



environmental defender's office new south wales

25 June 2010

Submission on corruption risks and the regulation of lobbying in NSW

The EDO Mission Statement:

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

- ◆ *the importance of public participation in environmental
decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *the fundamental role of early engagement in achieving good
environmental outcomes*
- ◆ *the importance of indigenous involvement in protection of
the environment*
- ◆ *the importance of providing equitable access to EDO
services around NSW*

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Executive Summary

The EDO welcomes the opportunity to provide comment to the Independent Commission Against Corruption (ICAC) on its *Issues Paper on the Nature and Management of Lobbying in NSW*. The EDO is a community legal centre specialising in public interest environmental law. The EDO is not a lobby group, although one of our functions is to provide legal advice to assist our clients with their various environmental campaigns. We therefore do not have direct experience with the current NSW Lobbyists Code of Conduct. We do however, have extensive experience in dealing with the NSW planning system, which we understand is a particular area of interest for this inquiry. This submission will therefore concentrate of the development assessment regime under the *Environmental Planning and Assessment Act 1979* (*EP&A Act*). We provide general comments on how to eliminate the perception of corruption in the planning regime but do not comment specifically on the Issues Paper.

The EDO receives many calls from members of the public concerned about perceived corruption or bias in development assessment processes, both at a local and state level. In our view, this perception is symptomatic of a legislative regime underpinned by significant discretion coupled with limited transparency and accountability mechanisms. In our opinion, the best means of eliminating the potential for corruption or perceived corruption is to amend the *EP&A Act* to strengthen transparency and accountability mechanisms rather than simply relying on lobbying codes and guidelines.

In our view the key areas that require amendment are:

- Transparency and accountability mechanisms for councils;
- Merits appeal rights for third parties; and
- Part 3A.

We will discuss these in turn.

1. Transparency and accountability mechanisms for councils

The EDO receives many calls from members of the public concerned with the issuing of development consents by councils and perceived illegal or corrupt conduct. Section 79C of the *EP&A Act* prescribes mandatory matters for consideration by councils when determining whether to issue development consents. These matters include the likely environmental, social and economic impacts of the development, the provisions of Local Environmental Plans (LEPs), the suitability of the site for development, public submissions made and the public interest. However, the weight that councils give to these considerations is left to their subjective determination. The EDO submits that such discretion is appropriate, as local councils need to be able to consider local issues, address community concerns and make locally appropriate decisions that balance the needs of the area. However, this inherent discretion often leads to a perception of bias or corruption, especially where community concerns are overlooked, there is a departure from development standards in Local Environmental Plans or Development Control Plans, or where councils give greater weight to economic considerations.

The EDO believes that a means of overcoming this perception is to increase the transparency and accountability of council development assessment processes. In this regard, the EDO strongly supports ICAC's recommendation in its recent report, *Corruption risks in NSW development approval processes*¹ that the Minister for Planning consider making it a requirement for councils to give reasons for all decisions on development applications, including decisions to approve development applications. This is strongly supported as it will allow the community to determine what factors were given greater weight in the decision and the rationale for the decision. This would be an improvement on the current approach, whereby the factors that most influenced the decision are not always revealed, which increases the perception of corruption in the community and the sense that councils have capitulated to lobbying by developers. The community is more likely to accept the decisions of councils if the factors that influenced the decision in a developer's favour are clearly spelt out, made public, and where the concerns of the community are openly addressed.

To complement the requirement for reasons to be published, the EDO strongly agrees with the recent ICAC recommendation that councils should be required to implement systems that record how individual Councillors vote on development matters. This increased transparency would deter Councillors from making inappropriate decisions motivated by conflicts of interest or inappropriate lobbying.

The two mechanisms discussed above would go a long way to eliminating perceptions of bias and corruption in NSW development assessment processes and would help restore public faith in the planning system at a local government level.

2. Merits appeal rights for third parties

The EDO submits that providing merits appeal rights for third parties has the capacity to deliver better environmental outcomes under the Act as well as increasing the transparency and accountability of decision-making. This may significantly address community concerns of corruption by providing a legislative recourse for objectors who are dissatisfied with council decisions, or who believe that councils have acted inappropriately. At present, third party objectors may only appeal in relation to designated development, which comprises a small percentage of all development applications. Moreover, most categories of designated development are now assessed under Part 3A, which further restrict merits appeal rights.

The EDO strongly agrees with ICAC that broad merits appeal rights for objectors can inhibit corrupt conduct.² We support ICAC's 2007 recommendation that third party merits appeal rights should be extended to the following categories:

- Developments relying on significant SEPP 1 objections;
- Developments where council is both the applicant and the consent authority, or where an application relates to land owned by a council;
- Major and controversial developments, including for example large residential flat developments; and

¹ Independent Commission Against Corruption (2007), *Corruption risks in NSW development approval processes*, p26.

² *Ibid.*

- Developments that are the subject of planning agreements.

We note however that the NSW Government has only introduced one of these recommendations since 2007, albeit in a limited manner. A yet uncommenced provision of the recent planning reforms proposes the introduction of new limited merits appeal rights for objectors where development standards have been exceeded by at least 25% through the use of *State Environmental Planning Policy No.1 - Development Standards*. However, only objectors who have owned land in the area for more than 6 months and who live within one kilometre of the development may appeal, among other restrictions. In addition, the appeal itself is to a Joint Regional Planning Panel, not the Land and Environment Court. This new right is therefore very restrictive and will do little to improve broader public accountability.

The EDO submits that the *EP&A Act* should be amended to introduce merits appeal rights to the Land and Environment Court for objectors, regardless of geographical location, in line with the ICAC recommendations outlined above.

3. Part 3A

The key area of the planning system that the EDO receives complaints about is Part 3A. The EDO has commented extensively on Part 3A and its significant deficiencies in terms of public participation and adequacy of environmental assessment.³ We have recently submitted to the NSW Government that Part 3A should be repealed and a new regime for major projects introduced that mandates comprehensive environmental assessment processes and community consultation.⁴

At present, decision-making under Part 3A is centralised in the Minister for Planning, who alone determines whether a project is a Part 3A project and what factors will be taken into consideration in the final decision. This has cultivated a perception in the community that Part 3A is a corrupt process allowing developer lobby groups special access to the Minister for Planning in order to have their projects declared as Part 3A projects “behind closed doors”, and that by the time the community is notified of a development proposal, it is a “done deal.”

We address the key amendments needed to introduce transparency and accountability into Part 3A below.

Classification of major projects

Under Part 3A, the classification of a project as a Part 3A project is dependent on whether the Minister is *of the opinion* that the project is of ‘regional or state significance’ or ‘essential

³ For example see EDO submission to the State Development Committee’s *Inquiry into the NSW Planning Framework*. Available at: <http://www.parliament.nsw.gov.au/prod/PARLAMENT/committee.nsf/0/D4159E393E3D9489CA25757600074794> (12 May 2010).

⁴ EDO NSW, *Submission on the National Building and Jobs Plan (State Infrastructure Delivery) Act 2009*, Found at: http://www.edo.org.au/edonsw/site/pdf/subs10/100518nation_building_jobs_plan_act.pdf

for economic, environmental or social reasons'. This is open to broad and highly variable interpretation, and therefore outside influence.

The EDO submits that the Act should be amended to remove the ability of the Minister for Planning to declare a project as a Part 3A project. The *State Environmental Planning Policy (Major Development) 2005* already contains categories of Part 3A development that depend on factors such as the size and cost of development. This is a more objective and transparent process as the community knows in advance which projects are likely to be Part 3A projects. The Minister should not be able to declare Part 3A projects for projects that fall outside the scope of the SEPP.

Matters for consideration

Under the *Environmental Planning and Assessment Regulation 2000*, the Director-General is required to furnish a report to the Minister for Planning that includes an assessment of the environmental impact of the project, any aspect of the public interest that the Director-General considers relevant to the project and copies of submissions received by the Director-General in connection with public consultation under section 75H or a summary of the issues raised in those submissions. However, unlike section 79C for local councils, Part 3A does not specify any mandatory matters for the Minister to consider in making his or her decision.

There is no explicit requirement for the Minister to have regard to public submissions when determining whether to approve a major project, only that they be included in the Director-General's report. Thus, there is no indication to the public what matters the Minister paid explicit regard to in making his or her decision, nor any assurance that public concerns have been taken into account. This increases the perception that the Minister has made a decision based on inappropriate lobbying from developers when the Minister approves a Part 3A project.

To remedy this situation, the EDO submits that a mandatory list of considerations should be specified for the Minister to take into account. This list must be similar in scope to section 79C and include submissions made by the community and the principles of ecologically sustainable development. As above, this list should be complemented by a requirement that the Minister for Planning publish reasons for each decision under Part 3A.

Concept plan process

In our view, the perception that decisions made under Part 3A are made in favour of developer interests or 'secret deals' is exacerbated by the concept plan process in Part 3A. This process enables a proponent to submit for approval a development application that merely sets out the scope of a major project with no specific detail about the location, size, operating output or the activities to be conducted. Moreover, a single application can be made for approval of a concept plan and for the final approval to carry out the project. At face value this seems to allow final approval of a project by the Minister based on a concept plan which contains little detail about the true environmental footprint of the project. In addition, once a concept plan is approved, no merits appeal rights exist for objectors in relation to the final approval.

This is an unaccountable process allowing approval to be granted based on very little detail about the final development, and resulting in the removal of third party appeal rights even where inappropriate decisions have been made. The EDO submits that the concept plan process should be removed from the Act.

Appeal rights

Part 3A significantly limits appeal rights for third party objectors. For major projects, no merits appeal rights exist if the project is not normally designated development, where a public hearing has been held by the Planning Assessment Commission or where a concept plan has been approved.

Of most concern are critical infrastructure projects. Under Part 3A no judicial review proceedings to enforce a breach of the law, except with the permission of the Minister for Planning, can be instituted by third party objectors in relation to critical infrastructure projects. As it is unlikely that the Minister will approve a legal challenge to the Minister's own decision, this means that there are essentially no judicial review rights for critical infrastructure projects, even where it can clearly be shown that there has been a breach of the law or of conditions of consent. Further, third parties cannot apply for stop work orders, interim protection orders and notices regarding threatened species, heritage and pollution. This effectively marginalises environmental laws relating to the protection of biodiversity, heritage, water, etc.

The EDO submits that merit appeal rights for objectors in relation to Part 3A projects should be introduced without restriction. Merits appeal and judicial review rights should also be introduced for critical infrastructure projects, as well as an ability to apply for stop work orders, interim protection orders and notices regarding threatened species, heritage and pollution in relation to major projects. Introducing strong appeal rights in this manner will improve the accountability of Part 3A projects, which will in turn improve public confidence in the planning system.

Unless effective transparency, accountability and review mechanisms are reinserted into the legislation, there will continue to be community perceptions of corruption regarding planning decisions.

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