environmental defender's office of new south wales

Recommendations for reforming planning in NSW

In recent years, the NSW planning system has shifted away from a system focused on public involvement and transparent and accountable decision-making, to one that is discretionary, ad hoc and that has significantly eroded the community's ability to participate in planning processes. This has largely stemmed from the introduction of Part 3A to the *Environmental Planning and Assessment Act 1979* (EP&A Act).

The EDO recommends 6 key areas for reform of the EP&A Act to ensure that the planning system returns to one centred on community participation, transparency and comprehensive environmental assessment. These areas for reform are:

- Require actions under the Act to be consistent with Ecologically Sustainable Development (ESD);
- Reinstate genuine public participation;
- Strengthen environmental assessment provisions;
- Remove certain discretions from the Act;
- Repeal critical infrastructure provisions; and
- Repeal concept plans provisions.

These will be discussed in turn.

1. Require actions under the Act to be consistent with Ecologically Sustainable Development (ESD).

Ecologically sustainable development (ESD) is a concept that seeks to marry environmental, economic and social considerations in decision-making. Its aim is to make it clear that environmental impacts are no longer seen as separate from economic and social considerations, but as part of one integrated whole. While ESD is included as one of the objects of the EP&A Act, its application is uneven. For example, there is no express requirement under Part 3A to consider ESD. There is no statutory obligation to consider or apply its principles, such as the precautionary principle and the conservation of biodiversity, when assessing major projects. This contrasts with Part 4 of the Act where ESD has been long accepted as a mandatory consideration when regarding the 'public interest' under section 79C.

Furthermore, even where there is a requirement to consider ESD, it can still be ignored as long as the consent authority has simply "had regard" to it. To ensure that ESD has a meaningful place within the Act, consent authorities should be

granted their discretion to approve projects and developments within an ESD-centred regime, with ESD being the basis of any planning decision. That is, the decision maker would have the discretion to determine *how* a development should conform with ESD, and any development must be consistent with ESD, or it should be refused. These amendments will assist in ensuring that ESD is enforceable as a matter of law and that decisions that are unsustainable are prohibited. To achieve this, ESD must be elevated to the position of overarching object of the Act.

Recommendations for amendments:
(i) Make development under Part 3A bounded by the need to achieve ESD.
(ii) Elevate ESD to the position of overarching objective of the Act.

2. Reinstate genuine public participation

The EDO notes a fundamental shift in the government's attitude towards community involvement and broad public participation. Opportunities for the public to participate in planning processes have been significantly eroded, primarily in Part 3A. There appears to be a perception that community participation is an administrative and bureaucratic burden rather than a process that can add much value to decision-making. Indeed, genuine public participation adds significant value to government decision-making. This is for three main reasons.

First, community participation helps to ensure that better decisions are made, as the views of all stakeholders are taken into account. Put simply, community involvement allows decision makers to acquire information about the public's preferences so they can play a part in the decisions about projects, policies or plans. This leads to improved decision-making because the knowledge of the public is incorporated into the calculus of the decision.[1]

Second, public participation ensures the "buy-in" of the community as people are more likely to accept decisions if they have been given a proper opportunity to be heard.

Thirdly, and related to the above, public participation helps to ensure fairness, justice and accountability. In terms of fairness, there are well known reasons why certain groups' needs and preferences can go unrecognised through normal government processes. Such needs may only come onto the radar once an open public participation process occurs. This is particularly the case for environmental interests. Public participation is also consistent with accountability in governance. The Institute of Urban and Regional Development at the University of California gives a good example of this in practice;

[1] J. Innes & D. Booher, *Public Participation in Planning: New Strategies for the 21st Century,* Working Paper 2000-07, University of California at p6.

If a planner can say, 'we held a dozen public hearings and reviewed hundreds of comments and everyone who wanted to had a chance to say his piece,' then whatever they decide to do is, at least in theory, democratic and therefore legitimate.[2]

Therefore, public involvement is essential to the workings of a democratic system of government.

The *Environmental Planning and Assessment Act 1979* should be amended to substantively reinstate public participation as the cornerstone of the NSW planning system.

Recommendations for amendments:
(i) Allow the public to make submissions on whether a proponent's environmental assessment is adequate before it is accepted by Director-General.
(ii) Require the Director-General to include public submissions in the Report given to the Minister under Part 3A.
(iii) Require the Minister to have regard to public submissions when determining whether to approve a major project.
(iv) Allow merits appeal rights for both objectors and proponents notwithstanding that an IHAP or public hearing has been held.
(v) Allow merits appeal and judicial review rights for objectors and proponents notwithstanding that the project is a critical infrastructure project.
(vi) Allow the public to apply to the Land and Environment Court for stop work orders, interim protection orders and notices regarding threatened species, heritage and pollution in relation to major projects.
(v) Make it mandatory for IHAP's to receive and hear submissions from the public.

3. Strengthen environmental assessment provisions

The EDO has identified a need to strengthen the environmental assessment provisions in the Act. Environmental assessment under Part 3A is ad hoc, discretionary and unstructured. There is no clearly defined environmental framework within which decisions are to be made. Further, although Parts 4 and 5 of the Act do contain a clearly-defined and mandatory process of environmental assessment, there are significant shortcomings. Four key problems with the environmental assessment system in the Act, and how to rectify them, are identified below.

First, the scope and extent of the environmental assessment to be undertaken by a proponent under Part 3A is solely within the Director-General's discretion because there are currently no criteria the Director-General must have regard to in setting the environmental assessment requirements. As Part 3A projects are those likely to have the greatest impact on the environment in terms of their size and scale, the

[2] *Ibid* at p7.

EDO submits that they should be subject to at least the same level of assessment as Part 4 projects.

Second, although the Director-General is required to consult with other agencies such as the Department of Environment and Climate Change under Part 3A, and to have regard to the issues they raise, the failure to do so may not necessarily invalidate an approval. Several important licensing and approval requirements from other agencies that are required under Parts 4 & 5 of the Act are not required for Part 3A projects. These include permits under the *Heritage Act 1977, National Parks and Wildlife Act 1974* and the *Water Management Act 2000.* This means that important environmental issues such as pollution, heritage, water and threatened species are potentially subject to insufficient and/or basic assessment. These inter-agency approvals and consultation requirements constitute important safety nets, and help to ensure that all the potential impacts of a development are adequately considered when the Minister makes his decision. The departments that are responsible for granting these additional approvals have the necessary expertise to adequately assess issues such as pollution, heritage and threatened species licences.

Third, Part 3A allows for the approval of concept plans, which contain only the basic details of the project. This makes the effective assessment of these projects difficult, or even impossible, since the breadth of the environmental effects of the project is unclear. Concept plan provisions should be repealed.

Finally, although Parts 4 and 5 requirement an assessment of the impacts of development through the process of Environmental Impact Assessment (EIA), there are inherent problems. On its installation into the Act, the EIA process was seen as providing a mechanism "wherein projects or undertakings that would likely have a significant adverse environmental impact could be excluded from further consideration and approval denied outright."[3] However, this has been far from the case. There are several readily identifiable problems with the present system. The fact that it is up to the proponent to prepare an SIS or EIS, creates obvious issues relating to objectivity. As has been observed, without independent technical assessment the outcome of the EIA process will always remain fraught with suspicion.[4] In addition, an SIS of EIS that shows that a development will have potentially devastating impacts on threatened species or the environment does not operate to halt the development proposal. It is merely a procedural process. A council is only required to take an environmental impact statement into account in making its decision. To correct this problem there should be a requirement for consent authorities to refuse consent to development proposals where an SIS or EIS has shown that there will be a significant deleterious impact on threatened species, critical habitat or the environment. This will ensure that the Act more readily conforms to one of its key objects which is:

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[3] Michael Jeffrey, 'Environmental Impact Assessment: Addressing the Major Weaknesses' In Nathalie Chalifour *et al* (eds.) *Land Use Law for Sustainable Development* (2007) Cambridge University Press at 451.

[4] *Ibid* at 463.

the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats.

Furthermore, EIA under the planning laws in NSW has no feedback or accountability loop. That is, there are no structures in place to assess the accuracy of EIA after the event. Some form of external auditing requirement should be introduced to ensure the integrity of the process.

Recommendations for amendments:
(i) Require the Minister to publish guidelines Environmental Assessment Requirements for Part 3A projects.
(ii) Reinstate concurrence and integrated approval provisions for Part 3A projects.
(iii) Require an EIS or SIS for all Part 3A projects.
(iv) Repeal concept plans.
(v) Require the mandatory refusal of developments under Part 4 where an SIS or EIS demonstrates that a development will have a significant impact on the survival of threatened species, critical habitat or the environment.
(vi) Introduce external auditing requirements that assess the accuracy of environment impact statements prepared by proponents.

4. Remove certain discretions from the Act

The *Environmental Planning and Assessment Act 1979* enshrines a largely discretionary planning regime that is ad hoc and largely unfettered. For example, Part 3A of the Act is largely a discretionary regime with decisions often based on the Minister or Director-General's subjective opinion, rather than objective criteria. For example, 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 of state significance" or "essential for economic, environmental or social reasons." This is open to broad and highly variable interpretation. As a result, some suburban, single-residence developments are being classified as Part 3A projects.

Another example is the Minister for Planning's power to dismiss a council and to appoint an administrator to take its place as he/she sees fit. He can do so if he/she is *of the opinion* that the council has failed to comply with its obligations, or if its performance is unsatisfactory in any respect. Councils should not be dismissed unless objective evidence demonstrates poor performance.

The EDO submits that decisions under the planning system should be based on objective criteria, not subject to the whims of a decision-maker. This leads to greater accountability and transparency because decisions have to be justified with objective and verifiable evidence.

Recommendations for amendments:
(i) Insert objective criteria into the Act that the Minister must have regard to when determining whether a project is of "regional of state significance" or "essential for

social, environmental or economic reasons".
(ii) Require the making of environmental assessment guidelines to be mandatory, not up to the discretion of the Minister.
(iii) Require a statement of commitments by the proponent for environmental management and mitigation measures on site to be mandatory, not discretionary.
(iv) Make it mandatory for the proponent to submit a revised environmental assessment if the Director-General considers that the proponent's environmental assessment does not adequately address the Environmental Assessment Requirements under Part 3A.
(v) Make the Minister's ability to dismiss a local council reliant on objective criteria rather than the Minister's subjective opinion.

5. Repeal critical infrastructure provisions

The critical infrastructure provisions of Part 3A are problematic for several reasons.

First, as noted there is a lack of objective criteria in characterising projects as critical infrastructure projects. The only prerequisite is that the Minister is *of the opinion* that the project is "essential for economic, environmental or social reasons." This means that whether a project is so characterised is solely dependent on the Minister for Planning's subjective opinion. Given the ramifications of characterising a project as "critical infrastructure", a reliance on the Minister's individual opinion that is not necessarily supported by objective evidence, is objectionable.

Second, the environmental assessment to be conducted by the proponent is entirely reliant on the Director-General's Environmental Assessment Requirements. As noted, the Director-General has largely unfettered discretion in setting environmental assessment requirements.

Third, community participation is essentially non-existent once a project is designated as "critical infrastructure". For example, no objector appeals exist, even where the project would have been designated development. However, of most concern is the inability of a member of the public to commence judicial review proceedings to enforce a breach of the law, except with the permission of the Minister for Planning. As it is unlikely that the Minister will approve a legal challenge to his own decision, 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, there is no provision 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.

On these bases, the EDO calls for the repeal of the critical infrastructure provisions in the EPA Act. Nothing is so critical that it justifies a process with a high risk of facilitating 'bad' decisions.

Recommendations for amendments:

Repeal critical infrastructure provisions and related sections of the Act.

6. Repeal concept plans provisions

Concept plans under Part 3A are inconsistent with good environmental decision-making for two main reasons.

First, concept plans enable a proponent to submit a development application that merely sets out the scope of the project, but with no specific detail about the location, size, operating output or the activities to be conducted on the site. Indeed, the Act makes it clear that "a detailed description of the project is not required." Concept plans therefore provide little detail about the potential impact and extent of developments. This makes accurate assessment of the environmental impacts of such a project impossible.

Second, 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.

As a result of the above, the EDO submits that the provisions relating to concept plans should be repealed.

Recommendation for amendment:
Repeal the provisions relating to concept plans in the Act.

For further information about our recommendations, please contact jeff.smith@edo.org.au