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NSW Planning Law Changes
EDO NSW Key Issues Summary
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Six big changes to the Planning Act in 2017 (and three missed opportunities)

The NSW Government is proposing to amend our State planning laws – updating the Act's objects and structure, clearer public participation requirements and timeframes, reforms to state and local decision-making panels, speeding up decisions on large and small development, and putting another nail in the coffin of the former 'Part 3A' major projects pathway.

The community has until Friday **31 March 2017** to comment (extended deadline). The Government will then introduce a revised Bill to Parliament.

The Department of Planning & Environment has released 4 explanatory documents:[1]

1. Summary of proposals
2. Bill guide
3. Draft Bill: Environmental Planning and Assessment Amendment Bill 2017
4. Stakeholder feedback summary

This briefing note from EDO NSW, your community legal centre for the environment, explains some of the major changes and how the Bill relates to other reforms.

It also identifies some missed opportunities – or ways to do better – that should be addressed before the Bill hits Parliament. In short: first, the updated objects make no reference to climate change responses or reducing greenhouse gas emissions. Second, there is no general power to keep consent conditions up-to-date with modern standards. Third, the disparity between developer and community rights to merit appeals has not been addressed, and appeal rights continue to be curtailed.

Below we look at:

1. **New objects and redrafting**
2. **Community Participation Plans and minimum exhibition periods**
3. **Local Planning Panels**
4. **Independent Planning Commission to replace the 'PAC'**
5. **Repeal of Part 3A 'transitional' pathway (updated)**
6. **Related reforms: biodiversity, coastal, Crown land and complying codes**
7. **What is missing? Climate change, up-to-date conditions, merit appeals.**

[1] See: http://www.planning.nsw.gov.au/Policy-and-Legislation/Legislative-Updates.

This overview should give you a head start if you plan to comment. Our detailed submission to Government will be on the EDO NSW website ahead of the due date.

1. New objects and redrafting

The Bill updates the Act's objects, re-numbers many sections, and structures the Act into 10 parts. Some existing parts are carried over and consolidated (Parts 1 to 5) and some are re-ordered or new (Parts 6-10).

New objects are proposed to promote 'good design'; and the management of built and cultural heritage, including Aboriginal cultural heritage. Business and employment are emphasised alongside housing provision (including affordable housing, as now). Current objects to encourage land for public purposes, utilities, community services and facilities are removed.

Importantly, the Act's current objects include 'to encourage *ecologically sustainable development*' (ESD). The Bill would change this to:

> *facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment.* (clause 1.4(b))

Analysis

Objects set out what an Act is intended to achieve and guide decision-making. Most of the revised objects in the Bill reflect and simplify existing objects, but there are some important changes and significant omissions, including climate change.

We support references to good design and cultural heritage protection. The objects could note 'good design' as a means to enhance health, wellbeing and sustainable communities. Protection of the environment and threatened species should include 'their habitats'.

In relation to ESD, we understand the Act's definitions will still refer to long-standing principles found in NSW pollution law (the *precautionary principle*, *intergenerational equity*, *conservation of biological diversity*, and the *polluter pays principle*). However, we are concerned the proposed aim to 'facilitate' ESD will water down what the Act is intended to achieve, by linking ESD with a basic triple bottom line approach to planning and assessment. The ESD object should be rewritten to 'achieve' ESD by 'implementing' ESD principles in decision-making, or acting 'consistently' with them.[2] It should refer to 'effectively integrating short and long-term' considerations, not simply 'relevant' considerations.

There is no new object to respond to climate change despite the NSW Government's recent target of net-zero emissions by 2050.[3] This continues a distinct lack of

[2] For example, the *Biodiversity Conservation Act 2016* (NSW) (clause 1.3) aims to:
> *'maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future, consistent with the principles of ecologically sustainable development (described in section 6(2) of the Protection of the Environment Administration Act 1991)…'*

[3] NSW Office of Environment and Heritage Factsheet - *Achieving Net-Zero Emissions By 2050* (2016).

guidance on how planning authorities, developers and decision-makers are to address the issue. We would propose the following new object:

> *to respond to climate change and reduce greenhouse gas emissions from NSW sources, in accordance with NSW and federal emissions reduction targets, global goals and the best available science.*

This should be given effect at key decision points such as strategic plan making and development determinations. For a comprehensive response to emissions reduction and the planning system, see our report on *Planning for Climate Change* (2016).[4]

2. Community Participation Plans and minimum requirements

The Bill includes some important gains for community participation in planning decisions.

Each 'planning authority'[5] will now have to prepare and exhibit a community participation plan. The plan will set out how and when the planning authority will undertake community participation on a range of planning functions – preparing environmental planning instruments, assessing development applications and doing environmental impact assessments.[6]

In preparing the plan, the planning authority must *consider* the 'community participation principles' in the Bill. These are developed from the community participation charter proposed in 2013.[7]

These new plans will be supported by other changes. Minimum timeframes for public exhibition are proposed for a range of plans and development types, and notification requirements will be mandatory for development applications and decisions. Decision-makers will also be required to give reasons for certain decisions, including how community views were taken into account, such as for development consents and large infrastructure approvals. However, these requirements don't extend to exhibiting or amending State Environmental Planning Policies (SEPPs).

Analysis

We strongly support the adoption of community participation plans and principles. However, there is no guarantee the principles will be reflected in the plans, as planning authorities are only required to consider the principles when formulating the plan, not implement them or show how their plan complies.

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[4] Available at http://www.edonsw.org.au/planning_for_climate_change.

[5] Planning authorities include: The Minister, the Planning Secretary, the Greater Sydney Commission, the Independent Planning Commission, Sydney district regional planning panel, a council, a local planning panel, a determining authority under Part 5, a public authority prescribed by the Regulations. See Draft Bill, pp. 15 and 16.

[6] Councils won't need to prepare these plans where an equivalent document is already in place, such as in a Community Strategic Plan prepared under s. 402 of the *Local Government Act 1993* (NSW).

[7] In brief the principles include (at clause 2.23): a right to be informed, partnerships and meaningful participation opportunities, accessible planning information, early engagement in strategic planning, inclusive and representative consultation, local consultation on major development, open and transparent decision-making (and reasons for decisions), and proportionate participation methods based on the matter's significance and likely impacts.

Further, the provisions of a community participation plan are only mandatory if the provision is identified by the plan as mandatory. This is a potential weakness that could make the plan unenforceable and ineffective. Mandatory requirements will include minimum public exhibition and notification periods, giving reasons for decisions, and other matters identified in individual plans.

Importantly, the community can challenge the validity of a community participation plan within 3 months of it being published on the NSW planning portal. Planning authorities are more likely to take the process seriously if the community has some oversight in this way.

3. Local Planning Panels

The Bill would standardise the make-up of bodies that local councils can appoint to make decisions on complex development approvals.

New 'Local Planning Panels' will have three members appointed by the local council, including two independent experts in relevant listed fields and one community representative. A model charter and operating procedures will be developed.

The Panels are not mandatory, but new regulations will empower the Minister to direct a council to appoint one in some circumstances. Existing Independent Hearing and Assessment Panels (IHAPs) will be retained and transitioned to the new system.

Councils will make the rules on what matters go to the Panel (although the Bill also allows the Minister to direct this). Council staff will still handle most development applications, while Panels will determine more complex and contentious applications.

Analysis

We support updating and standardising provisions for the governance, membership and role of local planning bodies. Standardised reporting is also welcome, provided it goes beyond simplistic timeframes and approval numbers. Speed of approvals is not an indicator of sound assessment and decision-making.

Other points to clarify include: how community representatives are identified and appointed (and whether this includes councillors); the use of ministerial directions; and how to vet members' independence and credentials to act in the public interest. Finally, listed fields of expertise should also include social scientists; and expertise in law or economics should be in a relevant sub-field.

4. Independent Planning Commission to replace the PAC

The Planning Assessment Commission (PAC) is to be renamed the Independent Planning Commission and its functions are to change. Currently the PAC may *review* and report on a major project proposal midway through the assessment process; or it may *determine* whether to refuse or approve a project in place of the Minister. Sometimes it does both.

The Independent Planning Commission will no longer have a *review* role in assessing State Significant Developments (SSD). It will continue to *determine* certain types of SSD, to be set out in the *SEPP (State and Regional Development) 2011*. It is not clear that the Bill implements recent NSW Audit Office recommendations.[8]

The Minister will continue to have the power to ask the Commission to hold *public hearings* prior to determining SSD proposals. Hearings would be held in two stages, and be more inquisitorial than they are now (with the Commission preparing questions to ask, and enabling more interrogation).[9]

Analysis

The highly concerning part here is that public hearings will continue to remove merit appeal rights to the independent Land and Environment Court. Yet public hearings are directed at the Minister's discretion, and are by no means as rigorous or equitable as a court hearing, where the evidence can be properly tested by both objectors and proponents.

We strongly oppose the continued exclusion of third party merits appeals following a public hearing. A public hearing is no substitute for merits appeal rights to the Court. For more information see our 2016 report, *Merits review in Planning in NSW*.[10]

Other aspects are more positive. Setting out Commission-determined development types in the SEPP appears more transparent than the current delegation process and will provide more certainty for the community and development proponents.

A two-stage public hearing process may allow the community and the Commission greater opportunity to influence the project so as to minimise adverse impacts. However, these reforms do not address central public confidence issues such as removal of appeal rights. The Audit Office's report will also need to be examined.

5. Repeal of Part 3A 'transitional' pathway (updated analysis)

The Bill proposes to effectively switch off the Part 3A 'transitional' arrangements, which allow the approval and continued modification of hundreds of projects already in the system when the controversial major projects pathway was repealed in 2011.

Part 3A projects will be moved into the existing system as either State Significant Development (**SSD**) or Infrastructure (**SSI**). Applications to modify major developments approved under Part 3A will now be assessed in the same way as all other modification applications (under s. 96 of the Act).

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[8] *NSW Auditor-General's Report, Performance Audit - Assessing major development applications (*Jan. 2017), at: www.audit.nsw.gov.au/news/assessing-major-development-applications-planning-assessment-commission.

[9] As proposed, the *first hearing* will be held after public exhibition of the project proposal and Environmental Impact Statement. The proponent will then have an opportunity to respond to the issues raised in submissions and the public hearing. Issues raised can also inform the Commission assessment of the project. The *second hearing* will take place after the assessment and before a final determination. The Commission will be able to examine the Planning Department's assessment report and any draft conditions. The community will also be able to raise any issues or concerns at this second hearing stage.

[10] Available at: http://www.edonsw.org.au/merits_review_in_planning_in_nsw

However, some uncertainty remains around the future of 'concept plans' made under Part 3A. Concept plans are broad-brush master planning documents that were a source of community controversy after Part 3A was introduced in 2005. The breadth and lack of detail in concept plans meant that big decisions were often made without public input, without appeal rights, and without their full impacts being understood.

Analysis

We strongly support discontinuing the Part 3A 'transitional' arrangements. These provisions add unnecessary complexity to planning decisions and extend the operation of controversial, discretionary provisions that were repealed six years ago.

Section 96 is a more rigorous, transparent and consistent process for assessing applications to modify or expand developments. In particular, it requires the modified project to be 'substantially the same development' as was originally approved; and requires additional notification and consultation if the regulations say so.

We make three further comments on the Part 3A transition repeal. First, the Bill and guidance say that new regulations will 'make provision [for] any outstanding concept plans'; and that the 'ongoing effect of approved Part 3A concept plans will be preserved'.[11] The intent and implications of this 'ongoing effect' must be properly explained to the community, and feedback sought. We understand that over 100 concept plans have been determined under Part 3A. Wherever possible, proposals and modifications should transition to SSD or SSI and receive full public scrutiny.

Second, there is no basis to support a further two months for proponents to lodge new modification applications under the 'old' Part 3A process after this Bill is passed. The amendments should have effect immediately if Parliament passes them.

Third, for future applications to modify consent, the Bill proposes to consider whether the project is 'substantially the same development' based on *when the Bill is passed* (allowing for any earlier modifications), instead of comparing it to the *original approval*. For example, if a major mine has been modified 17 times since approval under Part 3A, a further modification application would be measured against the highly-changed mine layout, rather than the original mine as approved before the 17 modifications.

In our view, future modifications should be assessed on whether the Part 3A project is substantially the same as the development originally approved (as is the case for all other section 96 modifications). If not, a fresh development application and environmental assessment should be prepared. There is no justification for making out a special case for old Part 3A projects, as that part of the Act was repealed six years ago. This would add complexity and fragmentation instead of clear, consistent and fair decision-making.

6. Related reforms: Changes to biodiversity assessment, coastal protection, Crown lands management and complying development

[11] Sch. 10, item 7 (*Sch 6A Transitional arrangements-repeal of Part 3A*), Bill p. 110; *Summary of proposals* p. 29.

There are several other significant reforms that will affect the NSW planning system outside of the 2017 Bill. These include biodiversity assessment changes; a new coastal protection framework; and ongoing expansion of complying development that can be approved by private certifiers, instead of development consent from councils.

First, the new *Biodiversity Conservation Act 2016* and its Biodiversity Assessment Method (BAM) will largely replace the 'assessment of significance' that currently considers the effects of a development proposal on threatened species, ecological communities, populations and their habitat (under s 5A of the EP&A Act).[12] Details to underpin this Act and BAM are expected in draft regulations to be exhibited in 2017.

Second, the *Coastal Management Act 2016* and a forthcoming Coastal SEPP will introduce a new legal framework and management approach to the NSW Coastal Zone. The framework will be supported by new coastal zone mapping, categories of permissible development and protection against natural disasters like flooding and storm surges. Consultation on a draft Coastal SEPP closed in January 2017.

Third, there has been a shake-up of how public lands are managed across the state, such as Crown reserves, caravan parks, showgrounds and travelling stock routes. The *Crown Lands Management Act 2016* will soon replace several Acts including the *Crown Lands Act 1989* and the *Western Lands Act 1901*.

The new Act makes it easier for the Government to transfer management of Crown lands to local councils, other state agencies or other land managers. It also allows the Government to 'vest' land in councils or agencies or sell it under certain circumstances (so it is no longer Crown land). Crown land management will be informed by new community engagement plans, new rules to be made in regulations, and existing principles of Crown land management carried over from the 1989 Act. Plans of management will still operate under the new Act or the *Local Government Act 1993*.

Finally, while the 2017 Planning Bill doesn't revisit the controversial 'code assessable' development category from the 2013 reform proposals, the categories of housing and other complying development have been steadily expanding since then.[13] EDO NSW has previously identified issues with code-based assessment that have not been adequately addressed to date.[14] In particular:

- Avoiding cumulative impacts, especially on environmentally sensitive areas
- Improving enforcement action and governance of private certifiers

[12] While the assessment of significance in s. 5A has its own flaws, the BAM will increase reliance on 'biodiversity offsetting' in NSW; enable developers to pay money directly into a government Fund (instead of locating offsets before destruction occurs); and provides limited safeguards against 'serious and irreversible impacts' (yet to be defined). In our view, the direct payment-to-Fund option, exceptions to the rule that offsets should be 'like-for-like' and the ability to approve major projects that cause serious and irreversible damage will undermine the integrity of the offsets scheme, and push some NSW species and ecological communities closer to extinction.

[13] This reflects the state/Premier's priority target to have 90% of housing applications determined within 40 days (NSW Government, *NSW Making It Happen*, Sept. 2015). Code expansions in recent years include:

- the controversial *10/50 Bushfire Clearing Code* which saw loopholes misused to clear urban landscapes
- ongoing amendments to the *SEPP (Exempt and Complying Development Codes) 2008*, including a draft Medium Density Housing Code exhibited in 2016, and
- rural land-clearing codes under the Native Vegetation Regulation 2013 and, in future, the *Local Land Services Amendment Act 2016* (draft codes and regulations forthcoming).

[14] See our code-related submissions at http://www.edonsw.org.au/planning_development_heritage_policy.

- Ensuring meaningful community engagement on design standards, and
- Mandating leading practice sustainability standards (BASIX and beyond).

7. What is missing?: Climate change, updated conditions and community merit appeal rights

While the Bill is over 100 pages long, there are some missed opportunities to address some of the most pressing issues in planning, such as climate change, adaptive management and equitable appeal rights.

First, the updated objects make no reference to climate change responses, or reducing greenhouse gas emissions to achieve the State target of 'net-zero' by 2050. The Act would remain silent on climate change, yet most emissions in NSW are authorised by planning and development approvals, explicitly or otherwise.

The decisions we make now – on regional and city planning, transport, resource extraction, building standards and vegetation management – will have long-lasting effects on future generations. The new objects should include responding to climate change through timely mitigation and adaptation, consistent with state, national and global aims for emissions reduction, and best available science for a safe climate.

Second, there is still no general power in the Act to keep consent conditions up-to-date with modern standards – despite the ongoing right of proponents to ask for conditions to be modified. Instead, the Bill proposes 'transferrable' consent conditions that lapse when given effect in other licences or approvals; and a narrow power to update environmental audit conditions. We have a number of concerns with the proposed transferrable conditions approach.

We think the time is right to allow consent authorities to update consent conditions, taking into account cost and technical feasibility of change. NSW pollution laws and federal environmental laws already allow this, while in the US, the *Clean Air Act* uses principles of continual improvement and best available technology to set modern standards and reward industrial innovation.[15]

Third, there is still no expansion of community rights to bring merit appeals (as ICAC has recommended[16]). Also, existing appeal rights will continue to be curtailed if the Commission holds a 'public hearing' on a project when directed by the Minister. At the same time, the Bill proposes to extend developers' rights to internal review of refusals or conditions on large and complex projects behind closed doors. This will exacerbate the existing disparity of rights, and make decision-making less inclusive.

Community appeal rights should be restored and expanded to achieve the aims of increased public confidence, robust decision-making and improved planning outcomes.[17]

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[15] See US EPA, Clean Air Act overview, 'Setting Emissions Standards Based on Technology Performance', Jan. 2017: https://www.epa.gov/clean-air-act-overview/setting-emissions-standards-based-technology-performance.
[16] ICAC, *Anti-corruption safeguards in the NSW planning system* (2012), recommendation 16; ICAC, *Submission regarding a new planning system in NSW (White Paper and Accompanying Bills)* (2013), p. 4; at icac.nsw.gov.au.
[17] On the benefits of merit appeal rights, see EDO NSW paper on *Merits review in planning in NSW* (2016).