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EDO(SA) RESPONSE TO SOUTH AUSTRALIA'S EXPERT PANEL "OUR IDEAS FOR REFORM" PUBLICATION (AUGUST 2014) SEPTEMBER 2014

The Environmental Defenders Office (SA) Inc. ("EDO(SA)") is a community legal centre with over twenty years of experience specialising in public interest environmental and planning law. EDO(SA) provides legal advice and representation, undertakes law reform and policy work and provides community legal education.

Response Summary:

EDO(SA) considers that a number of the ideas for structural reform are (in principle) worthwhile. However, without knowing the detail, and without assurances about the resources available and the timing of introduction, EDO(SA) does not have sufficient information to determine its position.

EDO(SA) strongly opposes any winding back of community participation and appeal rights and has concerns about the professionalization and regionalisation of the planning system if a consequence is the alienation of local communities, who are directly affected by planning and development assessment decisions.

EDO(SA) acknowledges that if the Planning Commission, Regional Planning Boards and Regional Assessment Panels are not established the other reform ideas, that are dependent upon those three ideas, cannot proceed.

It would be disappointing and counterproductive if the outcome of the Review is that the government simply introduces some minor standalone reforms (e.g. development notices on sites; e planning; more private certification; introduction of costs in ERDC appeals) and does not take this opportunity to reform the system for the 21st century.

With the investment of more time and resources and further consultation with the Working Parties, the Expert Panel would be in a position to properly develop the "ideas" into comprehensive "proposals" and clearly indicate to the government the views of the Working Parties on the "proposals". Unfortunately, it appears (from discussions with Panel members at the PRRG meeting on 17/09/14) that the Panel is unwilling to approach the Minister for additional time to facilitate meaningful community consultation on the (as yet unseen) "proposals". A likely consequence of this failure will be additional delay at the draft legislative stage when issues that should have been addressed at the "proposals" stage are raised by the various stakeholders.

Given that the outcome of the Review will set the direction of the SA planning and development assessment system for many years to come, the investment of an additional three months in the review process is logical and would be worthwhile (from the perspective of all stakeholders).

The EDO(SA) response to "Our Ideas for Reform" is set out in three parts:

- Part 1 addresses:
  (a) The process, proposed by the Expert Panel, leading up to the preparation of the Panel's final report to government – particularly in relation to community engagement;
  (b) The proposed goals for a new planning system; and
  (c) The guiding principles against which the Expert Panel has assessed 27 "Ideas for Reform" ("the Ideas").
- Part 2 indicates the view of EDO(SA) in respect of each of the Ideas.
- Part 3 addresses resourcing and staged delivery of and the legislative framework for a new planning system.

Part 1 – Process, Goals and Guiding Principles

(a) The Process

- The Expert Panel has only put forward a series of 27 ideas (or suggestions per the Chair's letter to the Minister for Planning, August 2014, p. 5) for reform (containing numerous sub ideas) of the planning system.
- The report provides very little detail in regard to the Ideas.
- It is essential that specific reform proposals, that will be recommended by the Expert Panel in its final report, should undergo further public consultation - otherwise no opportunity will have been provided to comment on these proposals before they are submitted to the SA government.
- Further public consultation on the Expert Panel's Final Report should therefore be undertaken at the final draft stage, prior to its presentation to the SA government in December 2014.
- The Expert Panel should also seek an undertaking from the SA government that the government will publish a Formal Response to the Expert Panel's Final Report before it introduces new planning legislation into Parliament (as occurred with respect to the "Hawke Review" of the EPBC Act in 2010-11). Thus, allowing the community to understand and respond to the government's position in relation to the recommendations of the Expert Panel.

(b) Goals for the new planning system (see Figure 3, p.19)

- The stated goals for a new planning system, on which the various options advanced are based, are seriously inadequate and reflect an implicit and unquestioned bias in favour of continued growth at the expense of environmental and social goals.

- There is only token reference to environmental goals ("minimise and mitigate avoidable adverse impacts") rather than a contemplation also of **avoidance** of such impacts as the primary objective of the planning system.
- Note also that this standard is not commensurate with the "avoid, mitigate, offset" hierarchy of principles which underpin the operation of the EPBC Act and would therefore likely preclude accreditation of approval processes under such a system by the Commonwealth.
- Likewise, the goals do not accord sufficient importance to the social objectives of the planning system, e.g., recognition of the social utility of land, gender inclusiveness, community nurturing and the need to promote affordable housing.
- The goals stand in stark contrast to those espoused in 2012 by the UK Planning Minister, Greg Clark, in the *UK National Planning Policy Framework,* where it is stated that: "The purpose of planning is to help achieve sustainable development" and "Sustainable development is about positive growth – making economic, environmental and social progress for this and future generations".
- The new planning system, to be relevant in the 21st century, must have as its overarching goal, sustainable development which integrates, into every aspect of the planning system, assessment of economic, environmental and social impacts. None of the Ideas adequately integrate compulsory environmental impact and social impact assessment into the planning and development assessment processes.
- Some core values that should underpin the goals of a new planning system include: people having the right to live and work in an environment which is conducive to good health and to a good quality of life that enables the development of human and social potential; people having a right to be involved in decision making about the planned interventions that will affect their lives; and recognition that local knowledge and experience are valuable and can be used to enhance planned interventions.

The NSW ICAC Report *"Anti-Corruption Safeguards and the NSW Planning System"* (February 2012), identified that it is important that planning legislation addresses the issue of the appropriate balance of competing economic, social and environmental public interests:

> *"… by recognising and providing guidance on the weight to be given to competing public interests. Disregarding or placing undue weight on relevant public interest objectives leads to perceptions of bias and corruption, which undermine the integrity of the planning system."(page 13)*

The Report made the following recommendation:

> *"That the NSW Government ensures that the new planning legislation clearly articulates its objectives and provides guidance on the priority (if any) to be given to competing objectives. (Page 14, Recommendation 6)"*

It is essential that, under a new development assessment system, all decision-makers are expressly required to take account of the objects of the legislation and relevant policy instruments when

making assessment determinations. The current "seriously at variance" test has resulted in unpredictable and arbitrary outcomes which undermine community confidence in the system.

In the context of the comments set out above, EDO(SA) proposes the following as a draft objects framework for a new planning system:

1. *The object of the Act is to provide for and promote economic improvement, environmental protection and social well-being through the achievement of ecologically sustainable development, by the application of the principles of ecologically sustainable development (ESD) within the planning and development assessment system.*

"Environmental protection" includes:

1. *the protection and conservation of native animals and plants and their habitats.*
2. *the conservation and sustainable use of built and cultural heritage.*
3. *the effective management of natural, agricultural and water resources.*
4. *The effective management, conservation and preservation of native forests.*
5. *The effective management, conservation and preservation of coastlines.*

"Social well-being" includes:

1. *Having the right to live and work in an environment which is conducive to good health.*
2. *Having the right to a good quality of life that enables the development of human and social potential.*
3. *Having the right to be involved in decision making about the planned interventions that will affect our lives.*
4. *Recognition of the social utility of land.*
5. *Gender inclusiveness.*
6. *Community nurturing .*

"Economic improvement" includes:

1. *The development of affordable housing.*
2. *Development that improves social, environmental and economic outcomes.*

Note: the three definitions require further refinement and expansion.

2. *In order to achieve its objects, the Act provides for:*
   a) *opportunities for early and on-going community participation and engagement in strategic planning, strategic decision-making and development assessment.*
   b) *the co-ordination, planning, delivery and integration of infrastructure and services.*
   c) *the delivery of business and housing opportunities (including for housing choice and affordable housing).*
   d) *the provision of land for public purposes.*

   Note: this clause requires further refinement and expansion.

3. *All decisions, powers and functions under the Act and relevant subordinate instruments must be exercised consistently with the principles of ESD.*

For the purposes of this Act, the following principles are principles of ecologically sustainable development : (from the EPBC Act)

(a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

(c) the principle of inter-generational equity--that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;

(d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;

(e) improved valuation, pricing and incentive mechanisms should be promoted.

(c) Guiding Principles (pp.22-24)

- The Panel's Guiding Principles have a highly technical focus; as with the stated goals, the Guiding Principles do not properly balance economic and technical considerations with those of an environmental and social character.
- Specifically, the fifth Principle of "Performance and Professionalism" reflects an unquestioned assumption that professional expertise is best capable of delivering "effective and efficient processes" and outcomes (reflected, for example, in the proposals for the appointment of fully professional regional assessment panels);
- There needs to be a recognition, within the Guiding Principles, that the planning system is a vehicle for the expression of community aspirations, values and preferences in which technical, expert opinion is merely one component, rather than the sole determinant of outcomes – the failure to understand this dimension of the planning system lies at the heart of the extensive community discontent with the current system and appears to have extended to the Panel's Guiding Principles. The "Partnerships and Participation" principle is acknowledged, but in a technical, expert driven planning system, it is not going to engender community confidence in, and support for, such a system.
- The references in the context of the "Renewal and Resilience" principle to embedding sustainability and supporting economic, social and environmental resilience are tokenistic, given the failure to reflect environmental and social goals adequately or to reflect such goals in the actual ideas presented.
- Whilst the principle of "Partnerships and Participation" is welcomed, as is its reflection in the proposal for a Charter of Citizen Participation, we note that this initiative will apply only in the planning policy context and that there is a general strategy contemplated in various other ideas to significantly reduce the level of community participation in the development assessment context.

Part 2 - the 27 "Ideas for Reform"

Overview

The task of assessing the 27 ideas (and approximately 200 sub-ideas), and deciding which ones are worthy of support or should be rejected, is difficult to perform without further, more detailed elaboration of them by the Expert Panel. It became clear from the Workshops that even the Expert Panel members were unable to explain the rationale behind, and the practicalities of, some of the sub-ideas. In addition, some of the sub-ideas are inconsistent with the "head" idea under which they sit (e.g. 18.4; 14.5). Hence, the need for further community consultation after the Expert panel has refined the Ideas into a number of draft recommendations to government (see Part 1(a) above).

Viewing the 27 Ideas as a reform "package", EDO(SA) has four key concerns:

I. One of the fundamental principles that emerge from the Ideas is that there should be a substantial in shift community participation from the development assessment process to the policy and strategy development stage (Ideas 2, 3, 12, 13, 14, 15, 18). This approach may have theoretical merit. However, without comprehensive, properly resourced and ongoing cross- generational community education, experience suggests that the legislative shift will not be accompanied by a corresponding community participation shift. In any event, increasing community participation in policy and strategy development does not require community participation in the development assessment process to be reduced. The two options can (and should) co-exist. If the policy and strategy participation approach is successful, it should follow that the community's rights to participate in the development assessment process would be resorted to less frequently.

II. The "professionalisation" of the planning and development assessment system (Ideas 2 and 15) could result in the effective exclusion of community and local participation in the decision-making processes. The proposed Charter of Citizen Participation, if not made legally enforceable and if the community is not resourced to enforce it, will not provide an appropriate balance. Good planning is about the well-being of the whole community – it is not just about efficiency and technical correctness.

III. The "regionalisation" of the planning and development assessment system (Ideas 2 and 15) could result in the effective exclusion of community and local participation in the decision-making processes – particularly in rural areas. The remoteness of the community both in terms of physical distance from and accessibility to the decision-makers will undermine community confidence in, and support for, the system.

IV. The failure of the Ideas to encompass an overarching goal of sustainable development which integrates, into every aspect of the planning system, assessment of economic, environmental and social impacts.

EDO(SA) has considered each of the 27 reform ideas in the context of 4 fundamental questions:

- Does the reform idea promote meaningful public participation?

- Does the reform idea help to safeguard the planning and development assessment system against systemic corruption?
- Does the reform idea promote the assessment of environmental, social and economic impacts?
- Does the reform idea facilitate the establishment of an independent, professional and integrated planning and development assessment system?

The answers to these 4 questions will provide clear guidance as to **what** improvements should be made to the planning and development assessment system and **how** those improvements should be made.

ROLES, RESPONSIBILITIES & PARTICIPTION

Reform Idea 1

EDO(SA) **supports** Reform Idea 1 (establish state planning commission) because it will increase community confidence in, and therefore increase community support for, the planning system.

Benefits:

a) The commission will assist in removing politics (and the consequential short term decision making mindset) from the planning system.
b) The commission will be seen to be independent of government.
c) The commission will assist in greater professionalization of the planning system.

Comments:

a) Ensure that all advice that the commission provides to government is publically available unless there are state or national security reasons for not releasing the advice. The planning system is managing community assets and should therefore be transparent.
b) If the government/minister does not act upon the advice provided by the commission, the government/minister should be required to provide reasons to both houses of parliament.
c) The commission needs the power to intervene, direct and manage (not just coordinate/oversee) community engagement processes if it considers that the processes are not being properly managed and implemented.
d) The effectiveness of the commission will be dependent upon the level and range of expertise and experience that it members have: (i) The majority of commission members should be independent and relevantly qualified experts and should include conservation and environment protection experts; (ii) One commission member should be required to have practical knowledge of, and experience in, advocacy on planning and development assessment matters on behalf of the community.
e) Appointment of commission members should be subject to the approval of both houses of parliament.
f) The effectiveness of the commission will be dependent upon the commission being adequately resourced with skilled support staff and funding to call in specialised expertise.
g) There is a need for greater clarity and detail with respect to the division of functions between the Commission, Regional Boards and Panels and local government, with respect to both planning policy and development assessment roles, including involvement with major projects assessment and approval.

Reform Idea 2

EDO(SA) **supports some aspects** of Reform Idea 2 (establish regional planning boards(RPB)) because it may increase community confidence in, and therefore increase community support for, the planning system. However, EDO(SA) has **concerns about some aspects** of Reform Idea 2.

Benefits:

a) It will assist in removing politics (and the consequential short term decision making mindset) from the planning system at the regional level.
b) The RPBs will, potentially, amalgamate state government agency expertise with local government representation.
c) It will assist in the professionalization of the planning system.

Concerns:

a) How will the RPBs have the expertise to select the most appropriate expert members of regional development assessment panels and monitor their performance (Idea 2.4)?
b) RBP funding through voluntary/agreed "co-contributions" (Idea 2.6) will not work and will result in underfunding and funding uncertainty.

Comments:

a) RPB members should include conservation and environment protection experts.
b) The boundaries of the RPB areas should be set by reference, primarily, to environmental catchments (as in NZ) – e.g. the Flinders Ranges; the Fleurieu Peninsula; the Adelaide Hills; River Torrens Catchment.
c) In regard to metropolitan Adelaide, financial incentives should be provided to metro. councils to combine resources to create a small number of RPBs that will engender greater community confidence in the metropolitan planning system and enable a more consistent approach to planning and assessment decisions.
d) Adelaide City should be integrated into the overall metropolitan planning system, allowing a more integrated approach to metropolitan planning and allowing the broader community to be involved in the management and conservation of the valuable Adelaide Parklands.
e) In regard to the Metropolitan development plan(s)/strategy, further detailed consideration needs to be given to how this is best structured (e.g. an overarching strategy with 3 metro. region plans consistent with the strategy; a single metro. Strategy/plan; 3 separate metro. regional plans).
f) The composition of the RPBs warrants more detailed explanation before it is possible to reach a firm conclusion as to the merits of this option, in particular as to how the balance between expert versus representative membership will be struck.
g) There is a need for greater clarity and detail with respect to the division of functions between the Commission, Regional Boards and Panels and local government, with respect to both planning policy and development assessment roles, including involvement with major projects assessment and approval.

Reform Idea 3

EDO(SA) **supports** Reform Idea 3 (enact a charter of citizen participation(CCP)) because it will increase community confidence in, and therefore increase community support for, the planning system.

Benefits:

a) A properly resourced and utilised CCP will enable early and meaningful community engagement, potentially changing community culture regarding the planning system.
b) Good community engagement processes promote community 'buy-in' of decisions which can reduce potential disputes and can help to ensure fairness, justice and accountability in decision making. This view is reflected in a recent report produced for the Local Government Association of South Australia,[1] in section 11.2 entitled "Community Engagement in Planning".

Comments:

a) If the CCP is to replace existing prescriptive consultation requirements, the CCP (and individual engagement plans) must be legally enforceable in the ERD Court, against planning authorities and proponents, by 3rd party community members and organisations on a no costs and open standing (subject to a frivolous/vexatious litigation test) basis.

[1] *Strengthening South Australian Communities in a Changing World: The future role of Local Government in South Australia* (November 2013) accessed at: http://www.lga.sa.gov.au/page.aspx?u=2934

b) The enforceable CCP must apply to all planning authorities (responsible for determining planning policy and planning strategy - from the Minister through to regional and local authorities).
c) The CPP must establish seven high-level principles:
   1) Partnership (opportunities to participate),
   2) Accessibility (to understandable information),
   3) Early involvement (participation in strategic planning 'as soon as possible before decisions are made'),
   4) Right to be informed (about planning decisions that affect the community),
   5) Proportionality (participation in decisions is proportionate to a development's significance and impact),
   6) *Inclusiveness* (representative, inclusive and appropriate consultation methods) and
   7) *Transparency* (open and transparent decision-making, reasons for decisions and feedback on the influence of community views).
d) The CCP should not replace or weaken existing 3rd party development assessment appeal rights.
e) The focus of CCP should be on enabling and facilitating meaningful community participation in planning processes and policy/strategy debates and in some aspects of the assessment process for individual development proposals.
f) Increasing community participation in policy and strategy development (through the CCP) does not require community participation in the development assessment process to be reduced. The two options can (and should) co-exist. If the policy and strategy participation approach is successful, it should follow that the community's rights to participate in the development assessment process would be resorted to less frequently – but should be retained as a safeguard.
g) The use of the CCP at the individual development proposal level may increase the likelihood that, as a consequence of the resources and knowledge imbalance between the community and development sectors, community members may lose confidence in their right to voice their views.
h) Adequate government resourcing for CCP advice/assistance/training to community members (including school children) and groups is an essential prerequisite for the CCP to work effectively and efficiently.
i) There is no value is establishing a CCP if the community is not provided with the resources and knowledge to use it and to understand its limits.

EDO(SA) recommends two complementary approaches to enforcing CCP compliance (a) civil enforcement proceedings; and (b) accountability through a public register, audits and review.

Civil Enforcement

All planning authorities should have a duty to comply with:

- The CCP's broad principles when undertaking strategic planning and development assessments (including when making mandatory Community Participation Plans (Plans) - that provide guidance on how a planning authority will ensure community participation for functions that the CCP applies to).
- The specific mandatory legislative provisions that will give effect to the broad principles and the Plans – for example, but not limited to, any minimum public exhibition periods for draft Plans and draft development plan amendments; the notification requirements for development applications and decisions.

Breach of the CCP principles or the specific legislative provisions should constitute a breach of the relevant Act. Legislative provision should be made for a planning authority to be called to account in the ERD Court, through civil enforcement proceedings with "any person" having standing to apply to commence such proceedings seeking orders to remedy or restrain the breach(es).

The Court, if satisfied on the application that the respondent has *a case to answer*, would grant permission to the applicant to serve a summons requiring the respondent to appear before the Court to show cause why the order(s) sought should not be made.

Any such proceedings should be free of discretionary costs security orders, costs undertakings and costs orders and each party should bear its own costs.

Audits, a Public Register and Review

A Register of Community Participation Plans (Plans) should be publically available (on line). A mandated number of random independent audits to monitor compliance with Plans should be undertaken annually. The results of the audits should be publically available, as part of the Register.

All the Plans should be subject to mandatory review at least every 5 years, involving opportunities for community members to participate in the review process through community consultation and comment.

Reform Idea 4

EDO(SA) **supports** Reform Idea 4 (allow for independent planning inquiries) because it will increase community confidence in, and therefore increase community support for, the planning system.

Benefits:

a) Independent planning inquiries will enable all stakeholders to participate in a transparent and accountable process to resolve contentious and/or complex policy or strategy issues and contentious and/or complex development proposals – including major projects.

Comments:

a) The majority of inquiry members should be independent relevantly qualified experts and should include conservation and environment protection experts.
b) Where the outcome of an issue has the potential to directly affect a particular community, the membership of the planning inquiry should include a person with knowledge of that community.
c) Any inquiry should be a public process and accept both written and oral submissions.
d) The provisions of the CCP should apply to the inquiries to facilitate meaningful public participation.

Reform Idea 5

EDO(SA) **supports** Reform Idea 5 (reframe the role of parliament) because it will increase community confidence in, and therefore increase community support for, the planning system.

Benefits:

a) There is community expectation that Parliament and parliamentary committees should make strategic political decisions that set the future environmental, economic and social direction of SA.
b) It is the role of Parliament to establish robust structures (such as a planning commission) to give effect to the strategic political decisions, using expertise and resources that are not within the parliamentary process.

Comment:

a) At what stage would parliament have input into the strategic planning process – before or after the community? And what would be the consequence of its views being expressed?

PLANS AND PLAN-MAKING

Reform Ideas 6, 7 and 8

EDO(SA) **supports** Reform Ideas 6, 7 and 8 (single state directions frame work, regional planning documents, consistent state-wide planning rules) because they will increase community confidence in, and therefore increase community support for, the planning system.

Benefits:

a) The three ideas, in combination, have the potential to enable the creation of more integrated, transparent, simpler and faster planning and development processes.

Concerns:

a) How will the state planning directions be set? Who will set them? (Idea 6.1)
b) What will be the consultation process for any proposed changes? (Idea 6.6)
c) The community should be provided with opportunities for engagement and consultation in regard to the new directions and changes to the directions.

Comments:

a) The potential of the 3 ideas will only be fully realised if RPBs and councils are required to consult and engage (in a meaningful way) with their local communities – for example, on the state planning directions, the regional planning strategies and the regional development plans and planning rules.
b) The proposed charter of citizen participation (Reform Idea 3) will need to have express application to the community consultation and engagement process and will need to be enforceable.
c) The effectiveness of these three ideas will be very much dependent upon the changes to culture, values and risk management, envisaged in Idea 27.
d) In the 21st century, every component of planning and development must have, as its starting point, the assessment of the environmental, social and economic impacts of planning and development decisions. These imperatives need to be imbedded in the various strategies, directions, plans and rules that are proposed.

Reform Idea 9

EDO(SA) **supports** Reform Idea 9 (build design into the way we plan) because it will increase community confidence in, and therefore increase community support for, the planning system.

Benefits:

a) A form based-zoning approach to planning and development assessment has the potential to create a forward looking, flexible and holistic system that can adapt to changing community expectations and environmental imperatives.
b) The state planning code should not only protect streetscape, townscape, landscape and neighbourhoods but also provide a fundamental link between these protections and the assessment of the environmental, social and economic impacts of planning and development decisions.

Comment;

a) A form based-zoning approach also needs to take account of land use issues. Certain types of "change of use" should remain development requiring approval. For example, change of use of a house to a pub would not be a change in form but would have significant implications for the locality in terms of noise, parking etc. Form and use need to be of equal importance.

Reform Idea 10

EDO(SA) **supports** Reform Idea 10 (heritage system renewal)) because it will increase community confidence in, and therefore increase community support for, the planning system. However, EDO(SA) **strongly opposes** some specific aspects of the reform idea (see below).

Benefits:

a) Integration and simplification of the heritage system will provide for greater certainty and for greater protection of all aspects of heritage.

Comments:

b) EDO(SA) **opposes** the proposal that accredited heritage professionals undertake regulatory functions - if those professionals are going to be directly engaged/employed by the owners of the (proposed or existing) heritage item (Idea 10.7).
c) Such a process would be subject to the perception (and potentially the reality), at very best, of conflict of interest and undue influence and at worst, of corruption. The simple solution is that the regulatory functions should be undertaken by accredited government employees or independent professionals.
d) EDO(SA) **opposes** any privatisation of the heritage assessment system. For the community to have confidence in and support for the planning system, the integrity of the heritage listing process must be apparent and evident in the quality and integrity of the decision-making.

Reform Idea 11

EDO(SA) **supports, in principle,** Reform Idea 11 (easy, quick, transparent plan changes) because it will increase community confidence in, and therefore increase community support for, the planning system.

EDO(SA) **has serious concerns about how this reform is going to be achieved**, namely, by allowing:

- The updating of zoning by private infrastructure providers.
- The updating of zoning by land-owners.
- The funding of zone changes by private infrastructure providers.
- The funding of zone changes by land-owners.

Comments:

a) It is very difficult to envisage "appropriate controls" on such private sector activities that will adequately protect the public interest in the transparent and accountable administration of the planning and development assessment system (Idea 11.4).
b) Such private sector activities would be subject to the perception (and potentially the reality), at very best, of conflict of interest and undue influence and at worst, of corruption. The simple solution is that the zoning process remain within the ambit of the regulatory functions of government. It should not be outsourced.

DEVELOPMENT PATHWAYS & PROCESSES

Reform Idea 12

EDO(SA) provides **qualified support** for Reform Idea 12 (adopt clearer development pathways) because it has the potential to increase community confidence in, and therefore increase community support for, the planning system.

Comments:

a) EDO(SA) **supports** (a) a review and simplification of the development definitions; and (b) in the context of form-based zoning, assessment to be based on "impact assessment" (including environmental, social and economic impacts). However, "change of use" principles still need to be an important assessment guide because the practical impacts of the use of a development are as important as the form/design of the development.
b) EDO(SA) **supports** a move away from a rigid assessment categorisation system (which creates presumptions or expectations of approval or refusal) and supports a shift towards assessment to be based on "impact assessment". Such an approach would address the

environmental, social and economic value of a proposed development rather than having an emphasis on fitting a proposed development into an artificial "category".

c) EDO(SA) **has concerns** that "clearer development pathways" will be used a euphemism for "clearing a pathway for development with reduced opportunities for community engagement".
d) EDO(SA) **has concerns** about the proposed 5 new categories. Community members find the current 4 assessment categories confusing and difficult to navigate. The proposed new 5 assessment categories will exacerbate community frustration, with the addition of another category and the perpetuation of category tags (such as "performance-based assessment") that are not easily understood.
e) The adoption of simple and less confusing development category tags would be of benefit to all stakeholders in the planning and development system. The use of alphabetical tags (i.e. Category A; Category B; etc.) with a short explanation of the category scope would provide clearer and simpler guidance. The current and proposed categories (e.g. Exempt; Merit; Performance-based) are confusing and misleading to people who do not have planning experience and/or qualifications and immediately establish erroneous expectations as to the prospects of a proposed development being refused or approved.
f) The task should not be to shift as many developments into the "complying" category as possible, simply to facilitate development to send the "right" message to businesses. The task should be to identify those developments that warrant faster approval because of their compliance with zone requirements and their environmental, social and economic impact. Planning is about quality of life and sustainability - business development should not take precedence over community interests.

Reform Idea 13

EDO(SA) **opposes** Reform Idea 13 (staged and negotiated assessment processes) because it will undermine community confidence in, and therefore decrease community support for, the planning system.

Concerns:

a) Will effective community engagement be possible, in regard to larger projects, if the assessment process is broken down into a number of stages?
b) Will community engagement occur at each stage or only at the stage of "in principle agreement"?
c) In regard to staged projects, once a number of stages are approved, the balance of power (in regard to assessment and approval of additional stages) will shift in favour of the proponent because the project will be partially completed and the assessment authority is unlikely to effectively halt or delay a partially completed development through assessment refusal of a later stage.

d) EDO(SA) considers that delays in assessment of larger projects that currently require only two overall consents (planning and building) are justifiable because the projects have significant environmental, social and economic impacts which warrant, from the broader community's perspective, careful assessment.
e) EDO(SA) considers that staged and negotiated assessment processes will create uncertainty as to the environmental, social and economic impacts of a development, particularly if provisional consent is granted on the basis of only "in principle" agreements containing little detailed information.

Reform Idea 14

EDO(SA) **supports some aspects** of Reform Idea 14 (improve consultation on assessment matters) because they have the potential to increase community confidence in, and therefore increase community support for, the planning system. **While other aspects have the potential to undermine** community confidence in, and therefore decrease community support for, the planning system.

Benefits:

a) Initiatives, such as notices on land (Idea 14.1) and a development online portal (Idea 14.2), will increase community access to information about proposed developments and enable community engagement.
b) The simplification of the notification/appeal rights pathway and development pathway, through their amalgamation, will make the assessment process easier to understand and simplify the assessment processes (Idea 14.3).
c) Judicial review rights on questions of law are an essential aspect of the Rule of Law (idea 14.6).

Concerns:

a) In theory, the proposed applicant/neighbour consultation process (Idea 14.4) is a positive community engagement step – provided that all parties act in good faith. However, given that there is usually a power imbalance in that type of relationship – the applicant with greater financial resources, more knowledge and a financial incentive to speed up the assessment process - EDO(SA) has significant concerns about what safeguards can be used to prevent abuse and exploitation of this proposed process. Many examples of the consequences of power imbalance emerge under the mining and petroleum exploration consultation processes. In any event, the proposed process should not replace existing formal consultation, notification and appeal rights.
b) The proposed Charter of Citizen Participation should not replace existing formal consultation, notification, representation and appeal rights (Idea 14.5). The Charter should be an adjunct to those rights which will, potentially, reduce the need for community members to exercise the formal representation and appeal rights.
c) There is insufficient detail provided in regard to Idea 14.5, and its companion Idea 18.4, about what changes to third party appeal rights and the ERD Court costs regime are proposed. The existing third party appeal rights **should not be reduced** – as mentioned, if the proposed shift to greater community engagement at the policy/strategy level is successful, the current (very small) number of third party appeals will further reduce. If the proposed shift is not successful, the current appeal rights need to be retained as a safeguard. In regard to Idea 18.4, it is noted that, under the Tribunal's costs regime, orders can be made against third parties for economic loss (in addition to legal costs) and the Tribunal's costs discretion is very broad. The effect of such a costs regime in the ERD Court would be to stop any public interest third party appeals.
d) The proposal for mediation (Idea 14.7), conducted by the planning authority, to resolve development related neighbourhood disputes has merit – provided that there is appropriate ongoing mediator training available and provided that the mediation process is not distorted by a power imbalance between the parties. An additional concern is that planning authority staff cannot be "independent" as they are part of the assessment process. Mediators are required to be independent and impartial.

Appeal Rights

The Proposed "A Clear Interest in the Matter" Standing Test

This proposed shift in the appeal "standing" test from standing being determined by the status of the proposed development (under notification categories 1, 2 and 3) to standing being determined by the status (or interest) of the appellant **is opposed** by EDO(SA).

Why?

(1) It will create uncertainty and add complexity to the appeal process with prospective appellants having to argue complex legal and factual issues to fall within the proposed "sufficient interest" test (irrespective of how the test is worded).

(2) The types of developments that will be subject to appeal will include those that impact upon the "public interest" in a particular development site/region (with the exception of competitor appeals). Therefore, any member of the public (irrespective of where they live) has an interest in the matter and should have a right to appeal (as is the case currently with Category 3 developments, provided a valid representation has been made).

Standing to bring a third party appeal in the public interest

There should be no impediment to third party appeals by persons or organisations who are able to satisfy the Court, by way of preliminary argument, that they are acting in the "public interest". The "public interest" threshold test and the practical complexities, time commitment and associated costs

for “public interest” appellants will dissuade and filter out disingenuous and non-meritorious “public interest” appeals.

As a consequence, the much overused “opening of the litigation flood gates” argument, that is used to oppose “public interest” litigation, continues to lack any practical or academic merit.

The simultaneous introduction of **both** Idea 18.5 (register public interest litigants) and the “A Clear Interest in the Matter” Standing Test may have merit (i.e. two classes of litigants have standing to bring third party appeals: (a) registered public interest litigants; and (b) persons with a “clear interest” in the matter) – subject to consideration of the details of the Ideas.

The existing third party appeal costs regime should be retained
For the reasons set out in Annexure A, EDO(SA) **is <u>strongly opposed</u>** to any changes from the current 3rd party appeals “no costs (each party bear its own costs)” regime to a “costs follow the event” regime. Such changes will severely disadvantage 3rd party litigants and the South Australian community.

A significant desirable major reform would be to enable successful “public interest” litigants to obtain costs orders against the unsuccessful party(ies).

Reform Idea 15

EDO(SA) **supports some aspects** of Reform Idea 15 (independent professional assessment) because they have the potential to increase community confidence in, and therefore increase community support for, the planning system.

Benefits:

a) The use of Regional Assessment Panels (RAP), whose members are independent professional experts, should reduce local government political influence from the assessment process and should provide more certainty and consistency in decision-making.

Concerns:

a) Without local council representation on the RAP, local communities will not support the “regional” system” - there should be a minority of local council members permanently on the RAP who can contribute local knowledge and have voting/decision-making status on the RAP.
b) The local council members should be required to undergo initial and ongoing periodic training in regard to their role and responsibilities in the assessment process.
c) EDO(SA) **strongly opposes** the proposal that low-risk matters (who and how will the “low-risk” status be determined? Are “low risk matters” the same as “non-contestable” matters?) be “handled” (does this mean assessed and approved or just assessed??) by professionals who could be “private consultants contracted as certifiers by applicants” (Idea 15.12).
d) Such an assessment process would be subject to the perception (and potentially the reality), at very best, of conflict of interest and undue influence and at worst, of corruption. The simple solution is that assessment of low-risk matters only be undertaken by accredited council staff.
e) EDO(SA) is **opposed** to any expansion of the current private certification. For the community to have confidence in and support for the planning system, the integrity of the assessment process must be apparent and evident in the quality and integrity of the decision-making. SA does not have the resources to adequately train, audit, and monitor an expansion in the number of private certifiers.

Comments:

a) On every RAP there should be environmental protection and conservation experts.
b) The avenues for individual and community representations (written and in person) to be made to the RAP on “contestable” development proposals are unclear. Is the only avenue to be through elected council representatives being invited to appear before Assessment Panels?

Will there be rights of notification and representation at the local council assessment report writing stage for certain categories of development?

c) The right to make individual and community representations (written and in person) needs to be retained as a vital feature in a planning system that values community participation, transparency and accountability.
d) The composition of the proposed RAP warrants more detailed explanation before it is possible to reach a firm conclusion as to the merits of this option, in particular as to how the balance between expert versus representative membership of these bodies will be struck.
e) Similarly, there is a need for greater clarity and detail with respect to the division of functions between the Commission, Regional Boards and Panels and local government, with respect to both planning policy and development assessment roles, including involvement with major projects assessment and approval.

Reform Idea 16

EDO(SA) **supports some aspects of** Reform Idea 16 (enhance transparency of major project assessment) because it will increase community confidence in, and therefore increase community support for, the planning system.

Benefits:

a) The sub-ideas 16.1 to 16.7 will all improve accountability and transparency in the major project assessment process and provide greater certainty and consistency in the decisions that are made.
b) Judicial review rights are an essential component of an accountable and transparent assessment system.

Concerns:

a) While Idea 16 proposes improvements to the major project triggering mechanisms, there is a failure to provide any detailed outline of a revised major project inquiry and assessment process that reflects contemporary, state-of-the art practice in this field – for example, in relation to the use of public inquiries and strategic environmental assessment mechanisms.
b) More generally, the treatment of this subject reflects a perception that environmental impact assessment (EIA) is an extension of the "normal" development assessment system and fails to reflect an appreciation of its distinct and quite separate function in providing a detailed, scientifically rigorous assessment of the environmental and social impacts of proposals likely to have major impacts.

Comments:

a) Idea 16.7 should be extended to include approvals under the *Petroleum and Geothermal Act Energy Act 2000*. In the context of efficiency, accountability and transparency, there is a strong rationale for bringing the assessment of both mining and petroleum/energy projects into the planning assessment system.
b) The ministerial "call-in" power criteria and the planning commission statutory assessment criteria must encompass and balance environmental, social and economic impacts in the context of strategic regional and national impact assessment.

Reform Idea 17

EDO(SA) **opposes** Reform Idea 17 (streamline assessment for essential infrastructure) because it will undermine community confidence in, and therefore decrease community support for, the planning system.

Concerns:

a) The current and proposed treatment of "essential infrastructure" projects perpetuates the long-standing and erroneous assumption that such forms of development deserve privileged treatment, via a fast-track approval process (as in the past has been accorded to so-called "public works" prior to the privatisation of many such services).
b) In the 21st century, these types of projects are mostly commercial undertakings that have significant impact upon public land and assets and upon community wellbeing.
c) These categories of development should be subjected to the same level of process and scrutiny as all other forms of development, and in particular should regularly be subject to the major projects process (e.g., for ports and harbours).

Reform Idea 18

Idea 18 is misleadingly labelled "Make the appeals process more accessible". As outlined below, the majority of the proposed changes under Idea 18 would have the opposite effect.

EDO(SA) **supports Idea 18.5** which will (potentially) make the appeals process more accessible because it will increase community confidence in, and therefore increase community support for, the planning system. However, **EDO(SA) opposes Ideas 18.1, 18.2, 18.3 and 18.4** because they will further reduce access to the appeals system and make it less efficient.

Comments:

a) For the reasons set out in the EDO(SA) submission to the Expert panel (July 2014) (copy attached at Annexure B), EDO(SA) considers that **the retention of the ERD Court is essential** to facilitating an accessible and efficient appeals process. There is nothing to be gained by transferring the ERD Court functions to the SACAT and much to be lost.
b) EDO(SA) supports the establishment of (potentially) faster and less expensive options to resolve minor merit and procedural disputes , provided that there is a subsequent right of appeal to the ERD Court against the determinations. However: (1) re-hearing of RAP decisions by a RAP is not workable (Idea 18.1) because the re-hearing would not be undertaken by an entity that is independent of the original decision. (2) Procedural disputes are most effectively dealt with in the ERD Court rather than requiring a non-judicial officer to consider (usually) legalistic arguments (Idea 18.2). (3) Idea 18.3 would detract from the current effectiveness of the compulsory conferences by empowering the commissioners to become arbitrators, rather than maintaining their current (de facto) role as a mediator. Parties, in such a conference, would be less likely to indicate a willingness to compromise, fearing that they do not have ultimate control of the outcome.
c) As detailed under **Idea 14** above, EDO(SA) **is <u>strongly opposed</u>** to any changes from the current 3rd party appeals "no costs (each party bear its own costs)" regime to a "costs follow the event" regime (Idea 18.4). Such changes will severely disadvantage 3rd party litigants and the South Australian community.
d) As detailed under **Idea 14**, there should be no impediment to third party appeals by persons or organisations who are able to satisfy the Court, by way of preliminary argument, that they are acting in the "public interest". The "public interest" threshold test and the practical complexities, time commitment and associated costs for "public interest" appellants will dissuade and filter out disingenuous and non-meritorious "public interest" appeals.
e) The alternative idea (Idea 18.5) to the preliminary argument process (to establish "public interest" litigant status) – that of enabling the ERD Court to register "public interest" litigants - may be a more efficient option.
f) A significant desirable major reform would be to enable successful "public interest" litigants to obtain costs orders against the unsuccessful party(ies).

g) EDO(SA) notes the extract from the Local Government Productivity Commission Report (at page 99 of the "Our Ideas for Reform" report) that highlights the (ab)use of the appeal process by competitors litigating vexatious/frivolous anticompetitive appeals. There is scope for the establishment of an innovative and more robust costs regime that will not only facilitate adverse legal costs being awarded against anti-competitive appellants but also facilitate the making of compensatory orders that would cover the court administration costs of hearing and determining such appeals.
h) Any proposed changes to the appeals process need to be very carefully considered and evaluated. It does not appear, from the Expert Panel's Report, that the proposals in Idea 18 are evidence based.

Reform Idea 19

EDO(SA) **supports** Reform Idea 19 (more effective enforcement options) because it will increase community confidence in, and therefore increase community support for, the planning system.

Comments:

a) Without innovative and effective sanction/penalty options that have a significant monetary/commercial deterrence impact, the enforcement system is ineffective and community confidence in the planning system is undermined.
b) The development industry should strongly support this reform. Without innovative and effective sanction/penalty options, "rogue" developers have an unfair competitive advantage over those developers who act in accordance with the planning and development assessment system.
c) Any reform must ensure that the risks attached to having penalties imposed, that would significantly impact upon the reputation and/or the commercial viability of a project/developer, will significantly outweigh the commercial benefit that could be gained through non-compliance. Therefore, the current maximum enforcement penalties need to be substantially increased, adverse publicity orders (Idea 19.2) should be utilised and penalties should be imposed that are proportionate to (and counteract) the commercial benefits of non-compliance (Idea 19.3). See, for example, remedies/penalties for illegal native vegetation clearance under section 31A of the *Native Vegetation Act 1991.*
d) Broader and simpler use of civil enforcement and penalties will enable planning authorities to deter non-compliance without having to embark upon expensive, time-consuming and difficult to prove criminal enforcement action. For example, the 12 month restriction on bringing section 84 proceedings could be extended to 3 years.
e) While having substantial theoretical merit, it would be very difficult, from an evidentiary perspective, to prove negligence and liability in regard to Idea 19.5.
f) Compliance monitoring and enforcement must be appropriately funded - otherwise, the system would soon be identified as a "toothless tiger". This need not be a cost to the general community/government because it should be a cost "of doing business", absorbed by the development industry, through (for example) a specific "compliance levy".

PLACE-MAKING, URBAN RENEWAL AND INFRASTRUCTURE

Reform Idea 20

EDO(SA) **supports** Reform Idea 20 (precinct-based urban renewal) because it will increase community confidence in, and therefore increase community support for, the planning system.

Benefit:

a) Precinct-based urban renewal has the potential to reduce urban sprawl, improve urban quality of life and contribute to more sustainable residential and other development.

Comments:

a) Meaningful community engagement will be essential if precinct-based urban renewal is to fulfil its potential.
b) A significant gap and weakness in the current legislated precinct process is the absence of community consultation or engagement in regard to the decision to establish a precinct. Engagement occurs after the precinct is gazetted (in relation to the preparation of a precinct plan) but not before.
c) In order to encourage community support for the proposed precinct, engagement should be undertaken to obtain views on the proposed establishment of a precinct.
d) Urban renewal should not be used as a vehicle by private land owners to, primarily, fast track development to maximise profit and turnover. A private land owner precinct proposal should only be considered by the planning commission if it is supported by a regional board or council.

Reform Ideas 21 and 22

EDO(SA) **supports** Reform Ideas 21 and 22 (effective provision of open space, parks etc.; incentives for urban renewal) because they will increase community confidence in, and therefore increase community support for, the planning system.

Comments:

a) In order that urban renewal and densification is undertaken in a sustainable way, there needs to be integration of funding for, and allocation of land for open space to be converted into precinct development.
b) Innovative urban renewal financing options need to be developed.
c) Consideration needs to be given to innovative options and incentives for the rehabilitation and re-use of contaminated sites as open space.

Reform Idea 23

EDO(SA) **supports** Reform Idea 23 (infrastructure funding and delivery) because it will increase community confidence in, and therefore increase community support for, the planning system.

Comments:

a) Integration of planning, assessment, infrastructure provision and financing across the individual, local, regional and national development landscape is essential if future development in SA is going to be environmentally, socially and economically sustainable.
b) Infrastructure projects should be subjected to the same level of process and scrutiny as all other forms of development, and in particular should regularly be subject to the major projects process (see Idea 17).

ALIGNMENT, DELIVERY & CULTURE

Reform Idea 24

EDO(SA) **supports** Reform Idea 24 (seamless legislative interface) because it will increase community confidence in, and therefore increase community support for, the planning system.

Concern:

a) There is a real danger that this type of reform could become a means by which environmental and social impacts are not adequately taken into consideration. The “one stop shop” could become a poorly resourced and overworked shop that fast tracks decisions without the safeguards that the current advice/referral mechanisms provide.

Comments:

a) The current fragmented legislative scheme is complex and confusing. It is time consuming and inefficient.
b) A comprehensive review of the current fragmented legislative scheme must be undertaken before changes are made. The overarching objective of the review should be to ensure that the environmental, social and economic impacts of development are comprehensively and efficiently assessed.
c) The expertise that is currently held within the various referral agencies must be retained and utilised.
d) The incorporation of the precautionary principle into a truly integrated development assessment system will enhance community confidence in the system and enable sustainable development.

Reform Idea 25

EDO(SA) **supports** Reform Idea 25 (online approach to planning) because it will increase community confidence in, and therefore increase community support for, the planning system.

Comments:

a) A centralised online portal and the implementation of e-planning will greatly simplify and enhance community engagement with the planning system – provided that the portal is user friendly, kept up to date and properly resourced.
b) The body that is proposed to co-ordinate e-planning should include community representatives with “on-line” and IT expertise to assist in creating a system that is user friendly for the broader community (and not just for business and government).

Reform Idea 26

EDO(SA) **supports** Reform Idea 26 (rigorous performance monitoring) because it will increase community confidence in, and therefore increase community support for, the planning system.

Comments:

a) Performance monitoring, feedback loops and public reporting will:
    - Improve accountability in the planning system and provide the data and incentive that will enable a dynamic and evolving planning system to thrive.
    - Engender a greater sense of community ownership and membership of the planning system.
    - Facilitate a more strategic regional and national approach to planning and development assessment.

Reform Idea 27

EDO(SA) **supports** Reform Idea 27 (cultural change and improved practice) because it will increase community confidence in, and therefore increase community support for, the planning system.

Comments:

a) Changes to culture, values and risk management take time to manifest. Oversight and management of those changes by an *independent* planning commission should provide the best chance of success.
b) The planning commission should not only work with local government, the public service and professional organisations to pursue these changes – but should also work with environmental and community organisations, whose members and clients regularly interact with the planning authorities and the planning system.

Part 3 – Resourcing, and Staged Delivery, of and the Legislative Framework for a New Planning System

Due to very limited resourcing, EDO(SA) is not in a position to provide detailed suggestions, on the questions posed in Part 10 of "Our Ideas For Reform" in regard to staged delivery, resourcing and the legislative framework.

These are fundamental issues that will impact upon the effectiveness of any reforms and community confidence in, and support for, those reforms.

Resourcing

Two key concerns are: (1) What resourcing will be provided to the proposed new system and (2) how that resourcing will be provided.

For example: (a) Regional Boards and Assessment Panels: there is no coherent funding approach provided - the suggestion that "co-contributions" will be provided by the State government and "participating" local councils is unrealistically optimistic and impractical and suggests that there is no coherent view as to how these fundamental reform ideas will be resourced; (b) Charter of Citizen Participation: the development and implementation of engagement plans and the meaningful involvement of the community in the engagement process - the Expert Panel recognises that this will require "effective resourcing". However, the suggested "offset" of this expense by "savings at other stages in the process" again suggests that there is no coherent view as to how these fundamental reform ideas will be resourced. Indeed, if the lack of resourcing for community engagement in the current planning reform process is any indication, the Charter may end up being little more than "window dressing".

More broadly, There is no benefit in raising community expectation of greater community participation and engagement (through ideas such as the Charter of Citizen Participation), if the practical reality is that the community does not have access to the advice, training, information to enable meaningful take up of those opportunities. In all likelihood, the creation of unrealisable community participation expectations will fundamentally undermine most of the reform ideas because they will not be understood and will not have community support.

The increased community engagement and consultation that is envisaged has significant resourcing implications for conservation, environment protection and residents groups. It is counterproductive to have, in theory, greater community engagement and consultation if, in practice, the community does not have the skills, experience and advice to exercise those rights in a meaningful way.

The provision of those services (advice, training, information) must be done independently of government and by properly trained personnel to avoid issues such as real or perceived conflict of interest and confidentiality.

EDO(SA) proposes the establishment of a "Community Engagement" Fund.

The Fund would provide resources to organisations that have the expertise and independence to provide training, information and advice regarding responsibilities, rights and obligations under planning, environmental and heritage legislation. The Fund could be administered by the Law Society, Justicenet or the Law Foundation

Two possible funding sources should be explored:

1. At page 69 of the Report, in respect of funding for heritage financial assistance, the idea of a lottery is canvassed. Resourcing of community consultation and engagement (advice, training, information) through a "Community Engagement" lottery is an option.
2. Funding through a levy on Development Applications (set amount on each DA or sliding scale based on value of development). 50,000 to 70,000 Applications per year.

Staged Delivery

The Expert Panel anticipates that the reform process will be staged. The Panel suggests that a "carefully designed, staged approach" is needed and is seeking suggestions as to how this should be done. Presumably, various stakeholders will have a variety of suggestions (driven by their priorities).

From the community perspective, any reforms that further reduce the very limited avenues for community participation in the current system should not be implemented (if at all) until proposals (such as the Charter), that are purported to increase meaningful community participation, are trialled, monitored and fully resourced.

Potentially, the easiest and cheapest reforms will be made first and the more complex (and resource intensive) community engagement reforms will be delayed and possibly fall away over time. As a consequence, the Charter of Citizen Participation may become tokenistic, not properly resourced and unenforceable while reductions in community rights to challenge development assessments may be introduced immediately.

Prioritisation of reforms
Reform 3 (Charter of Citizen Participation) should be stand-alone legislation that is enacted prior to the implementation of other reforms. Such an approach sends a clear message to the community that community engagement is a vital component of the reform package.

Many of the reforms are interdependent (for example, the responsibilities of the state planning commission and the regional planning boards). As such, those interdependent reforms will need to be grouped and delivered together.

Staging of implementation
The major structural change reforms (such as the planning commission) should be implemented as a matter of priority. This will avoid the scenario of some smaller piecemeal reforms being implemented first and then the reform process losing political momentum – leaving the current system intact with a few bolt-on reforms.

Legislative framework

The current *Development Act 1993* is too large, too complex and covers too many planning and development assessment topics.

The new legislative scheme should be divided into three separate pieces of legislation: the Charter of Citizen Participation Act; The Planning Act (addressing the administrative structure and policy/strategy/plans); and the Development Assessment Act (addressing the assessment process).

ANNEXURE A

Third party appeal rights and Costs

EDO(SA) **is <u>strongly opposed</u>** to any changes from the current 3rd party appeals "no costs (each party bear its own costs)" regime to a "costs follow the event" regime. Such changes will severely disadvantage 3rd party litigants and the South Australian community. Some important points concerning the nature of the disadvantage and the importance of retaining real third party appeal rights are set out below:

1. Imposing a "costs follow the event" regime, will strongly deter prospective 3rd party appellants (whether private or public interest) from exercising their appeal rights because of the uncertainty inherent in litigation outcomes and the consequential uncertainty as to the quantum of costs potential liability.

    a. Imposing a "costs follow the event" regime is contrary to the object of the *Development Act 1993.* The parliamentary intention behind Category 3 representation and appeal rights in a 'no costs' jurisdiction (which have existed for more than 40 years in South Australia) is:

        i. to enable any person (because their private interests are affected or because the public interest is affected) to appeal against a decision to grant a development authorisation. In principle, section 38 enables a member of the community in limited circumstances to challenge the merits of a planning decision and to seek to have reviewed the procedural steps of the planning authority.
        ii. to assist in giving effect to the object of the *Development Act 1993* which is to "provide for proper, orderly and efficient planning and development in the State" and, for that purpose to (inter alia) "establish and enforce cost-effective technical requirements, compatible with the public interest, to which building development must conform;" and "provide for appropriate public participation in the planning process and the assessment of development proposals."

    b. The retention of realistic third party appeal rights reflects the good sense in providing for public participation in decisions on certain development proposals and thus avoiding the kind of public outcry and protest that led to the instigation of third party appeal rights in a 'no costs' jurisdiction in this State in 1972. These rights are consistent with Australia's obligations to provide access to justice in the interests of the attainment of sustainable development. To effectively reduce these rights by implementing a "costs follow the event" regime for third party appeals is not in the interests of public participation in planning or the provision of the means for access to justice.

    c. Real third party appeal rights and effective public participation are corruption prevention safeguards and assist to maintain the integrity of the planning and development process in South Australia:

        i The NSW ICAC, in its February 2012 Report, *"Anti-corruption Safeguards and the NSW Planning System",* emphasises the significance for transparent decision making, of community participation:.

        "Meaningful community participation and consultation in planning decisions helps ensure that relevant issues are considered during the assessment and determination of plans and proposals. It also allows the community to have some influence over the outcome of decisions.
        Community participation and consultation requirements also act as a counter balance to corrupt influences. The erosion of these requirements in the planning system reduces scrutiny of planning decisions and makes it easier to facilitate a corrupt decision." (at page 19)

"The limited availability of third party appeal rights under the EP&A Act means that an important check on executive government is absent. Third party appeal rights have the potential to deter corrupt approaches by minimising the chance that any favouritism sought will succeed. The absence of third party appeals creates an opportunity for corrupt conduct to occur, as an important disincentive for corrupt decision-making is absent from the planning system." (at page 20)

ii. Concerns regarding accountability and integrity in government decision-making processes are not restricted to NSW.

In 2013, the SA Government established the office of Independent Commissioner Against Corruption to:

- identify and investigate corruption in public administration;
- assist in identifying and dealing with misconduct and maladministration in public administration; and
- prevent or minimise corruption, misconduct and maladministration in public administration through education and evaluation of practices, policies and procedures.

In SA, in regard to the FOI regime, the Ombudsman SA, in his *"Audit of state government departments' implementation of the Freedom of Information Act 1991 (SA)"* Report (May 2014) made the following observation:

> "In summary, the evidence provided to the audit strongly suggests that ministerial or political influence is brought to bear on agencies' FOI officers, and that FOI officers have been pressured to change their determinations in particular instances. I have no reason to disbelieve this evidence." (at paragraph 337)

2. 3rd party appeal rights are available in very limited circumstances - only to persons who are notified of a Category 3 development, make a written representation and file an appeal under section 38 of the *Development Act 1993*.

Category 3 developments are those that are not assigned to Categories 1, 2A or 2 under the *Development Regulations* or a Development Plan. Category 3 developments can be described, in a general sense, to be the types of development that may not be appropriate for a particular Zone, unusual types of development and/or types of development that may be the subject of community concern.

As a consequence, there are very limited numbers of Category 3 type developments and very limited 3rd party appeal rights.

Imposing a "costs follow the event" regime, will strongly deter prospective 3rd party appellants (whether private or public interest) from exercising their limited appeal rights – in effect removing a very important check and balance in the development assessment process.

Imposing a "costs follow the event" regime will reduce 3rd party appeal rights to little more than "window dressing" because potential liability for an unknown quantum of costs will deter all but the wealthiest 3rd party appellants. If a security for costs and costs undertaking regime is also imposed in relation to third party appeals, "public interest" 3rd party appeals by individuals and organisations with limited financial resources will, in effect, be prevented.

3. The uncertainty as to the application of a "costs follow the event" regime in the common circumstance when a development approval is upheld but conditions are tightened and/or imposed as a result of the 3rd party appeal.

4. It is spurious to argue that a "costs follow the event" regime will create a "level playing field" in regards to costs in that successful 3rd parties will obtain their costs from the unsuccessful

applicant and/or relevant authority. The financial resource imbalance between applicants and 3rd parties (particularly "public interest" third parties) which is common and the financial incentive (arising from commercial or residential development) for applicants to pursue development approval mean that a "costs follow the event" regime clearly favours the applicant. Will an unsuccessful 3rd party be required to pay the costs of both the relevant authority and the applicant? Will an unsuccessful applicant be allowed to split liability for the costs owing to the successful 3rd party with the relevant authority?

5. Any proposal to provide a "public interest" exemption from a "costs follow the event" regime raises the question of how that "public interest" is to be defined/determined. There are two options: prescribe a statutory test or rely upon common law principles such as those set out by the High Court in *Oshlack v Richmond River Council (1998) 193 CLR 72.*

What of appeals that involve a consideration of both private and public interests in varying proportions? Will the exemption only apply to pure "public interest" appeals? On the preliminary "public interest" costs exemption argument itself, will the "costs follow the event" regime apply to costs incurred on the preliminary argument?

Even with a "public interest" exemption, a "costs follow the event" regime for "non-public interest" third party appellants would not be equitable and cannot be justified. Many of those "non-public interest" third party appellants [who currently make up the overwhelming majority of 3rd party appeals] are going to be deterred by the prospect of unknown quantum of costs if their appeal is unsuccessful. As a consequence, with the effective removal of 3rd party appeals due to the costs risk - as argued above, the intent of the *Development Act 1993* will be undermined, an important corruption safeguard will be undermined and a very important check and balance in the development assessment process will be undermined.

ANNEXURE B

EDO(SA) Submission regarding the Benefits of the Retention of the Environment, Resources and Development Court for matters arising under planning legislation. July 2014

EDO(SA) **strongly** supports the retention of the Environment, Resources and Development Court (ERD Court).

Background

1. Prior to the 1990's, the system of development control in the states and territories suffered from complex development appeal systems and jurisdictional problems due to a multiplicity of appeal bodies in some states and territories leading to lengthy time delays and costs to the industry and community as a whole.

2. A Report for the Commonwealth Department of Industry Technology and Commerce (Hayes and Trenorden, 1990) on the potential for, and implications of, introducing a combined jurisdiction for land and building development appeals and associated enforcement procedures concluded (inter alia):

   > *A combined and integrated appeal court structure must be part and parcel of an integrated development control system. The proposed Court with a combined jurisdiction to hear and determine development appeals and building appeals together with jurisdiction to enforce compliance with planning and building legislation and exercising a supervisory and declaratory jurisdiction is an important step towards achieving efficiency and cost effectiveness in the appeal process.*

3. This approach was reflected in the recommendation of the 1991-1992 Planning Review (SA) to establish the ERD Court; a recommendation that was accepted by the government of the day and had bipartisan support.

4. The legislation for the establishment of the ERD Court was enacted in 1993 and the Court began operations in January 1994. Having been established at District Court level, with its judges having been appointed to the District Court, the ERD Court was enabled to hear and determine matters, including the following in relation to planning and development matters:

   a. appeals (de novo) from decisions of a relevant decision-making authority;
   b. applications for civil enforcement orders including compensation;
   c. charges of offences
   d. charges of contempt (for the alleged breach of or failure to comply with court orders)

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5. As a result of the breadth of its jurisdiction, in relation to the *Development Act* and other legislation, the ERD Court is truly a specialist court in relation to the matters that it is empowered to hear and determine and its members have specialist expertise.

6. The ERD Court has developed streamlined processes to enable matters to be directed towards the most appropriate option for efficient finalisation, with an

emphasis on an agreed outcome, where appropriate, or proceeding to a hearing with each party having access to all relevant information, thus avoiding delays (and costs).

7. The reputation of the ERD Court within the community for the hearing and resolution of often complex matters in an unbiased and informal atmosphere has been built up over many years and should be valued.

8. The ERD Court is more efficient and finalises matters at a faster rate than other courts. How the evolution of the Court into a tribunal could result in an improvement on the speed and efficiency of the ERD Court is not obvious.

EDO response to 4 arguments for disbanding the ERD Court

Argument 1 *- the number of matters before the ERD Court has decreased over recent years and the members of the ERD Court could be more gainfully and fully employed in the SA Civil and Administrative Tribunal (SACAT) where they could sit in other streams or lists, in addition to involvement in planning/development appeals.*

EDO Response:

9. Argument 1 overlooks the existing deployment of the judges of the Court within the District Court. ERDC judges presently sit to hear and determine matters in the following additional jurisdictions:

    a. Equal Opportunity Tribunal
    b. Criminal jurisdiction of the District Court
    c. Civil jurisdiction of the District Court
    d. Administrative and Disciplinary Division of the District Court

10. Argument 1 overlooks the fact that the commissioners (non-legal members of the ERD Court) are already busy chairing conferences, mediating, and hearing and determining appeals (either alone or with a judge) including writing judgments. In addition, it is unlikely that the commissioners would be qualified to participate in the disposal of matters in other streams or lists of the SACAT.

11. Argument 1 overlooks the fact that lodgement numbers in the ERD Court have fluctuated over the years. The fluctuation tends to reflect the state of the economy. For example, in 1994-1995 the total number of lodgements was 373; in 1997-1998 it was 306; in 2001-2002 it was 429; in 2004-2005 it was 544; in 2010-2011 it was 400; in 2012-2013 it was 325. What is appreciated by developers, decision makers and third parties, is the existence of a Court that is able to deal quickly and expertly with matters that are lodged.

Argument 2 *- there would be costs savings for the government should the ERD Court be abandoned and its work transferred to the SACAT.*

EDO Response:

12. The costs to the government for the judges would remain the same, assuming the judges would continue to sit in the District Court or would sit in other lists of the SACAT (as deputy presidents).

13. If executive senior members of the SACAT were to do the work of a judge of the ERD Court, there would be a small cost saving given that the senior members are to be

remunerated at a lower rate than a District Court judge[2] and will not have the expectation of a judicial pension.

14. The costs to the government for the current commissioners would remain the same if they were to be transferred to the SACAT. There would be a cost saving in the future if the work of commissioners was undertaken by ordinary members of the SACAT given that it is proposed that ordinary members be remunerated at a lesser rate than the present remuneration for commissioners and motor vehicles are not to be provided for ordinary members[3].

15. However, any saving in costs for the government has to be considered against the current reputation and value of the ERD Court, including its efficient operations and timely disposal of matters (thus minimising delays in the disposal of appeals and the consequent expense, for parties) and its true independence.

Argument 3 *- the abandonment of the ERD Court would be beneficial to the District Court, in that it would free up space in the Sir Samuel Way Building for judges chambers and enable the District Court to use the courtrooms and conference rooms presently used by the ERD Court.*

EDO Response:

16. Additional judges' chambers would only be required if additional judges (that is, additional to the existing DC complement) are to be appointed to the District Court – an additional cost to the government.

17. The ERD Court presently uses 3 courtrooms, one of which has been modified for the ERD Court for use for the dual purposes of conferences and less formal hearings. None of these courtrooms are suitable for District Court criminal hearings without modification, such as the provision of elevator access from the basement cells, with the associated expense.

18. In any event, if the kinds of matters within the ERD Court are to be moved into the SACAT, sufficient space for the specialist stream/list members' offices/chambers and hearing and conference rooms would have to be provided. Reducing the number/availability of hearing and conference rooms, in an effort to save money, would have negative outcomes with respect to the timely disposal of matters.

Argument 4 *- the abandonment of the ERD Court in favour of a planning and environment stream/list in the SACAT, would result in the saving of ERD Court registry staff salaries and on costs.*

EDO Response:

19. This argument overlooks the fact that the ERD Court registry staff have long been integrated with the District Court registry meaning that in many respects the ERD Court is served by staff who are essentially registry staff providing services to the District Court and encompassing the ERD Court. In any event, the SACAT would

[2] *Terms and Conditions and Code of Conduct - Executive Senior Members* accessed at: http://www.agd.sa.gov.au/initiatives/south-australian-civil-and-administrative-tribunal/careers-sacat

[3] *Terms and Conditions and Code of Conduct – Fulltime and Part-Time Ordinary Members* accessed at: http://www.agd.sa.gov.au/initiatives/south-australian-civil-and-administrative-tribunal/careers-sacat

have to employ sufficient staff to handle the volume of matters presently in the ERD Court, in addition to lodgement for other lists/streams in the SACAT. Very little, if any, saving of costs would accrue.

Why the ERD Court should be retained:

20. The ERD Court has a well-documented record and reputation for the fair and efficient disposal of matters with an emphasis on disposal through agreement between the parties (ADR) without an extended and costly hearing.

21. The ERD Court is housed within the District Court complex and served by staff who also serve the District Court which has the following benefits:
    a. It is relatively inexpensive to operate (compared with a separate court);
    b. It is independent;
    c. It has the ability to develop its own rules and practice directions and the flexibility to modify these in response to changes in caseload volume and complexity; and
    d. The judicial members retain the opportunity for communication, case discussion, collegiality with peer generalist judges, the ability to serve in other jurisdictions while retaining their specialist knowledge, involvement and influence in improving the practices and procedures of courts and thus access to justice.

22. The ERD Court has been mindful of the needs of those for whom it provides access to justice and dispute resolution and has over the years:
    a. conducted several surveys of court users
    b. consulted with the community through community liaison committees
    c. sought the views of those lawyers who regularly appear in the Court
    d. made and implemented changes (or refrained from proposed change) as a result of the consultations and surveys.

23. The ERD Court has endeavoured to operate in a manner so as to minimise, for the parties, the costs of court proceedings and the delays associated with court proceedings. To that end, over the years the Court has amended its procedures and, for the past 5 years, has brought all appeals to an early (preliminary) conference conducted about 3-4 weeks from lodgement, to assess the most appropriate course for the matter; the relevant decision making authority having by then filed and provided to each party all relevant documentation, in accordance with the Court directions. The Court directs the matter into one of three tracks: conference; hearing; or pending (the last to enable, for example, extra-Court negotiation or amendment of the proposed development).

24. A significant majority of all planning appeals lodged are resolved without the need for a hearing (overall 88% appeals in 2011-2012; overall 70% appeals in 2012-2013), saving time and expense for the parties. This is a reflection of the emphasis by the ERD Court and its members on fair and timely resolution of matters consistent with the law and relevant policy.

25. The ERD Court is not costly for parties, in comparison with other Courts (leaving aside the expenses of legal representation), in regard to filing and hearing fees. The fees are significantly less expensive than in all comparable specialist courts and tribunals around Australia, excepting the Resource Management and Planning

Appeal Tribunal in Tasmania. This reflects an informed and enlightened approach by successive governments, supported by the ERD Court, and is of benefit to all appellants and applicants, including developers and third parties (in relation to appeals) and relevant decision making authorities (in relation to enforcement matters).

26. The ERD Court is comprised of experts - judges with specialist knowledge and experience and commissioners with relevant expertise and experience; and it is an integrated court and a court of record, able to hear and determine all matters under the *Development Act 1993* (and other legislation) including planning appeals, civil enforcement applications and charges of offences, as well as charges of contempt in respect of breaches of or failure to comply with court orders. As a consequence, the Court is able to embrace an integrated approach to matters before it regarding the same parcel of land, saving time and expense for the parties.

27. The ERD Court is independent; its members are not reliant on being reappointed by government after an initial appointment period of 3-5 years, as is the position under the legislation creating the SACAT. It is independent of the legislative and executive branches of government. It is publicly visible and thus facilitates access to justice in planning and environmental matters and the other fields within its jurisdiction.

28. The SACAT is neither a court of record, nor is it able to hear and determine charges of an offence or of contempt in respect of breaches of its orders/determinations. These kinds of matters would have to be lodged and heard in the courts. The integrated approach to land use would be lost. What is the rationale for abandoning a valued institution that is working well?

29. The ERD Court is a success story. It is working well (acknowledging that there will always be detractors regardless of how well an institution performs). Its processes produce better results for its users and the community 20 years after its commencement than at its outset. If it is seen to be working well for those who use it and the community at reasonable cost, why abandon it?

Summary

30. The only perceived benefit in abandoning the ERD Court in favour of planning and other matters being addressed in the SACAT, is some saving of costs for the government, most of which are likely to be realised only after the current commissioners have retired. It is difficult to see what other real savings might ensue, given the current efficient operations of the ERD Court.

31. On the other hand, if the ERD Court is abandoned in favour of a stream in the SACAT:

    a. the State will lose a specialist, integrated court that is suitably flexible in its practices, has honed its processes and practices over 20 years, and is well regarded and respected, not least for its early triaging of matters, its emphasis on dispute resolution without a formal hearing and the timely disposal of matters between parties including the de novo hearing of appeals; and
    b. planning and environmental appeals will be addressed, not by members who are truly independent of government, but by members appointed by the Governor (upon the advice of the Executive Council) for a limited tenure of 3-5 years.

32. EDO(SA) notes that, in the Queensland and NSW jurisdictions, civil and administrative tribunals have been established, into which numerous tribunals have been amalgamated. However, in each of those jurisdictions, planning/development and environment issues remain within the jurisdiction of independent specialist courts, namely the Planning and Environment Court (in Queensland) and the Land and Environment Court (in NSW).