



Submission on proposed changes to NSW Exempt and Complying Development Codes

prepared by

**EDO NSW
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About EDO NSW

EDO NSW is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

EDO NSW is part of a national network of centres that help to protect the environment through law in their [states](#).

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Introduction

EDO NSW has engaged extensively on the practical application of NSW planning laws in our capacity as a community legal centre specialising in environmental and planning matters. It is from this perspective that we provide comment on the proposed expansion of code-based approvals under the **Codes SEPP** and related amendments to the **Planning Regulation**.¹ We note that the purpose of the proposed amendments is 'to allow a wider range of commercial, retail, industrial and residential development types to be able to obtain code-based approvals';² and to consolidate various SEPPs that allow exempt and complying development.³

We are concerned that the proposed changes:

- weaken environmental protections by removing prohibitions on *exempt development* (and allowing specified *complying development*) in environmentally sensitive areas;
- allow new industrial buildings and additions to be code-approved, and quadruple the previously-exhibited maximum building size from 5000m² to 20,000m² (approximately the area of the Melbourne Cricket Ground);
- reduce the community's ability to comment on large neighbouring developments;
- pre-empt broader consultation and finalisation of NSW planning reforms (including concerns about the scope of code assessment and governance of private certifiers);
- do not reflect commitments in the Government's Planning Green Paper to leading-practice community engagement and improved environmental protection.

We make the following **recommendations**:

1. Retain the prohibition on exempt and complying development in environmentally sensitive areas (and where necessary, clearly outline the rationale for special exceptions to this rule, and limit any proposed exceptions to target the problem);
2. Limit the application of the code to new industrial buildings and additions: the maximum size must be reduced, and mandatory conditions (design, landscaping, setbacks and resource efficiency) strengthened – to ensure minimal environmental and neighbourhood impacts, and encourage well-planned mixed-use zoning;
3. Defer consideration of any significant expansion of code-based developments until:
 - the Government has fully considered concerns about code expansion arising from the Green Paper and forthcoming White Paper, and
 - the NSW private certification system is significantly improved, by way of governance, quality assurance, enforcement and auditing.

¹ *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP)*; and the *Environmental Planning & Assessment Regulation 2000 (EP&A Regulation)*.

² NSW Department of Planning & Infrastructure factsheet, 'Overview of proposed changes', October 2012.

³ Replacing and repealing SEPP 4 (miscellaneous exempt and complying), SEPP 6 (number of storeys), SEPP 22 (shops and commercial premises) and SEPP 60 (exempt and complying): *State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Commercial and Industrial Development) 2012*, p 2.

Proposals remove important protections for environmentally sensitive areas

EDO NSW strongly opposes the weakening of protections for *environmentally sensitive areas*⁴ under proposed changes to the Codes SEPP. In particular, we oppose the removal of clause 1.19(1) and the amendment of clause 1.17A(e). The effect of these proposals is to:

- lift the prohibition on exempt development in environmentally sensitive areas (without qualification),⁵ and
- allow the Codes SEPP to introduce specific exceptions for complying development.⁶

The consultation material for the Codes SEPP changes states:⁷

... It is proposed to allow exempt development in the Codes SEPP to occur in environmentally sensitive areas but only where it is ancillary to other existing buildings or uses already on site. Development will be limited to small structure such as decks, fences, garden sheds and minor building alterations.

However, the proposed amendments to remove clause 1.19(1) of the current SEPP do not restrict exempt development in the way outlined above.⁸

These changes could have a significant cumulative impact on sensitive areas (such as coastal lakes, littoral rainforests, significant wetlands and Aboriginal heritage areas). A cornerstone of exempt and complying development is that it should apply to minor, low risk and low impact developments only. Consistent with this philosophy, the Codes SEPP currently prohibits exempt and complying development in environmentally sensitive areas.

⁴ Under the Codes SEPP, cl 1.5: **environmentally sensitive area** means any of the following:

- (a) the coastal waters of the State,
- (b) a coastal lake,
- (c) land to which State Environmental Planning Policy No 14—Coastal Wetlands or State Environmental Planning Policy No 26—Littoral Rainforests applies,
- (d) land reserved as an aquatic reserve under the Fisheries Management Act 1994 or as a marine park under the Marine Parks Act 1997,
- (e) land within a wetland of international significance declared under the Ramsar Convention on Wetlands or within a World heritage area declared under the World Heritage Convention,
- (f) land within 100m of land to which paragraph (c), (d) or (e) applies,
- (g) land identified in this or any other environmental planning instrument as being of high Aboriginal cultural significance or high biodiversity significance,
- (h) land reserved under the National Parks and Wildlife Act 1974 or land to which Part 11 of that Act applies,
- (i) land reserved or dedicated under the Crown Lands Act 1989 for the preservation of flora, fauna, geological formations or for other environmental protection purposes,
- (j) land identified as being critical habitat under the Threatened Species Conservation Act 1995 or Part 7A of the Fisheries Management Act 1994.

⁵ We note that the only limits would be for *critical habitat*, for which existing prohibitions on exempt/complying development remain, and for wilderness areas.

⁶ Clause 1.17A(e) currently states that complying development *must not* '(e) be on land that is within an environmentally sensitive area'. The amendments propose the additional words, 'except as otherwise provided by this Policy...'

⁷ NSW DP&I factsheet, 'Proposed changes to where you can do exempt and complying development' (October 2012), 'Can exempt development be carried out in environmentally sensitive areas?'

⁸ *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, cl 1.19 (Land on which exempt development and complying development may not be carried out). Clause 1.19(1), which is proposed to be deleted, states: 'To be exempt development or complying development, the development must not be carried out on land that is an environmentally sensitive area.'

The consultation material provides no information on the policy drivers for removing (or limiting) the prohibitions on exempt and complying development in environmentally sensitive areas at this time. We also understand this proposal was not exhibited in 2010. If there are specific problems caused by these important prohibitions, these needs to be clearly outlined, and any proposed amendments must be sufficiently narrow to address those specific problems in limited exceptional circumstances only.

Changes would quadruple proposed size of new code-approved industrial buildings

We are concerned that the proposed changes to the Codes SEPP will allow code-approved industrial buildings of 20,000m². This is four times the size of the proposals previously exhibited in 2010, with the resulting potential for greater environmental impacts.⁹

The consultation material does not refer to or explain this significant increase. In its recent submission on the planning Green Paper, EDO NSW noted the importance of limiting code-complying permissions to low risk, low impact development.¹⁰ We oppose this expansion on the basis of potentially significant cumulative environmental impacts and inadequate community consultation.

The submissions summary from the 2010 consultation notes: 'Concern was expressed by a few councils over allowing a 5000m² industrial building as complying development.' The Department includes a brief response to this issue.¹¹ However, given these councils' concerns, and the lack of any submissions from the general community at that time, it is disappointing that the current amendments quadruple the maximum proposed size for new industrial buildings that could be approved as code-complying (up to 20,000m²). We also note that the increase in building size has not resulted in an increase in proposed setbacks.¹²

Proposals pre-empt broader consultation and planning reforms

In a recent submission to the Planning Department,¹³ EDO NSW noted its concerns at a range of piecemeal reform measures that have recently been announced, which pre-empt the Government's wider overhaul of the planning system. Such interim changes include:

- policies to accelerate growth centre development and reduce protections for riparian corridors, biodiversity and Aboriginal cultural heritage;¹⁴
- changes to coastal management;¹⁵

⁹ See Department of Planning, *Stage 2 NSW Commercial and industrial General Exempt and General Development Codes Discussion paper – Submissions summary* (Nov. 2011). The proposed development standards included: a gross floor area (for new industrial buildings) of less than 5000m²; maximum site coverage not exceeding 75%; landscaped three-metre setbacks (increasing in scale) from adjoining residential properties; and 10-metre setbacks from environmentally sensitive areas. Department of Planning Stakeholder Discussion Paper, *Proposed amendments for Stage 2 – Commercial and industrial code...* (Oct. 2011), Table 8.

¹⁰ EDO NSW, *Submission on A New Planning System for NSW – Green Paper* (September 2012), pp 40-41.

¹¹ Department of Planning, Stage 2 Submissions summary (November 2011): 'New industrial buildings can only occur on industrial zoned land and industrial estates. To address potential impacts on adjoining residential areas, specific development standards can be provided for industrial development adjoining residential properties, including increased setback and landscaping requirements.'

¹² Setbacks next to a residential property would begin at 3 m landscaped area (increasing with building height) as per draft cl 5A.9. This appears to be the same as for 5000m² buildings in the Stage 2 paper (2011), Table 8.

¹³ EDO NSW, *Submission on additional permitted uses under the Standard LEP* (October 2012).

¹⁴ Department of Planning & Infrastructure, Planning Circular *PS 12-003 Initiatives to improve housing supply*, 6 June 2012.

- the announcement that Catchment Management Authorities will be disbanded and replaced (alongside other agencies) with 'Local Land Services';¹⁶ and
- a Bill to formally subordinate the role of Development Control Plans in order to facilitate development.¹⁷

These announcements have not involved sufficient (if any) public consultation; have not adequately explained their interaction with the overall planning reforms; and may reduce public confidence, understanding and certainty around the broader reforms. For example, the current changes considerably expand the Codes SEPP when the broader reforms propose to repeal and replace SEPPs with other instruments.

We recommend that such piecemeal planning changes be avoided where possible, to maintain the integrity of the wider planning reforms. Where specific interim changes are considered necessary, they should be clearly justified and widely supported; deal upfront with their interaction with the new planning system; and demonstrate the Government's commitment to leading practice consultation to improve policymaking and community buy-in.

There is a risk that by pre-empting the broader NSW planning reforms, the Department is perpetuating the unsatisfactory engagement model of 'Decide-Announce-Defend'.¹⁸ For example, comments on the Green Paper expressed concern about increasing code-based developments in light of environmental and social impacts, as well as the ability for communities to have a say.¹⁹

We are aware that the current proposals date back to a previous review of the Codes SEPP in 2010.²⁰ However, it is worth reiterating that the previous review received no submissions from community groups or the general public.²¹ We therefore have significant concerns about the continuing use of 'traditional' consultation methods, as well as the content of the proposed changes.

¹⁵ The Hon Chris Hartcher MP, Minister for Resources and Energy, "NSW moves ahead on coastal management", media release, 8 September 2012.

¹⁶ The Hon Katrina Hodgkinson MP, Minister for Primary Industries, "Local Land Services to transform service delivery to NSW farmers and landowners", media release, 4 October 2012.

¹⁷ *Environmental Planning and Assessment Amendment Bill 2012*. This Bill's explanatory note (October 2012) states that the object of this bill is 'to remove impediments to the supply of housing and to make other miscellaneous changes.' We note that courts have held that DCPs are not legally binding EPIs and are subordinate to LEPs and SEPPs, however we note that DCPs do currently contain a level of site specific detail that is not addressed in standard LEPs.

¹⁸ As the International Association for Public Participation (Australasia) noted in its submission to the NSW Planning Green Paper (2012): 'The current planning model is not effective and despite good intentions for engagement often falls into "Decide, Announce, Defend". Current methods of consultation have been difficult as there is often tension over who is consulted and/or who responds to consultations.' See also The newDemocracy Foundation's submission to the Green Paper (2012).

¹⁹ See for example, Local Government and Shires Association submission on the Green Paper (2012), p 30: 'The expansion of "code based assessment" to cover complex development forms is challenging and unnecessarily excludes communities from the process and overrides councils consent powers.' See further submissions on the Green Paper (2012), including EDO NSW (pp 40-41) and NCC/TEC (pp 44-45).

²⁰ Department of Planning, 'Overview of proposed changes' (October 2012), p 2.

²¹ There were 25 submissions from local councils (64%) and 14 from industry or professional organisations (36%). Department of Planning, *Stage 2 NSW Commercial and industrial General Exempt and General Development Codes Discussion paper – Submissions summary* (November 2011).

Proposals expand private certification in advance of improved governance

The expansion of private certification to a range of new industrial and other developments is problematic given the 'widespread current of community and council dissatisfaction with the present [private certification] process' found in the planning review. Community concerns included impacts on amenity caused by breaches.²² The greatest concerns overall related to:

- *the activities of the minority of certifiers who were regarded as 'shonky'*
- *the inadequacy of compliance and enforcement provisions to address breaches or provide effective disincentives for breaches.*²³

We recommend the current proposals to significantly expand private certification (particularly for industrial development) should be deferred for consideration until reforms are implemented to improve governance, quality assurance and enforcement of private building certification. We understand that a specific review of private certification is to be conducted. As the Local Government and Shires Association has stated, 'The introduction of a tougher building regulation regime is essential if code based assessment and private certification are to be expanded as proposed in the *Green Paper*.'²⁴

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²² See Independent Panel, *Issues Paper of the NSW Planning System Review* (December 2011), pp 23-24.

²³ Independent Panel, *Issues Paper of the NSW Planning System Review* (December 2011), pp 23.

²⁴ LGSA submission to the Planning Review Green Paper (September 2012), p 6.