and organisations.

The EDO has two overarching concerns regarding the public consultation process. *First,* we are very critical about the timing of these reforms and the short timeframe granted for public comment. The Discussion Paper was released just before Christmas, a time of the year when most people are on holidays. The timing of exhibition has limited the capacity of many people to undertake a comprehensive analysis of the proposals and make detailed comment. The Draft Bill should be delayed to enable the community to substantively comment. *Second*, there is a widespread lack of detail in these reforms. There is very little detail about how the new processes will work. This lack of detail does not enable meaningful comment to be made on the Discussion Paper. Indeed, the desirability and workability of many of these reforms will depend largely on the finer details and the means of implementation. It is appropriate for these details to be provided prior to the Draft Bill being prepared.

A robust and transparent planning system is of utmost importance to the community and the environment in NSW. The planning system forms the centrepiece of natural resource management. Planning has vital linkages with all environmental systems, including water, native vegetation, and threatened species. Decisions made within the planning system therefore have wide-ranging consequences. The EDO is concerned about the new raft of reforms proposed in the Discussion Paper. They reveal a move away from a planning system focused on

public involvement, comprehensive environmental assessment and transparent and accountable decision-making.

Significant reform to the planning system has occurred in the past few years, such at the introduction of Part 3A and the Standard LEP template. However, no objective review of these substantial reforms has occurred. The EDO submits that this needs to happen before this new wave of reforms commence. The Discussion Paper presents these recent reforms as successes, with no objective analysis or empirical evidence provided.

Of most concern to the EDO, the proposed reforms are likely to see a further reduction in public participation, which has already been significantly eroded with the introduction of Part 3A. Public participation forms the cornerstone of the planning system. Planning is about people and communities, so it is essential that they have a genuine say in the future development of their areas. Further, the planning system is only workable if the community has confidence in it. This was the prime reasoning behind the *Environmental Planning and Assessment Act 1979* which at the time, was one of the most progressive in the world. The EDO is therefore concerned with this new wave of reforms, as they have the potential to effectively sideline the community into having only a cursory and tokenistic role. There appears to be a perception that community participation is an administrative and bureaucratic burden rather than a process that can add much value to decision-making. Indeed, genuine public participation adds significant value to government decision-making. This is for three main reasons.

First, community participation helps to ensure that better decisions are made, as the views of all stakeholders are taken into account. Put simply, community involvement allows decision makers to acquire information about the public's preferences so they can play a part in the decisions about projects, policies or plans. This leads to improved decision-making because the knowledge of the public is incorporated into the calculus of the decision.[1]

Second, public participation ensures the "buy-in" of the community as people are more likely to accept decisions if they have been given a proper opportunity to be heard.

Thirdly, and related to the above, public participation helps to ensure fairness, justice and accountability. In terms of fairness, there are well known reasons why certain groups' needs and preferences can go unrecognised through normal government processes. Such needs may only come onto the radar once an open public participation process occurs. This is particularly the case for environmental interests. Public participation is also consistent with accountability in governance. The Institute of Urban and Regional Development at the University of California gives a good example of this in practice;

[1] J. Innes & D. Booher, *Public Participation in Planning: New Strategies for the 21st Century,* Working Paper 2000-07, University of California at p6.

If a planner can say, 'we held a dozen public hearings and reviewed hundreds of comments and everyone who wanted to had a chance to say his piece,' then whatever they decide to do is, at least in theory, democratic and therefore legitimate.[2]

Therefore, public involvement is essential to the workings of a democratic system of government.

The reforms proposed will also further broaden state control over planning in NSW. Local councils will have a minimal role that is largely confined to the conceptual stage of plan-making and to the assessment of 'minor' development applications. The EDO is concerned about this development. We believe that it is important that local expertise and knowledge informs the planning system. Indeed, councils have a familiarity with their local areas and they are accountable to the public, unlike planning panels or private certifiers. Although several councils are under-resourced which has led to delays and inefficiencies, this is not in itself a reason to largely bypass councils which are democratically accountable to the community. Rather than reduce the jurisdiction of local councils, the government should focus on increasing resources and training.

Lastly, there is scant mention in the Discussion Paper of Ecologically Sustainable Development (ESD). ESD is a key object of the *Environmental Planning and Assessment Act 1979*. It is a concept that seeks to marry environmental, economic and social considerations in decision-making. Its aim is to make it clear that environmental impacts are no longer seen as separate from economic and social considerations, but as part of one integrated whole. The EDO submits that ESD should be the overarching objective of the Act and the ultimate goal of any reform process. This is not apparent in the Discussion Paper.

Indeed, there is considerable confusion over what the reforms are essentially trying to achieve. The Paper purports to move NSW away from a 'one size fits all approach' to a tailored planning system that is dependent on the size, scope and value of a project. However, in other places it advocates for a move *towards* a 'one size fits all approach' such as for exempt and complying development which attempts to apply consistent codes across the State, whilst failing to take into account the significant differences across local government areas. Another purported aim of the reforms is to streamline the planning system, by removing unnecessary referrals, cutting assessment times and reducing the administrative burden. However, the Paper proposes reforms that will actually *increase* the current layers of regulation. For example, development assessment will now be conducted on five levels, an increase on the current three. Further, planning arbitrators will be introduced as an intermediate step before the Land and Environment Court. Therefore, most of the reforms are counter-productive to the ostensible aims of the Department. In contrast, an ESD-focused set of reforms would facilitate a structured, inclusive and sustainable planning system. These proposed reforms are therefore a significant opportunity missed.

---

[2] *Ibid* at p7.

Part Two - Changing Land Use and Plan-Making

Plan-making is a crucial element of the planning process as it sets out the strategic direction and developmental blueprint for a region. It is therefore of great importance to ensure that plan-making is subject to a systematic and rigorous process of assessment. This process may sometimes take time, but it is nonetheless essential to ensure that an ecologically sustainable and publicly acceptable plan is implemented.

The crux of the plan-making reforms contained in the Discussion Paper is a purported shift from a 'one size fits all' approach to a system that is "better tailored to the scale, risk and complexity of land use changes, and allows most LEPs to be finalised more quickly". There is a concern that this push to streamline plan-making and to reduce processing times will lead to a concomitant reduction in genuine public participation and robust environmental assessment.

The EDO's view is that the current plan-making process in Part 3 of the Act, although it could be improved, sets out a clear and unambiguous statutory process for plan-making. The Department of Planning has put forward no empirical basis to change it.

The Discussion Paper highlights considerable delays in the finalisation and preparation of plans and presents this as sufficient justification for an overhaul of the plan-making system. However, these delays in plan-making are not necessarily indicative of problems with the statutory process of plan-making contained in the *Environmental Planning and Assessment Act 1979*. In the EDO's experience delays in the current plan-making system are due to a myriad of factors including insufficient resourcing and personnel, insufficient training and administrative inefficiencies within councils. A new system of plan-making may not correct these systemic problems. Furthermore, the Discussion Paper does not take into account the fact that plan-making often takes time in order to adequately quantify and assess environmental and social factors and to provide the community with an opportunity to participate in a process that may potentially affect them significantly. The statistics provided in the Discussion Paper do not therefore provide justification for an overhaul of the plan-making system.

Moreover, the EDO does not support plans to expedite the process of spot-rezoning, which seems to be a main focus of the reforms. Indeed, the Discussion Paper mentions that the new system will "provide a significantly enhanced level of certainty about rezoning proposals". Rezoning proposals, which are conducted to facilitate developments that are contrary to the established zones and land uses for a particular area, need to be subject to a close level of scrutiny as these developments are strategically incompatible with the planning fabric of the area. The EDO is concerned that these reforms are more about providing certainty to developers than ensuring that a genuine process of assessment and community consultation occurs.

Gateway approach

The Discussion Paper proposes the introduction of a gateway system of plan-making in NSW. This will involve an upfront assessment of the suitability of an LEP against pre-defined criteria prior to the plan being drafted or assessed. The purpose of this assessment is to determine at the outset whether the plan should proceed or not.

EDO supports a strategic approach to plan-making. A determination at the outset whether a draft plan is strategically consistent is instrumental in ensuring that a consistent approach to natural resource management is adopted in NSW rather than an ad hoc process that facilitates the consideration of individual rezoning applications as at present. In this respect, the gateway approach may be beneficial as it allows an upfront refusal to prevent obviously inappropriate plans from proceeding into the assessment phase when it is clear that such plans are inconsistent with the planning fabric of the area. However, the paucity of detail as to the implementation of the gateway approach, as well as the lack of adequate environmental safeguards and robust principles, means that the EDO does not support the gateway system as proposed. Our concerns are set out below.

First, it is not good practice to grant initial approval to a plan while it is still in the conceptual stage, especially if it is a major spot-rezoning. It is difficult, or indeed impossible, to assess issues such as "environmental constraints and benefits" and "public benefits" before full details of the plan are provided.

Second, there is considerable confusion about the status of this "in principle" approval. The Discussion Paper seems to indicate that final approval for a plan is still required even though a plan has proceeded through the gateway. However, the Discussion Paper also states that "when land use changes have been agreed to in principle, the making or amendment of a rezoning or LEP would also be authorised". This is open to several interpretations, one being that the plan is approved once it passes through the gateway with the rest of the process being about drafting. There is a need to ensure that passing through the gateway is more an "approval to be assessed" rather than final approval. Otherwise the gateway approach may create an expectation in developers that the rest of the process is a formality since 'initial approval' to the plan has been granted. With this in mind, it is important that the process remains an accountable one. The assessment conducted once a plan has initial approval must be a genuine and rigorous process designed to assess the key environmental and social issues that may stem from the plan's introduction, especially if it a rezoning LEP. If this is not the case then the assessment conducted once a plan has proceeded through the gateway will be meaningless.

Third, there is a need to ensure that standards of transparency and accountability are maintained. Thus the justification report needs to be based on rigorous and objective criteria to enable the decision-maker to determine whether a plan passes through the gateway at the concept stage. Hence, the assessment criteria need to be

robust and meaningful. Given their importance they should be contained with the Act, not within guidelines. There is insufficient detail provided in the Discussion Paper. For example criteria may include "environmental constraints and benefits" of a proposed plan and a "statement of community involvement" but there is no discussion on what such an assessment will entail nor who will be responsible for it. Furthermore, the Discussion Paper indicates that not all proposed plans will need to be assessed in terms of their strategic validity. The EDO does not support this. If plans are to proceed through the gateway then they must be strategically consistent regardless of their 'size' or 'complexity'. Furthermore, there is no mention of cumulative impacts of developments which is a crucial consideration, especially in environmentally sensitive areas.

Fourth, a gateway approach may simply shift the administrative burden of plan-making to the beginning of the process. Unless the systemic issues are addressed, particularly resourcing, the gateway system will likely be subject the same constraints and delays that occur under the present system. Indeed, these problems may be exacerbated due to the lack of detail about the plan or rezoning application at the conceptual stage. Moreover, the gateway system also introduces a 2 stage system of plan-making. Thus it implants an additional layer of regulation and assessment. This goes against the Department's aim to streamline the planning system in NSW, which is meant to be an overarching theme of the reforms.

Streaming into different paths

The Discussion Paper proposes that once a plan passes through the gateway and granted in principle approval, the level of assessment will be tailored to the individual plan "commensurate with risk, scale and sensitivity". That is, the more complex and large a draft LEP is, the more rigorous the assessment and consultation process would be. Conversely, small and 'minor' plans will be subject to limited or no assessment or consultation.

The EDO has significant reservations about this approach. Our view is that it is not possible to determine whether a new plan is complex or significant prior to environmental assessment being done. Indeed, the approach is paradoxical as plans are streamed based on their likely impacts to determine what these impacts are likely to be. It is the process of environmental assessment itself that determines what the impacts of a plan are likely to be. That is why the consistent approach in Part 3 of the Act needs to be maintained.

The problem with the reforms proposed is that they are based on a fundamentally flawed premise that impacts of a proposal, whether social, environmental or economic, are directly proportional to the size and value of the proposal. This is not the case. What are considered 'minor' plans do not necessarily have minimal environmental/social impacts, especially in environmentally sensitive areas and areas of high conservation value.

If the streaming approach is adopted, then it will likely lead to significant potential impacts not being assessed on the basis that the plan is 'minor' or the rezoning below a cost value. On this basis, the EDO submits that the existing environmental assessment regime in Part 3 should be maintained for plan-making.

Expansion of section 73A

The EDO does not support the proposed expansion of s73A. That section was inserted into the Act to deal with drafting errors, spelling mistakes, etc. It was not designed to encompass substantive changes to LEPs. The Discussion Paper proposes to expand this section to deal with, for example, adding additional land uses to a land use table when this is consistent with the zone objectives. This is significant concern as zoning table changes cannot be considered minor. These can have significant ramifications on the environment and the community. Such changes need to be subject to assessment and public participation. For example, what is a minor change may be quite major in an environmentally sensitive area.

Further, no definition of 'minor' is provided in the Discussion Paper, nor any detail on who is to make this determination. Finally, an expansion of section 73A will lead to an increased number of plans not requiring any public participation or notification. The EDO therefore strongly opposes the proposed expansion of Section 73A.

Concurrence

The Discussion Paper proposes that referral to and consultation with state agencies would only be required at the gateway stage before an LEP is commenced. Furthermore, in areas that have already been approved for release, such as the Growth Centres, no further referrals would be required.

The EDO believes that upfront consultation at the strategic end of plan-making is of course logical and beneficial. However, it is also important to consult with agencies once the details of the plan are worked out. It is often the finer details of proposals that will bring to light particular environmental and social consequences, and require the expertise of other agencies. Therefore, it is imperative that consultation and agency referrals are conducted once the plan is finalised.

Mandatory timeframes

The Discussion Paper proposes mandatory timeframes for the various stages of plan-making. This may be useful in expediting the plan-making process, however the EDO believes that there is a need to ensure that the environmental assessment process is not compromised in order to meet these timeframes. Rigid timeframes may therefore be inappropriate. Often more time will be needed to ensure that issues are considered in a genuine and substantive manner.

'One stop shop'

Although little detail is provided in the Discussion Paper as to how it will be implemented, the EDO provisionally supports the proposal for all final drafting of LEPs to be conducted within the Department at a 'one stop shop'. This would assist in expediting the planning process and ensuring consistency in drafting and definitions. This would improve certainty for the community and lead to plans being completed quicker. However, councils should be given a chance to comment on the final drafting of an LEP to determine whether it conforms with their intent at the conceptual stage.

Direct amendment of LEPs by Department of Planning

The Discussion Paper proposes to allow the Department of Planning to directly amend an LEP for issues of state or regional significance. The EDO has concerns with this proposal for several reasons.

First, no criteria or definition of 'state or regional significance' is provided. The EDO does not support the situation where 'state or regional significance' is left to the subjective opinion of a decision-maker rather than based on objective and definable criteria.

Second, this amendment will allow the Department to facilitate spot-rezonings where councils are opposed to them. The EDO is opposed to this. Councils often have detailed knowledge and expertise of their local areas and are most aware of the community's views relating to the future of their area. It is therefore inappropriate for the Department to override this, especially where this override is based on unarticulated and subjective criteria. Such a process engenders a perception in the community that an LEP can be amended as a result of successful lobbying by the development industry. Plan-making must remain transparent and accountable.

Third, the Discussion Paper states that this power will be used to order to 'implement state strategic planning objectives' such as those contained within the regional and subregional strategies. However, it is clear that the Minister for Planning already has the power to ensure that council LEPs are consistent with statewide strategies. There is already a Section 117 Direction in place that requires councils to make their LEPs consistently with various regional strategies. Firstly, the Minister has the power under the *EPA Act* to amend the standard instrument template which all councils must adopt. Intuitively, this would be the appropriate place to make amendments that assure strategic consistency across the state since this template applies across NSW and must be implemented. Furthermore, SEPPs as defined, are made to encompass issues of state/regional significance. Hence, instead of amending individual LEPs to ensure statewide application of codes or strategies, the Minister could contain such issues in statewide SEPPs which prevail over LEPs. Therefore, this proposed amendment will not broaden the Minister's powers in relation to ensuring that LEPs are consistent with state or regional strategies. There is a concern therefore that this amendment is more about

facilitating spot-rezonings that are opposed to by local councils than about ensuring strategic consistency.

Lastly, there is no indication that the public will be able to have a say in relation to any amendments to LEPs made by the Department for Planning. It is imperative that amendments to LEPs, especially spot-rezonings, remain an open process. The current process contained in the Act for amendments to LEPs is an open process.

Public participation

Plan-making needs to be an open and participatory process, especially considering the potential ramifications of a comprehensive LEP or a rezoning LEP on the community and the environment. Public consultation must therefore remain paramount. In this vein, the EDO has concerns that the new plan-making system will lead to a decrease in public participation and community consultation.

The EDO supports engaging the public at the strategic end of the plan-making process such as is proposed by the gateway system. Currently public participation only occurs after draft EPIs have been prepared. Such early consultation is crucial since this makes the community feel that they have a say at the strategic end of plan-making and also ensures that the community is made fully aware of the future plans for their area. However, there is also a need to ensure that the public gets a chance to consult on the final version of the draft LEP. Therefore, although introducing an earlier stage of public participation based on the intent of a proposed LEP is supported, this should be in addition to, rather than a substitute for, exhibition of the document as drafted. Despite this, the Discussion Paper is silent on whether the public will have a right to comment on the LEP once it is drafted. The EDO calls for the public's right to comment on the finalised version of an LEP to be maintained. The exhibition of a draft LEP provides a valuable opportunity for the community to comment on the detail of the proposed changes, in particular the wording of provisions which may have unintended consequences. This provides a valuable input into the process of fine-tuning the LEP and reduces the need for minor amendments down the track. Furthermore, the Discussion Paper states that consultation on plans is to be undertaken to provide the community with a complete picture of the zoning, height, floor space ratios and environmental constraints that will apply to the land affected by a draft LEP. The EDO submits that in order to achieve this, community consultation is required at the drafting stage of the LEP.

Of further concern, the Discussion Paper states that there may be circumstances where 'minor' amendments to LEPs will be exempt from public exhibition. Firstly, what is 'minor' requires a value judgement in advance of the public participation process which should inform such a judgement. Second, something which seems minor in theory (examples which are given in the discussion paper are addition of a permissible use to a land use table and an adjustment to zone boundaries) may have a significant impact on the character and amenity of a neighbourhood. Moreover, a change which seems minor on its face may have

unintended consequences. An LEP is a foundational planning document which affects people's rights to develop their land, land values and amenity. Even minor changes warrant public exhibition to ensure that people who are affected and who are concerned about the character of the neighbourhood can have their say. Notification of adjacent landowners only is considered inadequate. Lastly, there is no detail provided in the paper as to who will decide what is minor and whether this will be based on objective criteria.

Temporary rezoning

The EDO is opposed to temporary re-zonings. The Discussion Paper does not provide any detail on why a temporary rezoning would proceed. There is concern that this will be undertaken to enable controversial development proposals to proceed quickly without having to go through a formal re-zoning process. The only circumstances where this may be a useful tool, is where an area is temporarily re-zoned for environmental protection to ensure that the land cannot be developed prior to a formal zoning change.

Streamline and reduce number of SEPPs

The Discussion Paper proposes that SEPPs and REPs will be reduced by 50 percent. However, there no detail provided as to how this will be achieved nor whether any criteria will be used to inform the process. The consolidation or reduction of SEPPs and REPs is not necessarily a bad thing as it can make the system simpler. However, strict criteria should be used to determine which SEPPs are to be reduced or combined. The EDO finds it curious that a quantitative approach rather than a qualitative one is being adopted. It is important that a consolidation of SEPPs is based on a qualitative and substantive assessment rather than on a push to achieve a percentage target.

There is also a suggestion in the Discussion Paper that REPs may be removed entirely from the planning system with a focus instead on regional and subregional strategies. The EDO is concerned with this proposal. These strategies are policy documents with no statutory basis, unlike REPs. They are therefore not subject to the same level of scrutiny and enforceability. The EDO believes that REPs should be retained to deal with regionally significant issues.

Guidelines for DCPs

The EDO supports the requirement of only one DCP for each parcel of land. This would lead to improved certainty and consistency as to the relevant standards that apply to a proposed development. It helps proponents and the community to clearly determine what planning controls apply to an area.

However, the Discussion Paper proposes that councils will not be able to raise standards in their DCPs above those set in State codes. The EDO is opposed to this suggestion as it can lead to a lowering of environmental standards, particularly

in environmentally sensitive areas where higher standards are often needed to minimise environmental impacts. These will also implant a "lowest common denominator" approach to planning controls. Councils should be allowed to adopt stricter standards relvenat to their area and also as a means of encouraging sustainable practices.

Summary

The EDO is generally opposed to the suggested plan-making amendments in the Discussion Paper. We believe that the existing process of plan-making in Part 3 should be retained. This process is systematic and clear, and it guarantees public participation. On the other hand, the recommendations made in the Discussion Paper have significant shortcomings. In fact, rather than 'streamlining' plan-making and reducing processing times, the new system is likely to result in a reduction in robust environmental assessment and genuine public participation.

No real case has been made for reform of the plan-making system. There is no empirical evidence provided that the statutory process in Part 3 of the Act is unworkable. The EDO believes that most of the problems stem from the implementation of the legislation, rather than the Act itself. The Department's focus should be on increasing resources and training for councils and addressing administrative inefficiencies in order to improve plan-making in NSW.

Part Three - Development Assessment and Review

The reforms proposed regarding development assessment will radically change the process in NSW. A clear shift away from council-made decisions is apparent. This is a worrying development because although development assessment by councils is subject to significant shortcomings, a council is an elected body and directly accountable to its community. Thus, any plans to reduce or remove development assessment from the jurisdiction of councils should be treated with extreme caution and should be subject to strict controls.

Delays in processing are used in the Discussion Paper as the main justifying factor for the reform of development assessment and review in NSW. However there is a failure to recognise that delays in the planning system are due to a myriad of factors. These include the need for rigorous environmental assessment in sensitive areas, council resourcing issues, administrative inefficiency, and developers failing to provide adequate information. Also sometimes it can take time to assess complex environmental and social issues. This ensures the substantive consideration and application of ESD which is one of the objects of the Act.

The Discussion Paper acknowledges that there are significant inefficiencies in the Planning System - again these are not necessarily indicative of a problem with the legislative system but rather systemic problems of implementation and resourcing.

One of the stated reasons why the majority of development assessments are being taken away from councils is that councils have the tendency *"towards politicising specific projects or responding to lobbying and other external pressures"*. Although no statistical evidence has been provided by the Department to demonstrate the extent to which planning decisions by councils are made on political grounds rather than by reference to the criteria contained within the *EPA Act*. The rationale of the reforms is a curious comment given that state level assessment under Part 3A is open to much political pressure. For example what is determined as a major project is dependent on the Minister's subjective determination, due to a lack of objective criteria in Part 3A. Thus the characterisation of a project as falling within Part 3A is itself a politically charged decision. We note that the reforms proposed by the Discussion Paper correlate almost exactly to those asked for by Planning Coalition at the Planning Forum in August 2007. Councils are already constrained in their development assessment activities, unlike the Minister for Planning. Political considerations are not listed in Part 4 as a relevant consideration, so if it can be shown that a decision was made on political grounds then this may constitute a legal error for which there are legal avenues of redress. The EDO therefore rejects this as a basis for reducing the power of councils over development assessment.

Part of the rationale behind these reforms is a push towards removing unnecessary regulation and easing the administrative burden across governments in Australia. However, the amendments outlined in the Discussion Paper, propose five levels of development assessment, instead of the current three. Therefore instead of reducing regulation the reforms seemingly create a more complex system, and further

increase the layers of assessment, which is contrary to the stated objectives of the Department and the Discussion Paper.

In relation to panel-made decisions, no empirical basis is provided that demonstrates that planning panels are a workable alternative to council made decisions. Such panels are essentially unproven. Panels have recently been established in South Australia, of which there has been a mixed reception, although no formal review has been undertaken.

The Discussion Paper states four key objectives of the development assessment reforms, outlined as follows;

- Deliver outcomes that support sustainable development and improve the local amenity.
- Appropriately engage the community, to achieve better decision making.
- Ensure that the environmental assessment is appropriate to the size and scale of the proposal.
- Promoter independent determination models to make fair, informed and transparent decisions in a timely manner.

The EDO supports ecologically sustainable development, community consultation and transparent decision making. However, we do not support the third objective, which assumes that the size and scale of a development is proportional to its environmental impacts. Although size and scale are relevant, often impacts will also depend on the type of environment where the development takes place. Therefore what are considered 'small' developments can often have significant impacts. This flawed premise is the basis for many of the reforms proposed.

Panels

The Discussion Paper outlines a new hierarchy of planning panels that will undertake development assessment in NSW – at a state, regional and local level. As a result, councils' role in development assessment will be dramatically reduced.

The Discussion Paper provides little detail on how these panels will be implemented, nor how they will operate. Further the Discussion Paper does not address key issues that will be critical to the success of these panels. This means that it is not possible to provide meaningful comment until further detail is given. However, preliminary comment is provided in relation to the following issues;

- Independence
- Membership
- Accountability

These shall be dealt with in turn.

Independence

The Discussion Paper is silent as to how the independence of planning panels will be assured. This is a crucial issue. The EDO believes that it is important that if planning panels are introduced that they be independent and transparent, so that the community has faith in the development assessment process.

We believe that this will be difficult to achieve. Inherent conflict of interests may arise as panel members are likely to be dominated by professionals within the planning industry. For example, the Planning Assessment Commission will comprise of one permanent chair and up to eight other part time members. These part-time members will undoubtedly be working in a planning capacity as engineers, consultants, etc. Although no impropriety may necessarily occur, the perception by the community that some panel members are less than objective is unacceptable. Rigorous attention must therefore be paid to perceived conflicts of interest. To address this it may be necessary to create a mechanism that allows the community to object to certain panel members and a requirement that these objections are considered.

Independence of panelists is therefore a crucial element that remains to be addressed by the Discussion Paper.

Membership

The membership of a planning panel is a key issue. The Discussion Paper provides scant details as to how this will be put into practice.

Issues of concern in respect to membership include composition, tenure and expertise of panel members. These issues will be dealt with respectively.

The Discussion Paper makes it clear that members will be selected based on expertise. The EDO, although acknowledging that expertise is needed in planning decisions, is concerned that these members are culturally biased towards development. Their jobs usually involve determining how a development should proceed not whether it should proceed at all. Furthermore, expert based members may not necessarily be equipped to balance a range of value judgements, unlike councils who often need to make difficult decisions after weighing up the various economic, environmental and social considerations. Development assessment is a community issue, not simply an application of planning or engineering principles. Therefore, the Department should not treat development assessment as the application of expertise alone.

There is a need to make certain that there will be sufficient expertise on the panel to be able to consider the projects that come before it. What criteria will be used to determine who should be appointed as a member of a planning panel? This issue needs to be clarified.

Environmental, community and social factors are vital to any assessment based decision. Failure to consider such important factors will generally result in

developments that are not ideally suited for the particular area or that will have significant environmental and social impacts. Therefore there is a need to ensure that panels include environmental experts so as to adequate consider issues of biodiversity and sustainability.

Additionally the issue of tenure is not addressed by the Discussion Paper. It is important that no member can have a monopoly over any panel, and therefore the Department should have in place strict tenure guidelines.

Accountability

The Discussion Paper makes no mention of how the performance of panel members will be tracked, nor whether there will be some sort of review body to handle complaints, conduct investigations, etc. This is a crucial aspect that needs addressing as councils are directly accountable to their constituents who elect them. Panel members on the other hand essentially only report to the Department of Planning. Hence, an overseeing mechanism is needed. This issue must be addressed as a priority.

State Panels (PAC)

The PAC is to deal with the majority of developments currently considered under Part 3A. However, the most highly contentious projects remain with the Minister. The Minister will retain determination of critical infrastructure and *"projects of critical significance"*, which remains undefined. As a result, what goes to the panel remains contingent on the subjective opinion of the Minister for Planning. Clear criteria are needed to ensure that this is an objective determination.

Regional Panels (JRPP)

It is unclear who will determine which projects should be decided by a regional panel. Furthermore, no definition or criteria to determine 'regional significance' is provided. Finally, the Discussion Paper states that councils will be financially responsible for the funding of these panels. It is important to note that most regional councils are financially stretched[3]. Despite this, issues of resourcing are not discussed in the Paper.

Case Study: The South Australian Experience

In June 2006 the South Australian Parliament passed the *Development (Panels) Amendment Act 2006 (SA),* (the Panels Act). The Panels Act came into operation on 23 November 2006. The Panels Act was a significant change to the role of councils in the development assessment process within South Australia. The changes came about as a result of criticism, particularly from the development industry, to the

[3] Simon Williams, Senior Planner (personal communication).

effect that councils have not acted appropriately when making planning decisions, which were thought to have been made on blatantly political grounds in response to pressure from particular community interests groups, rather than on the basis of an assessment against the relevant development plan provision.[4] However, the Government's stated reasons for introducing hybrid panels were to enable councils to concentrate on planning policy, remove political considerations from the development assessment process and enable councillors to be more involved in a wider dispute resolution function.[5]

Despite the fact that most councils have appointed the elected member body to be on the membership panel for the Development Assessment Panels there remains suggestion of inappropriate appointment, as based upon our communications with stakeholders. This is particularly emphasised in rural areas where the availability of various experts is limited and often it is extremely difficult to appoint a member who is neutral. Therefore a perception of bias abounds in the community.

Further, the EDO office in South Australia has reported that during the initial parliamentary debate over the issue of panels, an amendment was made so that the Minister's role in ensuring the composition of the panels was removed. Therefore there is no watchdog and the community has to hope that councils are not taking advantage of this to create "de facto" council appointments. This is emphasised by the fact that clients continue to report concerns about the bias of DAP members.

The EDO is also concerned about the financial impact of panel decisions on councils, particularly rural councils who generally have less financial resources available to dispose of in comparison to their city counterparts.[6] Panels often make decisions that bind councils to a particular course of action without having a full understanding of the financial constraints that councils face, and hence the potential impact on councils arising from the decisions of Panels can be hugely detrimental. For example a panel may enter into a planning agreement with the proponent which binds the council to conduct certain activities in return for financial developer contributions, which may or may not cover Council costs.

There is also a concern that the panels may not have adequate information to make informed decisions on development applications. For example the recently released Code of Conduct has the potential to undermine the ability of DAP members to make informed decisions on development applications, because it does not allow members to engage in consultation outside of the panel process with any party on a proposed development application that is likely to be heard by the panel. Additionally, members only have access to information provided by Council staff

---

[4] Leadbeter, P. *'Development assessment and decision-making in South Australia – recent curtailment of the role of local councils'*, (2007) 12 LGLJ 155

[5] Melissa Ballantyne, SA EDO solicitor (Personal communication).

[6] Leadbeter, P. *'Development assessment and decision-making in South Australia – recent curtailment of the role of local councils'*, (2007) 12 LGLJ 155 and Mark Parnall MP, South Australia (Personal communication).

and cannot independently seek additional information; this therefore affects the quality and comprehensiveness of decisions.

Finally, no review has yet been conducted as to the efficiency and workability of the panel system, and whether or not the panels have been a success remains to be seen. However initial feedback has been critical with concerns about the financial drain, particularly on rural councils, independence, resources, composition of membership and information gathering. Therefore the South Australian experience does not provide a workable model for NSW to replicate as the success of the system cannot yet be proven.[7]

Arbitrators

The Discussion Paper proposes that for developments of a value of less than $1 million appeals by developers in the first instance are to be dealt with by planning arbitrators. The EDO has consistently supported improving access to justice and promotes the utilisation of non-legal avenues to resolve disputes. A system of arbitrators may increase accessibility and lower costs. However, more detail is required in order to determine whether the EDO would support a system of arbitrators.

The EDO is concerned that the community will not be able to have a say in the arbitration system. Currently, when a developer instigates a merits appeal in the Land and Environment Court, objectors can seek to be added to the proceedings at the discretion of the Court if they can demonstrate that they can raise an issue unlikely to be otherwise discussed. However, a system of arbitration is usually between two parties. The EDO recommends that a mechanism be implemented that allows objectors to be heard by arbitrators before they make their decision.

Arbitrators should be external to the planning industry and should be trained mediators. The EDO does not support the appointment of arbitrators from within local government. This will always be a perception of bias and it would be difficult to ensure that they will be independent arbiters of issues. Moreover, there is a need to ensure that arbitrators are contained within the LEC structure. This engenders faith in the community as it instils confidence and gives proceedings an air of legitimacy.

Unless the system of arbitrators is implemented properly, it will simply add another layer to the decision-making process which could significantly add to the costs and delays both for Councils and proponents, considering that proponents still have the option of appealing to the Court if they do not succeed before the arbitrator. It should be noted that the Land and Environment Court has made considerable progress in recent years towards streamlining and simplifying the process for appeals regarding smaller development applications, and advantage could be taken of these processes rather than adding an additional appeal avenue.

---

[7] Leadbeter, P. *'Development assessment and decision-making in South Australia – recent curtailment of the role of local councils'*, (2007) 12 LGLJ 155

Information required for DAs

The EDO acknowledges that one of the major sources of delay in the planning system is at the DA lodgement stage. Indeed, the majority of councils identify poor or inadequate information in development applications as a major source of delay. Councils spend a lot of time seeking extra information and clarification from proponents which significantly delays the system and leads to a back-up of DAs. Although many councils already set out information requirements in policies/DCPs, the level of compliance is uneven.[8]

We therefore support the proposal to simplify the information requirements for DAs through the use of guidelines and the extension of the time council may take to reject an application based on a lack of complete information. However, the guidelines must ensure that there is sufficient information provided in these applications to enable a proposal to be adequately assessed, taking into account the particular environment and circumstances of the proposal.

Appeals to the court

The EDO supports the maintenance of appeal rights for the community in relation to development assessment. However the Discussion Paper states that appeal rights may be removed where the PAC has held public hearings. The EDO strongly opposes the removal of appeal rights for the community. Public participation is the cornerstone of democratic governance. If the public is to have confidence in administrative decisions affecting their environment then the public need to know that these decisions are based on sound information, that all the relevant issues have been canvassed and have been subject to a methodical, transparent and accountable decision-making process. Where this has not occurred, the public should be granted the right to appeal against planning determinations.

Agency Referrals

The Discussion Paper states that the government will review agency referral requirements with a view to reduce unnecessary referrals. Furthermore, where referrals have been made during plan-making they will generally not be referred again at the development stage. The EDO has numerous concerns. Firstly, no definition is provided as to what is an 'unnecessary referral'. There is a need to ensure that referrals relating to the environment, threatened species, water etc. are maintained, as these agencies have the relevant expertise to address these issues (as noted in relation to plan-making referrals). Moreover, concurrences are an important way for government departments with various responsibilities to integrate with planning. Therefore this enables a consistent approach to natural resource management in NSW. Strict objective criteria is needed to define what is "unnecessary" or of no value.

---

[8] Helen Ketelby, Senior Planner (personal communication)

Furthermore, the EDO believes that agencies should also be consulted at the development assessment stage even where they have been consulted at the gateway stage. Although consulting at the strategic end of the process is of course beneficial, there will be insufficient detail available at the conceptual stage to allow them to substantially assess or advise on potential impacts. Therefore, it is important that they get a chance to comment once the details are worked out.

Standard conditions of consent

Standard conditions of consent may be useful in assisting councils to draft appropriate conditions relevant to the development at hand and may also provide certainty to developers. However, standard conditions should only be used as guidelines or as minimum standards. There is a suggestion that councils will not be able to place conditions of their own or site-specific standards not covered by the standard guidelines. The EDO does not support this approach.

Statutory assessment periods

Statutory assessment periods that vary for different types of developments may go some way to improving assessment times. However, the Discussion Paper does not specify what the consequences will be if councils do not meet these periods. The EDO strongly opposes any suggestion that a failure to assessment an application within the specified time should result in a 'deemed approval'. If a deadline is missed due to sickness for example, it will be impossible to then refuse a development once the required period is passed, even where there are significant potential impacts of a development proposal. We strongly oppose any 'deemed approvals.'

Community consultation

The Department of Planning is to issue consultation guidelines which incorporate community consultation principles and standardised notification procedures. The aim is to match community consultation to the complexity and impact of an application. The EDO is concerned with this approach. As mentioned earlier in this submission, the idea that impacts are proportional to the size and scale of an application is a flawed one. Often, potential impacts only come to light only after the community is consulted about a proposal. It is therefore impossible to attempt to quantify the potential impacts of a development based solely on its size and monetary value. The EDO is concerned that this will lead to the situation where certain applications will require no consultation based on their 'minor' nature.

The consultation guidelines, if they are considered advisory or as providing minimum standards of consultation, and if they are sufficiently robust, can be useful in clarifying the role of the community in relation to development assessment. However, councils should be free to adopt higher standards of consultation. The aim should be 'best practice' standards rather than minimum

standards. Furthermore, the right for the public to be consulted should remain firmly within the legislation, not found only within guidelines.

The EDO supports the proposal to require applicants to respond to issues raised by relevant submissions. This will demonstrate to the public that their concerns are noted and considered in a substantive manner.

Summary

The EDO believes that the existing system of development assessment should be retained even though it has significant shortcomings, such as Part 3A. No valid case has been made to take away the majority of development assessment away from councils. Unlike panels councils are accountable to the people, are familiar with local issues and are experienced in making value judgements consistent with the character of their local areas. Planning Panels have not been proven workable in any jurisdiction. However, if panels are to be introduced, clear guidelines on membership, accountability and independence must be implemented. Furthermore, there is a need to ensure that environmental and social expertise is represented on these panels.

The EDO does not support the reduction of community consultation based on the size and complexity of applications. The existing regime in the Act should be maintained as this is in line with a democratic and accountable planning system.

The current shortcomings of the development assessment process could be better addressed by providing increased resources to local councils, rather than by diminishing the assessment process.

Part Four - Exempt and Complying Development

Complying development was introduced in the Act to deal with relatively simple and minor developments to enable these to be approved if they comply with preset standards. The Department has proposed that a target of 50% exempt and complying development should be achieved in NSW, up from 11%. The EDO is strongly opposed to this proposal. We object to percentage based targets rather than targets based on a qualitative assessment that takes into account the particular location and environment of LGAs. Our discussions with senior planners and stakeholders have also cast considerable doubt on the ability to achieve this target.

Pressure on councils to achieve these targets may lead to the situation where certain types of developments with potential environmental and social impacts are converted to complying development simply as a result of a push to achieve this target to avoid departmental criticism and pressure. This exposes the essential problem with these reforms. The broad percentage target is based on an assumption that all council areas are the same. It makes no delineation between metropolitan, rural and regional councils, as well as local government areas with high biodiversity values. There is a crucial need to ensure that all developments that are likely to impact on the environment and the community are thoroughly assessed. The Department cannot assume that "small" or "minor" developments have minimal or no impacts on neighbours or the environment. For example, what is considered a 'small' development can have significant effects in environmentally sensitive areas. Therefore, a broadbrush approach is unworkable and inappropriate.

If 50% of development becomes exempt or complying, then this will lead to a huge expansion in the role of private certifiers who will effectively be the consent authority for the majority of residential developments in NSW, most of which are worth less than $1 million. The EDO believes that this increase in the activities of private certifiers is unjustified, especially given the deficiencies and criticisms of the private certification system, the large number of community complaints, perceived conflicts of interest, the lack of enforcement by certifiers, and the absence of a right for neighbours and the community to have a say. There are therefore significant issues as to accountability, independence and integrity which have not been adequately addressed by the Discussion Paper. It is highly inappropriate that unaccountable and unelected certifiers, who are paid by their clients, will be responsible for the approval of most residential developments to the exclusion of a local council who is directly accountable to its constituents.

The Department states that these reforms are to make it easier and timelier for "mums and dads" to develop their properties. However, a large expansion of exempt and complying development is likely to detrimentally affect families and the community at large. It is well to remember that mums and dads are usually only developers for one or two moments in their lives, but are , at all times, neighbours. As there is no right to comment or object to exempt or complying development, nor any merits assessment of the potential effects of such development, the impacts on the neighbourhood, the amenity of neighbours,

heritage and social issues will be disregarded for the majority of developments. This means that the community is effectively 'shut out' of the majority of residential developments. Requiring a courtesy notice to neighbours before automatic approval is grossly insufficient. The EDO submits that if the Department insists on going ahead with its massive expansion of exempt of complying development, then third party appeal rights should be inserted into the legislation to compensate for the broadscale reduction in public participation rights.

Furthermore, there is no reason why "minor" applications could not be dealt with expeditiously by councils. The EDO submits that where development is potentially minor or insignificant, then the DA process should not be onerous. It should simply be a case of ensuring there are no objections from the community and determining whether the development complies with preset standards in LEPs and DCPs. There is no reason why these developments should take a long time as there is minimal assessment to be done beyond a checklist approach.

Complying Development Experts Panel (CDEP)

The Department has proposed to establish a CDEP to advise on complying codes policy, and to formulate complying development codes. The Paper says that the panel will comprise experts working within local government. There is no further discussion as to the membership of the panel. The EDO submits that there should be an environmental expert on the panel, in order to ensure that only development types of negligible environmental impact be included as exempt or complying development. A well-rounded panel of experts from a variety of areas of expertise ensures balanced and good decision making occurs.

Complying development codes

The EDO does not support the proposed state-wide complying development codes for minor categories of development. Local government areas in NSW vary greatly in terms of their locality, diversity, social pressures and environmental sensitivity. It is therefore not possible to define complying development in a uniform manner across NSW. Indeed, some developments which may be considered 'minor' in a highly developed urban area may have significant impacts in areas of environmental sensitivity such as waterways, lakes, coastal, forest, heath, woodlands and wetlands. We believe that it is therefore impossible to draft a code that identifies complying development categories that apply across the state. As a result any such code will instil a 'one-size fits all' approach, contrary to what the reforms purport to achieve. Furthermore, it may lead to significant environmental degradation in areas of high conservation and heritage value. Moreover, the Discussion Paper does not take into account the cumulative impacts of a myriad of 'minor' developments, which, when considered in isolation, have minimal environmental impacts, but when considered on the whole, lead to "death by a thousand cuts".

The EDO agrees with the Blue Mountains Conservation Society submission that the only development types which could be described in a uniform manner across NSW are developments relating to internal fittings contained within a building's

existing environmental footprint (excepts perhaps for high impact internal fittings such as air conditioners).

For these reasons, the EDO opposes the state-wide complying development codes. We believe that categories of complying development should only be identified at the local level after the environmental character of the locality is considered. However, if these codes are adopted, we support public exhibition and stakeholder consultation prior to adoption. We also agree with the LGSA recommendation that these codes be trialled prior to implementation.

'Non-complying' complying development

The EDO is strongly opposed to the proposal to allow private certifiers to endorse developments with minor 'non-variations' from complying development codes if in the opinion of the certifier this variation would not generate an impact on neighbours. We believe that any variations to complying development standards should not be permitted. Any development application that does not meet the pre-set standards should require a development consent under Part 4 of the *EPA Act*. Complying development certificates should only be issued where a proposal can be 'ticked off' against fixed and objective standards. Any decision as to whether or not a departure from a development standard is 'minor' and 'acceptable' involves a value judgment. It is not appropriate for building professionals employed by developers to be making these value judgments, nor do they have the training or the skills to do so. They have no mandate from the community to do so. Furthermore, given that no merits assessment is conducted nor any public participation rights for complying development, it is important that complying development is strictly restricted to developments that comply with the preset standards. Granting certifiers the right to make a subjective determination will introduce considerable uncertainty and discretion into private certification regime. It would also increase the lack of transparency and accountability already apparent in the private certification system, especially since certifiers are paid by the client. It is therefore inappropriate to give certifiers the ability to make subjective determinations which are not reviewable. If the Department remains insistent on this reform there it must introduce an open review mechanism that provides a check on this discretion.

The Discussion Paper states that councils will have 7 days to object to any such variation. However, it does not set out what a council can do if it does not agree with the certifiers opinion that no impact on neighbours will result from this variation. As noted above, we strongly oppose 'deemed approvals.'

Environmentally sensitive areas

The Department proposes a mandatory default code that would include 'appropriate' complying development standards for developments in environmentally sensitive or heritage areas. The code would be assisted by mapping areas of an environmentally sensitive nature. The EDO strongly disagrees with this proposal, because it enables development that could create a high impact to occur

within an environmentally sensitive area, and this would be able to occur without independent council or panel assessment. For example a single dwelling in a hanging swamp or wetland can be approved by a certifier employed by the developer. The EDO submits that complying development codes should not be extended to environmentally sensitive areas. Any proposals to develop in these areas should be subject to environmental assessment and council approval, as currently is the case. Whether a development is 'minor' can only be determined once this has occurred.

Further, relying on improved mapping, as a mandatory default code has the potential for considerable delays and loss of environmentally sensitive and heritage areas while the maps do not exist. Vital questions need to be addressed by the Department that deal with whether or not these areas coincide with conservation areas, heritage areas and/or the coastal zone while a map may not exist. Moreover, the Department has failed to address issues such as, how the maps will be maintained, and at whose cost?

The Department also fails to consider a review period for the codes in light of changes to an area. Hence, the EDO does not support such proposals that threaten environmentally sensitive areas, particularly when there is so little detail currently available.

Electronic database

The Department proposes that local councils would be required to keep an electronic database of all complying development details for public and annual reporting purposes. Despite the fact that the EDO does not support the expansion of complying development, we strongly support the proposal for an publically accessible database, which will ensure transparency.

Summary:

The EDO is opposed to the proposal to significantly expand exempt and complying development. A percentage-based target of 50% is inappropriate and unachievable. The reforms are based on the mistaken premise that developments which are 'minor' or of 'low value' have minimal or no impacts on the community and the environment. Furthermore, there is a failure to take into account the significant differences between local government areas.

The EDO is concerned that "minor" developments that potentially have environmental and social impacts will not be subject to any assessment. Moreover, the community will be effectively shut out of the majority of developments as no merits assessment is conducted.

The resultant increase in the activity of private certifiers is strongly opposed, as it the suggestion that certifiers should be able to endorse minor variations to

complying development codes. Furthermore, complying development categories should not be extended in application to environmentally sensitive areas.

Part Five - Building and Subdivision Certification

Consistent with our concerns expressed above regarding private certification, the EDO supports the proposals put forward by the Department to expand the regulation of private certifiers and to address issues such as conflicts of interest, monitoring and enforcement. In the EDO's experience we have fielded many complaints from members of the public relating to the independence, performance and integrity of private certifiers. There is a real perception in the community that the private certification industry is neither impartial nor accountable. Therefore any measures taken to improve the communities' confidence in respect of the industry are a positive step forward, although these may not completely remove the inherent problems.

Addressing conflicts of interest

The Department proposes to limit conflicts of interests by limiting the number of construction and complying development certificates that a private certifier can issue to an individual client per year. This measure has been proposed due to the perceived lack of objectivity within the industry, as there is a perception that developers will 'shop around' for a compliant certifier, or that certifiers are in the employ of their clients so are unlikely to "bite the hand that feeds them". The EDO therefore supports measures designed to address these fundamental problems. However, it is unclear whether a limit of the number of certificates issued will be sufficient to address the perceived conflict of interests. Furthermore there is no indication of how this limit will be enforced, nor what the appropriate limit will be. Also of concern is that the Building Professionals Board (BPB) will be given powers to exempt certifiers in rural areas from this limitation. The EDO believes that this step could further exacerbate the overall perception, and problems within the industry.

The EDO suggests that an alternative measure to address conflicts of interests would be the introduction of an intermediary between the certifier and the client. This would assist in the addressing suggestions of bias as the certifier will no longer be perceived to be 'in the pocket' of the client. The way it could work is that a developer would apply to the intermediary to obtain a private certifier. The intermediary would then be drawn out of a pool of private certifiers at random..

The EDO also supports the proposal allowing the BPB to undertaken targeted audits focussed on those certifiers who obtain a significant proportion of their income from a particular client.

Clarifying responsibilities and sanctions

The Discussion Paper seeks to clarify that councils are able to enforce conditions even in the situation where a private certifier refuses to do so. The EDO has spoken to many clients and community members who are concerned about the widespread failure of private certifiers to enforce conditions of consent, even particularly simple environmental conditions such as sediment control. Furthermore, councils often do not act when prompted by members of the public

as there is considerable confusion as to their enforcement powers where a private certifier has granted certification. The Act needs to make it clear that councils do have such a right and indeed they are expected to exercise it by the local community. As a result, the EDO welcomes the proposal to clarify that councils have a role in enforcement even where a private certifier refuses to do so. Indeed the reforms are to emphasise that it is a council's responsibility to enforce the development consent. Furthermore, councils may be fined where they have been made aware of a potential breach and have failed to act. The BPB will also be granted greater powers to fine and suspend certifiers. The EDO welcomes these reforms.

However, the Discussion Paper does not address the issue of council resourcing which is often the main reason why councils do not take enforcement action. Unless councils are adequately resourced then clarifying the enforcement role of councils in legislation make no lead to any discernible improvement in enforcement.

Certification of land subdivisions

The EDO does not generally support the extension of authority and power of private certifiers to allow the private certification of subdivisions. Private certification as a concept is deeply flawed, especially considering that the certifier is paid by the client who applies for a certificate. There is an inherent perception of bias in the community which is difficult to overcome.

However, the controls suggested in the Discussion Paper may go some way to reducing the potential problems. For example, the requirement for a developer to choose a private certifier from a pool identified by the local council is a positive control measure as it reduces the potential for conflicts of interest. As to the certifier being required to lodge a provisional subdivision certificate with the local council, this too is supported by the EDO, although the period of 14 days during which the council may challenge the certificate, may be insufficient. Councils may require more time for proper review and investigation in order to effectively meet the needs of their respective communities. However, the issuing of a subdivision certificate has significant ramifications as it is an irreversible step. Once subdivision has been granted, title to the separate lots is given which, when registered, grants indefeasibility of title. Therefore, any mistakes in the granting of subdivision certificates will have long-lasting consequences. Given this, it is the EDO's opinion that a local council remains the most appropriate body to grant subdivision certifications as they are familiar with their areas and the procedures involved.

Mandatory training and reporting

The Department proposes that there will be mandatory training for accredited certifiers regarding policies for complying development. Whilst the EDO is strongly against any extension of authority of private certifiers, particularly regarding value judgements in complying development issues, the extension of

mandatory training is welcomed. Mandatory inspections and reporting of complaints are also supported. However in terms of reporting complaints, there is a lack of details as to the appropriate system to databank complaints and allow for potential review of the system if necessary.

Monitoring performance

The proposition to audit accredited certifiers at least every two years is a proposal that is strongly supported by the EDO. The private certification industry is one which has remained unchecked since its inception and the EDO believes that whilst auditing is a positive means of regulation, a more frequent system of oversight would be ideal. The EDO stresses that the 'measurable outcome' proposed by the department to reduce the number of complaints to the BPB relating to enforcement of development consents by certifiers by 50% in the first four years of reforms is innappropriate. This proposal assumes that the Department's reforms will be successful, however further measures may need to be taken to reach the 50% intended target and it puts the BPB in a position of being forced not to disclose the true number of complaints if they cannot reach the target. Therefore the EDO cannot support a proposal based on a quantitative approach rather than a qualitative approach.

Summary:

The EDO supports any measures that will assist in improving the accountability and transparency of the private certification process in NSW due to our serious concerns regarding the quality of private certification. A limit on the number of certificates per client is therefore supported. However, a better idea may be to require clients to apply for a certifier from an independent third party, who would then select a certifier for the client at random from a pool of registered certifiers. This would address conflicts of interest and sever the direct link between certifiers and developers.

The EDO supports the clarification of council responsibilities for enforcing conditions of consent, the increase in the powers of the BPB to fine and suspend certifiers, mandatory training and reporting for accredited certifiers and an increase in audits.

Part Six - ePlanning

The EDO supports the Department's plan to expand e-Planning initiatives to provide online DA tracking, exempt and complying codes and section 149 certificates.

e-Planning may prove to be a very useful tool in terms of public participation and community consultation. As has been noted, internet-based technologies offer the potential to allow many citizens to express their opinion on policy ideas or planning issues.[9] However the Discussion Paper does not expressly state that the e-Planning systems will be accessible to the public. This should be explicitly made clear by the Department.

Documents should be publicly accessible to enable the community to comment more substantively by having all information at hand in the one place. However, there are problems associated with the level of information in councils already using e-Planning tools. For example, there are complaints relating to the systems used by existing councils. While these have proved helpful in tracking DAs, criticisms are that there is very little information available. While the bare minimum information about a development might be helpful to some, the lack of detail limits its benefit in the case of an application of any complexity. Requiring more information and at a finer scale would help applicants, the community and stakeholders. Therefore, there is need to ensure that information is at a sufficiently detailed and comprehensive level.

Furthermore, although e-Planning may improve community engagement, the EDO submits that e-Planning should not be seen as a complete alternative to other forms of public participation. For example, rural and regional communities may have difficulty accessing the system so it is important that paper-based documents are still available.

Part Seven - Resolving paper subdivisions

The EDO does not support the activation of undeveloped paper subdivisions. Often due to the fact that subdivision development has not gone ahead, such areas have high conservation value. The EDO believes that where paper subdivisions exist on environmentally sensitive land or high conservation value land then there must be a clear and transparent process before these can proceed. The unanimous agreement of land holders is insufficient. Furthermore, appropriate environmental assessment should be undertaken.

Part Eight - Miscellaneous Amendments

Lapsing of development consents

---

[9] J. Innes & D. Booher, *Public Participation in Planning: New Strategies for the 21st Century,* Working Paper 2000-07, University of California at p9.

EDO supports reforms that will require the genuine and substantive commencement of a project before a development consent can be said to have been activated. The EDO agrees that the placing of pegs in land is insufficient.

Amendment of standard instrument

The EDO does not support the proposal that public consultation is not required when LEPs are amended due to changes in the standard LEP template. Changes to standard LEP can have significant impacts of the community and the environment. Any such changes should be exhibited.

Exhibition and amendment of planning agreements

The EDO does not support the proposal that re-exhibition of a planning agreement is not required, where it has been amended in response to a submission received during the period of public notice. It is important that planning agreements are transparent, and that the community can clearly observe the final terms of the agreement.

Compulsory mediation

The EDO firmly believes that parties to a planning dispute (usually the local council and the proponent) should exhaust all non-legal means of resolution. Court should remain as a last option. However, the EDO does not support compulsory mediation in the Land and Environment Court for Class 1 and 2 matters. We are particularly concerned that where there are issues of public interest involved there will be no scope for public participation if matters proceed to compulsory mediation. Mediation is an attempt to reach a resolution between the parties directly related to the dispute. Genuine concerns of the public may not be raised or addressed. Nevertheless, mediation may be appropriate in certain circumstances. Mediation should remain as a voluntary option for parties, of where the Land and Environment Court issues an order to undertake mediation.

Statement of Environment Effects (SEE)

The EDO supports the reinstatement of an SEE as a mandatory attachment to a development application. This is of critical importance since, for the vast majority of development applications, the SEE is the only information about environmental impacts which a consent authority has before it makes a decision. Moreover, an SEE enables the community to understand and comment on the potential impacts of the proposal. Therefore, if Councils can decide to approve a development application without an SEE there is a danger that potentially serious environmental impacts are overlooked.

Tailored assessment for Part 3A

The EDO does not support tailored environmental assessment in Part 3A that is based on the size and value of a project. As mentioned above, the potential impacts of projects are not necessarily proportional to their size and value. The EDO contends that to better co-ordinate environmental assessment under Part 3A, the Minister should publish environmental assessment guidelines, which are still not forthcoming two years after Part 3A was introduced.

Part Nine – Recommendations

Elements of a best practice planning system

As previously noted, in recent years the NSW planning system has shifted away from a system focused on public involvement and transparent and accountable decision-making, to one that is discretionary, ad hoc and that has significantly eroded the community's ability to participate in planning processes. This has largely stemmed from the introduction of Part 3A to the *Environmental Planning and Assessment Act 1979* (EP&A Act).

The EDO recommends 6 key areas for reform of the EP&A Act to ensure that the planning system returns to one centred on community participation, transparency and comprehensive environmental assessment. These areas for reform are:

- Require actions under the Act to be consistent with Ecologically Sustainable Development (ESD);
- Reinstate genuine public participation;
- Strengthen environmental assessment provisions;
- Remove certain discretions from the Act;
- Repeal critical infrastructure provisions; and
- Repeal concept plans provisions.

These will be discussed in turn.

1. Require actions under the Act to be consistent with Ecologically Sustainable Development (ESD).

Ecologically sustainable development (ESD) is a concept that seeks to marry environmental, economic and social considerations in decision-making. Its aim is to make it clear that environmental impacts are no longer seen as separate from economic and social considerations, but as part of one integrated whole. While ESD is included as one of the objects of the EP&A Act, its application is uneven. For example, there is no express requirement under Part 3A to consider ESD. There is no statutory obligation to consider or apply its principles, such as the precautionary principle and the conservation of biodiversity, when assessing major projects. This contrasts with Part 4 of the Act where ESD has been long accepted as a mandatory consideration when regarding the 'public interest' under section 79C.

Furthermore, even where there is a requirement to consider ESD, it can still be ignored as long as the consent authority has simply "had regard" to it. To ensure that ESD has a meaningful place within the Act, consent authorities should be granted their discretion to approve projects and developments within an ESD-centred regime, with ESD being the basis of any planning decision. That is, the decision maker would have the discretion to determine *how* a development should conform with ESD, and any development must be consistent with ESD, or it

should be refused. These amendments will assist in ensuring that ESD is enforceable as a matter of law and that decisions that are unsustainable are prohibited. To achieve this, ESD must be elevated to the position of overarching object of the Act.

The EDO submits that ESD should be elevated to the position of overarching objective of the ACT, and all Part 3A projects be bounded by the need to achieve ESD.

2. Reinstate genuine public participation

The EDO notes a fundamental shift in the government's attitude towards community involvement and broad public participation. Opportunities for the public to participate in planning processes have been significantly eroded, primarily in Part 3A. There appears to be a perception that community participation is an administrative and bureaucratic burden rather than a process that can add much value to decision-making. As noted earlier in this submission, genuine public participation adds significant value to government decision-making and is essential to the workings of a democratic system of government.

The *Environmental Planning and Assessment Act 1979* should be amended to substantively reinstate public participation as the cornerstone of the NSW planning system.

The EDO submits that the following amendments are required:

- Allow the public to make submissions on whether a proponent's environmental assessment is adequate before it is accepted by Director-General.
- Require the Director-General to include public submissions in the Report given to the Minister under Part 3A.
- Require the Minister to have regard to public submissions when determining whether to approve a major project.
- Allow merits appeal rights for both objectors and proponents notwithstanding that an IHAP or public hearing has been held.
- Allow merits appeal and judicial review rights for objectors and proponents notwithstanding that the project is a critical infrastructure project.
- Allow the public to apply to the Land and Environment Court for stop work orders, interim protection orders and notices regarding threatened species, heritage and pollution in relation to major projects.
- Make it mandatory for IHAP's to receive and hear submissions from the public.

3. Strengthen environmental assessment provisions

The EDO has identified a need to strengthen the environmental assessment provisions in the Act. Environmental assessment under Part 3A is ad hoc, discretionary and unstructured. There is no clearly defined environmental

framework within which decisions are to be made. Further, although Parts 4 and 5 of the Act do contain a clearly-defined and mandatory process of environmental assessment, there are significant shortcomings. Four key problems with the environmental assessment system in the Act, and how to rectify them, are identified below.

First, the scope and extent of the environmental assessment to be undertaken by a proponent under Part 3A is solely within the Director-General's discretion because there are currently no criteria the Director-General must have regard to in setting the environmental assessment requirements. As Part 3A projects are those likely to have the greatest impact on the environment in terms of their size and scale, the EDO submits that they should be subject to at least the same level of assessment as Part 4 projects.

Second, although the Director-General is required to consult with other agencies such as the Department of Environment and Climate Change under Part 3A, and to have regard to the issues they raise, the failure to do so may not necessarily invalidate an approval. Several important licensing and approval requirements from other agencies that are required under Parts 4 & 5 of the Act are not required for Part 3A projects. These include permits under the *Heritage Act 1977, National Parks and Wildlife Act 1974* and the *Water Management Act 2000.* This means that important environmental issues such as pollution, heritage, water and threatened species are potentially subject to insufficient and/or basic assessment. These inter-agency approvals and consultation requirements constitute important safety nets, and help to ensure that all the potential impacts of a development are adequately considered when the Minister makes his decision. The departments that are responsible for granting these additional approvals have the necessary expertise to adequately assess issues such as pollution, heritage and threatened species licences.

Third, Part 3A allows for the approval of concept plans, which contain only the basic details of the project. This makes the effective assessment of these projects difficult, or even impossible, since the breadth of the environmental effects of the project is unclear. Concept plan provisions should be repealed.

Finally, although Parts 4 and 5 requirement an assessment of the impacts of development through the process of Environmental Impact Assessment (EIA), there are inherent problems. On its installation into the Act, the EIA process was seen as providing a mechanism "wherein projects or undertakings that would likely have a significant adverse environmental impact could be excluded from further consideration and approval denied outright."[10] However, this has been far from the case. There are several readily identifiable problems with the present system. The fact that it is up to the proponent to prepare an SIS or EIS, creates obvious issues relating to objectivity. As has been observed, without independent technical assessment the outcome of the EIA process will always remain fraught with

[10] Michael Jeffrey, 'Environmental Impact Assessment: Addressing the Major Weaknesses' In Nathalie Chalifour *et al* (eds.) *Land Use Law for Sustainable Development* (2007) Cambridge University Press at 451.

suspicion.[11] In addition, an SIS of EIS that shows that a development will have potentially devastating impacts on threatened species or the environment does not operate to halt the development proposal. It is merely a procedural process. A council is only required to take an environmental impact statement into account in making its decision. To correct this problem there should be a requirement for consent authorities to refuse consent to development proposals where an SIS or EIS has shown that there will be a significant deleterious impact on threatened species, critical habitat or the environment. This will ensure that the Act more readily conforms to one of its key objects which is:

the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats.

Furthermore, EIA under the planning laws in NSW has no feedback or accountability loop. That is, there are no structures in place to assess the accuracy of EIA after the event. Some form of external auditing requirement should be introduced to ensure the integrity of the process.

The EDO submits that the following amendments are required:

- Require the Minister to publish guidelines Environmental Assessment Requirements for Part 3A projects.
- Reinstate concurrence and integrated approval provisions for Part 3A projects.
- Require an EIS or SIS for all Part 3A projects.
- Repeal concept plans.
- Require the mandatory refusal of developments under Part 4 where an SIS or EIS demonstrates that a development will have a significant impact on the survival of threatened species, critical habitat or the environment.
- Introduce external auditing requirements that assess the accuracy of environment impact statements prepared by proponents.

4. Remove certain discretions from the Act

The *Environmental Planning and Assessment Act 1979* enshrines a largely discretionary planning regime that is ad hoc and largely unfettered. For example, Part 3A of the Act is largely a discretionary regime with decisions often based on the Minister or Director-General's subjective opinion, rather than objective criteria. For example, the classification of a project as a Part 3A project is dependent on whether the Minister is *of the opinion* that the project is of "regional of state significance" or "essential for economic, environmental or social reasons." This is open to broad and highly variable interpretation. As a result, some suburban, single-residence developments are being classified as Part 3A projects.

[11] *Ibid* at 463.

Another example is the Minister for Planning's power to dismiss a council and to appoint an administrator to take its place as he/she sees fit. He can do so if he/she is *of the opinion* that the council has failed to comply with its obligations, or if its performance is unsatisfactory in any respect. Councils should not be dismissed unless objective evidence demonstrates poor performance.

The EDO submits that decisions under the planning system should be based on objective criteria, not subject to the whims of a decision-maker. This leads to greater accountability and transparency because decisions have to be justified with objective and verifiable evidence.

The EDO submits that the following amendments are required:

- Insert objective criteria into the Act that the Minister must have regard to when determining whether a project is of "regional of state significance" or "essential for social, environmental or economic reasons".
- Require the making of environmental assessment guidelines to be mandatory, not up to the discretion of the Minister.
- Require a statement of commitments by the proponent for environmental management and mitigation measures on site to be mandatory, not discretionary.
- Make it mandatory for the proponent to submit a revised environmental assessment if the Director-General considers that the proponent's environmental assessment does not adequately address the Environmental Assessment Requirements under Part 3A.
- Make the Minister's ability to dismiss a local council reliant on objective criteria rather than the Minister's subjective opinion.

5. Repeal critical infrastructure provisions

The critical infrastructure provisions of Part 3A are problematic for several reasons.

First, as noted there is a lack of objective criteria in characterising projects as critical infrastructure projects. The only prerequisite is that the Minister is *of the opinion* that the project is "essential for economic, environmental or social reasons." This means that whether a project is so characterised is solely dependent on the Minister for Planning's subjective opinion. Given the ramifications of characterising a project as "critical infrastructure", a reliance on the Minister's individual opinion that is not necessarily supported by objective evidence, is objectionable.

Second, the environmental assessment to be conducted by the proponent is entirely reliant on the Director-General's Environmental Assessment Requirements. As noted, the Director-General has largely unfettered discretion in setting environmental assessment requirements.

Third, community participation is essentially non-existent once a project is designated as "critical infrastructure". For example, no objector appeals exist, even

where the project would have been designated development. However, of most concern is the inability of a member of the public to commence judicial review proceedings to enforce a breach of the law, except with the permission of the Minister for Planning. As it is unlikely that the Minister will approve a legal challenge to his own decision, there are essentially no judicial review rights for critical infrastructure projects, even where it can clearly be shown that there has been a breach of the law or of conditions of consent. Further, there is no provision for stop work orders, interim protection orders and notices regarding threatened species, heritage and pollution. This effectively marginalises environmental laws relating to the protection of biodiversity, heritage, water, etc.

On these bases, the EDO calls for the repeal of the critical infrastructure provisions in the EPA Act. Nothing is so critical that it justifies a process with a high risk of facilitating 'bad' decisions.

6. Repeal concept plans provisions

Concept plans under Part 3A are inconsistent with good environmental decision-making for two main reasons.

First, concept plans enable a proponent to submit a development application that merely sets out the scope of the project, but with no specific detail about the location, size, operating output or the activities to be conducted on the site. Indeed, the Act makes it clear that "a detailed description of the project is not required." Concept plans therefore provide little detail about the potential impact and extent of developments. This makes accurate assessment of the environmental impacts of such a project impossible.

Second, a single application can be made for approval of a concept plan and for the final approval to carry out the project. At face value this seems to allow final approval of a project by the Minister based on a concept plan which contains little detail about the true environmental footprint of the project.

As a result of the above, the EDO submits that the provisions relating to concept plans should be repealed.

Summary of recommendations regarding the Discussion Paper

A summary of reforms that EDO supports and reforms that EDO does not support is provided below.

Plan-making

- The EDO does not support the proposed changes to plan-making. The existing process in Part 3 of the Act should be maintained as it is clear, methodical and guarantees public participation. Although the EDO supports a strategic approach to plan-making, the gateway system as

proposed is lacking in detail and does not guarantee public participation, nor comprehensive environmental assessment.

- The EDO does not support an initial "in principle approval' to a draft plan. This may enliven an expectation in developers that final approval has been given prior to an assessment being undertaken.

- The EDO is strongly opposed to the suggestion that impacts of draft rezoning plans are directly proportional to the size and value of the proposal. The potential impacts are largely dependent on location and environment. These impacts can only be determined once an assessment is done and once the community is consulted.

- Public participation and agency referrals should also occur once a proposed LEP is finalised. It is often the finer details contained in LEPs that bring to light social and environmental consequences.

- The EDO is opposed to temporary re-zonings. There is concern that these will be undertaken to enable controversial development proposals to proceed quickly without having to go through a formal re-zoning process. However, this may be a useful tool where an area is temporarily re-zoned for environmental protection to ensure that the land cannot be developed prior to a formal zoning change.

- The Department's focus should be on increasing resources and training for councils to improve the plan-making system.

- The EDO does not support a percentage based target of a 50% reduction in SEPPs and REPs. Although the consolidation of SEPPs may be a positive development, a qualitative approach is preferred.

- The EDO is opposed to the proposal that prevents councils from raising standards in their DCPs above those in State codes. Higher standards are needed in environmentally sensitive areas to minimise environmental impacts.

Development assessment

- The EDO believes that the existing development assessment processes should be maintained. Planning panels are unproven and there are issues relating to their membership, accountability and independence that have not been addressed in the Discussion Paper.

- The EDO generally supports a system of planning arbitrators as this may improve access to justice and lower costs but there is insufficient detail

provided in the Discussion Paper. There are issues relating to appointment, skills and public participation.

- The EDO supports the drafting of guidelines to simplify the information requirements for development applications. However, these guidelines must ensure that sufficient information is provided to enable a proper assessment.

- The EDO opposes the removal of appeal rights where the proposed Planning Assessment Commission conducts a public hearing.

- The reduction of "unnecessary referrals" should be based on strict objective criteria. Referrals relating to environmental impacts such as threatened species should be maintained.

- Standard conditions of consent may be useful in assisting councils and providing certainty to developers. However, councils should be able to insert site-specific conditions not covered by the standard guidelines.

- The EDO is strongly opposed to "deemed approvals" where statutory assessment periods have elapsed. Approvals should only be granted once an assessment is conducted.

- The EDO is opposed to the drafting of community consultation guidelines that tailor public participation to the scale and value of development applications. The potential impacts of a proposal on the community can only be determined once the community is consulted.

Exempt and complying development

- The EDO is opposed to the proposal to significantly expand exempt and complying development. A percentage-based target of 50% is inappropriate and unachievable. The reforms are based on the mistaken premise that developments which are 'minor' or of 'low value' have minimal or no impacts on the community and the development.

- The EDO does not support the proposed state-wide complying development codes. It is not possible to define exempt and complying development in a uniform manner across NSW as there are significant differences between local government areas. Categories of exempt and complying development should only be determined at the local level by councils after the environmental character and social fabric of the local government area is considered.

- The EDO is concerned that that "minor" developments that potentially have environmental and social impacts will not be subject to any assessment

if exempt and complying development categories are expanded. Moreover, the community will be effectively shut out of the majority of developments.

- The EDO opposes the proposal to apply complying development categories to environmentally sensitive areas.

- Private certifiers should not be permitted to endorse minor variations to complying development codes. Private certifiers are not equipped to make value judgments nor is it appropriate for them to do so. Where issues of merit are involved a development application should be required.

Private certification

- The EDO supports any measures that will assist in improving the accountability and transparency of the private certification process in NSW and addressing the perceived conflicts of interest. Increased training, reporting, auditing, the clarification of council responsibilities for enforcing conditions of consent, the increase in the powers of the BPB to discipline certifiers and limiting the number of certificates per client are all positive suggestions.

- The EDO recommends that the *EPA Act* be amended to require developers to apply for a certificate from an independent third party, who would then select a certifier at random from a pool of registered certifiers. This would address conflicts of interest and sever the direct link between certifiers and their clients.

e-Planning

- The EDO supports the proposal to expand e-Planning as long as all documents are publicly accessible. However, e-Planning should not be seen as an alternative to other forms of community engagement.

Paper subdivisions

- The EDO does not support the activation of paper subdivisions. Where these are located on environmentally sensitive land an appropriate environmental assessment should be undertaken before these can proceed.

Miscellaneous amendments

- The EDO supports reforms that require the substantive commencement of a project before a development consent can be said to have been activated.

- The EDO recommends that all changes to the Standard LEP be publicly exhibited.

- The EDO believes that the re-exhibition of a planning agreement should be required when amendments are made. This will ensure transparency.

- The EDO does not support compulsory mediation for disputes between proponents and councils. The public is effectively shut out of the process even where issues of public interest are involved.

- The EDO supports the reinstatement of a Statement of Environmental Effects (SEE) as a mandatory addition to a development application. An SEE is often the only information about environmental impacts which a consent authority has before it makes a decision.

- The EDO does not support tailored assessments for Part 3A projects based on their size and monetary value. The Minister should instead publish environmental assessment guidelines under section 75F of the *EPA Act*.