environmental defender's office new south wales

Submission to the review of the *National Building and Jobs Plan (State Infrastructure Delivery) Act 2009*

14th May 2010

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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Submitted to: Nation Building and Jobs Plan Act Review
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Executive Summary

The Environmental Defender's Office (EDO) is a community legal centre specialising in public interest environmental law. We welcome the opportunity to make comment to the review of the *National Building and Jobs Plan (State Infrastructure Delivery) Act 2009 (Nation Building Act).*

As a preliminary comment, the EDO is concerned about the limited scope of the review. The terms of reference are heavily weighted towards the economic and social benefits of infrastructure delivery. The EDO submits that the environmental impacts of infrastructure projects must also be a central focus of the review process.

The EDO has significant concerns with the *National Building Act* which passed through NSW parliament with no community consultation in March 2009. The *Nation Building Act* implements a special approval process to fast-track infrastructure projects funded under the Commonwealth *Nation Building and Jobs Plan*. The process of approval is entirely dependent on the discretion of the Coordinator General. While the EDO acknowledges the necessity for the expeditious delivery of key infrastructure in NSW (such as hospitals and rail infrastructure), the EDO does not support the fast tracking of infrastructure projects at the expense of community consultation and environmental assessment.

Infrastructure projects must, due to their scale and potential impacts, be subject to comprehensive community consultation and best practice environmental assessment procedures. This is consistent with the precautionary principle of ecologically sustainable development (ESD) to ensure that the potential environmental impacts of infrastructure development are fully understood prior to approval. The *Nation Building Act* does not meet these standards. Given these concerns, the EDO strongly opposes any attempts to broaden the scope of the Act to apply to other categories of development beyond those identified in the *Nation Building and Jobs Plan.*

In the EDO's experience there is widespread confusion among the community, and public authorities regarding the scope and applicability of the *Nation Building Act*. We have received numerous calls on our legal advice line from people concerned about the Act and its applicability. Many people are unfamiliar with the Act's requirements and are unclear about whether it applies instead of, or in conjunction with, assessments under Part 4, 5 or Part 3A of the *Environmental Planning and Assessment Act 1979* or under the *State Environmental Planning Policy (Infrastructure) 2007*.[1] This has lead to disillusionment among the community and a perception that there is no transparency or accountability in relation to infrastructure projects. Therefore, consistent with a recent submission we have made to the Department of Planning, the EDO recommends that public infrastructure development in NSW should be subject to only <u>one</u> regime that codifies best practice community consultation and environmental assessment procedures.[2] The *Nation Building Act* should therefore be repealed, or significantly amended in line with our recommendations in this submission. This will improve public accountability and transparency and reduce the complexity associated with infrastructure and development.

We make general comments on the following aspects of the *Nation Building Act*;

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[1] See EDO (NSW) *Submission on the review of the State Environmental Planning Policy (Infrastructure) 2007*, 12 April 2010, available at: http://www.edo.org.au/edonsw/site/pdf/subs10/100412infrastructure_sepp.pdf (12 May 2010).

[2] *Ibid.*

- Community consultation,
- Environmental assessment,
- Ecologically sustainable development, and
- Proposed expansion of the Act.

Our key comments and recommendations are:

- The Act should be amended to ensure that public notification is a mandatory condition under section 24(6) and not subject to the discretion of the Coordinator General. Furthermore, the Act must mandate community consultation prior to an authorisation being granted;
- Section 23 of the *Nation Building Act* must be amended to stipulate that the Coordinator General cannot exempt infrastructure projects from *all* development controls. At the very least the requirement for a species impact statement or environmental impact statement where required under the *Environmental Planning and Assessment Act 1979* must apply;
- Section 3 of the Act should be amended to insert "in line with the principles of ecologically sustainable development" at the end of the objects clause. This should be complemented by a provision requiring the Coordinator General to act consistently with the objects of the Act when determining whether to grant a project authorisation; and
- The *Nation Building Act* should not be extended in scope under any circumstances and should be repealed as soon as all projects under the *Nation Building and Jobs Plan* are complete.

1. Community consultation under the Act

The Act does not prescribe mandatory community consultation in relation to infrastructure projects covered by the Act. Whether any form of consultation occurs is dependent on the discretion of the Coordinator General. Section 24(4) of the Act allows the Coordinator General to authorise the carrying out of infrastructure projects subject to any conditions. Section 24(5)(a) states that these conditions may include "public notification requirements in relation to the carrying out of the project". Thus, the Act only seems to allow notification to the community *after* a project has been authorised. There is no mechanism requiring consultation with the community *prior to* a project being authorised. Although consultation in the form of submission periods may happen on an ad hoc basis (including where the Coordinator-General has not exempted all planning controls under section 23), there is no mandatory requirement for any consultation. For a scheme that is specifically designed to deliver "community infrastructure"[3] it is nonsensical to exclude community input.

The high degree of community uncertainty about the application of the legislation has been compounded by the lack of general information about the scheme. The EDO has received calls from communities regarding how application of the Act overlaps or replaces other infrastructure legislation requirements. Case studies of community and Council confusion are set out in our recent submission on the Infrastructure SEPP.[4] The website directs confused community members to a Taskforce hotline – 1800 752 100,

[3] As noted in the Review Terms of Reference brief.
[4] Available at: http://www.edo.org.au/edonsw/site/pdf/subs10/100412infrastructure_sepp.pdf.

but EDO received calls from people who got no answer from the hotline. When EDO contacted the hotline for further information, there was no answer on several occasions. Email inquiries were responded to after some time, but were misdirected and lacking crucial detail. A fundamental element of community consultation is that comprehensive information is publicly available and that services such as a hotline are resourced and effective.

The EDO has advised several clients disillusioned by the lack of community consultation under the Act in relation to projects in their communities. They have been frustrated by a lack of meaningful engagement which has left them with the sense that their concerns have been ignored and that the projects are a 'foregone conclusion'. The EDO submits that genuine community consultation is an essential element of transparent and accountable governance and should not be sidelined due to a perceived need to fast track essential projects. Indeed, it is well-established that public participation has two fundamental benefits:

- it ensures the "buy-in" of local communities which enhances the accountability, and thus acceptability, of environmental decisions; and
- it promotes better decision-making, with local communities best placed to provide accurate information on the proposal.

Moreover, in addition to fostering an inclusive and democratic society, public consultation and participation leads to better decisions by assisting decision-makers in identifying public interest concerns. The EDO therefore submits that the Act should be amended to ensure that public notification is a mandatory condition under section 24(6) and not subject to the discretion of the Co-ordinator General. Furthermore, the Act must mandate community consultation prior to an authorisation being granted.

2. Environmental assessment and approval processes

Environmental impact assessment provisions are an important aspect of planning legislation as they ensure that decisions are informed by rigorous and independent environmental assessment. There is no such process in the *Nation Building Act*. Whether any assessment occurs is entirely up to the discretion of the Coordinator General, who may exclude the application of all development control legislation in relation to specific infrastructure projects or a class of infrastructure projects under section 23. The exclusion of planning laws in this manner means that in effect that no comprehensive environmental assessment will be conducted in the majority of cases. Moreover, these planning controls, such as the *Environmental Planning and Assessment Act 1979* and the *Threatened Species Conservation Act 1995* contain significant protections, such as the requirement for permits or species impact statements for threatened species to ensure that all environmental impacts are understood and evaluated.

Although some environmental assessments are happening in relation to projects under the Act, this is not a mandatory requirement. Hence, the EDO submits that section 23 of the *Nation Building Act* must be amended to stipulate that the Coordinator General cannot exempt infrastructure projects from *all* development controls. It is imperative that infrastructure projects are subject to genuine environmental assessment regardless of the 'urgency' of the projects. At the very least the requirement for a species impact statement or environmental impact statement where required under the *Environmental Planning and Assessment Act 1979* must apply.

CASE STUDY - Department of Housing, Swansea

The Department of Housing received funding under the *Nation Building and Jobs Plan* to construct 24 Department of Housing dwellings and associated development at Boyd Street Swansea at Lake Macquarie in the NSW Coastal Zone and within 200 metres of a coastal lake. Despite significant community opposition and the objections of the local council, the project was authorised by the Coordinator General under the *Nation Building Act*.

No comprehensive environmental assessment was undertaken because the Coordinator General exempted the project from the majority of planning controls. This was despite the fact that there were significant potential environmental impacts associated with the project. Issues included a lack of consideration of the *NSW Government's Sea Level Rise Policy* even though the project was in an identified risk area, no assessment of the impact of the development on known biodiversity and threatened species on the site (including tawny frogmouths, frogs, lizards, possums, parrots and swamp mahogany) and little consideration of whether the project was consistent with the local streetscape or if there was appropriate surrounding infrastructure for the housing development. The local council was opposed to the proposal on the basis that it breached the Local Environmental Plan and Development Control Plan and other issues. As stated by council in a letter to the Department of Housing:

the design is disappointing in site context response, residential amenity, landscaping, streetscape, and general social housing issues. Overall the development proposed for this site is inappropriate…the development has been poorly conceived and council would not accept the proposal in its current form. The development is in direct conflict with DCP 1 and the concepts of good urban design.

Community consultation was minimal. Immediate neighbours were simply notified that the development was being conducted who only had 21 days to reply. The broader community was not invited to make comments, which has lead to community discontent.

Despite these significant issues, construction has commenced.

3. Ecologically sustainable development

The NSW Government has committed to the principles of ESD under the *National Strategy for Ecologically Sustainable Development 1992*.[5] The 2002 *World Summit for Sustainable Development* reaffirmed the three pillars of sustainable development which are economic development, social development and environmental protection. The concept seeks to ensure that there is both economic and social progress *and* the maintenance of a healthy, biodiverse environment. ESD therefore represents an overarching paradigm which should frame all government decision-making.

Despite the NSW Government's commitment to ESD, it is not mentioned in the *Nation Building Act* and there is little evidence to suggest that the Coordinator General is having regard to ESD when issuing authorisations. The EDO submits that the *Nation Building Act* should be bounded by the principles of ESD including the precautionary principle, the conservation of biodiversity principle and intergenerational equity. Section 3 of the Act should be amended to insert "in line with the principles of ESD" at the end of the

[5] See http://www.environment.gov.au/esd/national/nsesd/index.html (11 May 2010).

objects clause. This should be complemented by a provision requiring the Coordinator General to act consistently with the objects of the Act when determining whether to grant an authorisation.

4. Proposed expansion of the Act

The EDO strongly opposes the expansion of the *Nation Building Act* to other projects beyond those identified by the Commonwealth in the *Nation Building and Jobs Plan* as foreshadowed in terms of reference (c) and (d). In our view, extending the Act and its provisions to other projects in NSW is unnecessary; will significantly widen the feeling of disillusionment among the community; will remove any accountability or transparency in relation to infrastructure projects, and will have significant long-term effects on the environment.

Currently, development conducted by public authorities for the purposes of infrastructure can be approved under the following regimes: *State Environmental Planning Policy (Infrastructure) 2007*; Part 3A, Part 4, or Part 5 of the *Environmental Planning and Assessment Act 1979*. In particular, we note that the NSW Government has had a specific legislative process in place for the assessment and approval of major projects in NSW since 2005 - Part 3A of the *Environmental Planning and Assessment Act 1979*.

The EDO has commented extensively on Part 3A and its significant deficiencies in terms of public participation and adequacy of environmental assessment.[6] Similar to the intent of the Nation Building regime, Part 3A introduced a largely unaccountable planning regime for major projects, with no assurance that comprehensive environmental assessment of projects is undertaken. The role of the community is sidelined by Part 3A and, in turn, the community has lost confidence in the planning system. Creating yet another level of "fast-tracked" major projects over and above what is already fast-tracked by Part 3A will exacerbate these existing tensions and alienate local communities.

The EDO recommends that broad consultation needs to be undertaken to establish a new best practice approach to planning for major projects and infrastructure projects in NSW. The pathway to a new approach would include the following steps.

First, there is a need to better differentiate between the nature of major projects. For example;

- Critical infrastructure projects based on objective criteria not the discretion of Minister;
- Other major government projects that demonstrate that the projects are of regional of state significance; and
- Private developments

[6] Part 3A does include some mandatory requirements relating to community consultation and environmental assessment such as the 30 day consultation period under section 75H and the Director-General's environmental assessment requirements under section 75F of the *Environmental Planning and Assessment Act 1979*. See EDO submission to the State Development Committee's *Inquiry into the NSW Planning Framework*. Available at: http://www.parliament.nsw.gov.au/prod/PARLMENT/committee.nsf/0/D4159E393E3D9489CA25757600074794 (12 May 2010).

Second, there is a need to simplify the pathways to decision-making, including removing the new multi-layered forums (arbitrators, Joint Regional Planning Panels, etc) and increasing the checks and balances of the Planning Assessment Commission (PAC) through legislation to ensure clarification around its role and its independence.

Third, any new approach must build in comprehensive environmental assessment requirements and community involvement to ensure transparent, informed and objective decisions are made.

In summary, the *Nation Building Act* should not be extended in scope and should be repealed as soon as all projects under the *Nation Building and Jobs Plan* are complete. Instead of extending the *Nation Building Act*, the NSW Government should repeal Part 3A and develop a best-practice approach for assessing major infrastructure projects in NSW.

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