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The Honourable Bob Carr MP
Premier
Parliament House
Macquarie Street
SYDNEY NSW 2000

Cc. Hon Craig Knowles MP
Minister for Infrastructure, Planning and Natural Resources

Cc. Hon Bob Debus MP
Minister for the Environment

Dear Premier.

Re: Environmental Planning and Assessment (Infrastructure and Other Planning Reform) Bill 2005

The Environmental Defender's Office (NSW) is deeply concerned at the changes proposed under the *Environmental Planning and Assessment (Infrastructure and Other Planning Reform) Bill 2005* to environmental assessment procedures, community consultation and oversight, and levels of Ministerial discretion in environmental decision-making. We are now on the verge of witnessing the most retrograde laws in two decades with regard to the rights of the community to be involved in the planning process.

This year, the EDO is celebrating 20 years of working constructively within the environment and planning regime established in 1979 by the introduction of a specialist court and planning legislation. As the Attorney General and Minister for the Environment, the Honourable Bob Debus, said at our recent conference:

> "The EDO has played an important role in promoting rigorous and accountable government in New South Wales. While this wasn't always a pleasant experience for those governments, we do recognise the obviously important contribution to democracy and transparency of this work… [the EDO] have made strong contributions to the open public participation that we have worked to provide. They have also had a significant positive effect on the final form of the legislation."

As Judges of the Land and Environment Court and others have long noted, public participation is central to proper and effective environmental assessment and sound environmental outcomes. In short, it is well-established that public participation has two fundamental benefits:

- it ensures the "buy-in" of local communities.

- it promotes better decision-making, with local communities best placed to provide accurate information on the proposal.

The need for such community involvement was closely tied to the passage of the *Environmental Planning and Assessment Act 1979* and the advent of the Land and Environment Court. In fact, community involvement has long been institutionally recognised through the community involvement objects of the planning laws (section 5 of the Act) and institutionalisation of the public interest in court decisions (section 39(4) of the *Land and Environmental Court Act 1979*). Over this time, there has not been a flood of community-based litigation, but rather what has been described as a "trickle".

The proposed laws wind back community rights to a type not seen in NSW since before 1979. The Bill sets up a regime for major infrastructure developments or any development of State or Regional significance to be dealt with as either Critical Infrastructure Projects or Major Development Projects.

Critical Infrastructure Projects

Essentially, the new provisions (Part 3A) take away opportunities for community involvement for critical infrastructure projects and potentially other major developments with regard to the ability:

(a) to be involved pre-approval;
(b) to challenge an approval on legal grounds,
(c) to enforce the approval (such as breaches of pollution licences),
(d) to seek stop work orders, interim protection orders and notices regarding cultural heritage, threatened species and pollution, and
(e) to appeal on the merits.

In particular, these provisions seek to abolish the long-standing right of any person to take legal proceedings where environmental laws are not being followed, and oust the ability of the Land and Environment Court to entertain challenge to an approval and enforce the approval (such as breaches of pollution licences). Furthermore, the proposed legislation allows the Minister to approve critical infrastructure development even where local plans prohibit this.

The proposed amendments remove long-standing checks and balances (accountability, transparency, technical oversight and community input) for the most important, and potentially environmentally sensitive proposals, such as coal-fired power stations and desalination plants. In short, critical project approvals are not appellable, reviewable or enforceable (nor are declarations of such projects).

Major Infrastructure Projects

For major development projects, the legislation hands largely unfettered, discretion to the Minister regarding environmental assessment, criteria for approval, need to consider the views of the public and procedures governing other major projects. Conversely, the role for the community in environmental decision-making is considerably diluted. Moreover, almost complete power is also vested in the Minister regarding the need for separate approvals on pollution, native vegetation, and cultural heritage. Furthermore, by conflating minor developments (such as pergolas) as part of the general approach to Part 3A developments, the

proposed laws take a lowest common denominator approach to the checks and balances necessary to maintain well-established practices regarding environmental assessment and, indeed, good environmental outcomes.

A key concern is that major infrastructure projects treat public participation as discretionary. For example, while the environmental assessment must be exhibited, there is no requirement for:

- the Minister to have made any guidelines in the first instance: section 75F(1)
- the proponent to respond to the issues raised (except if directed): section 75H(2)
- the Director General to require the proponent to make a preferred project report available to the public, notwithstanding that significant changes have been proposed to the project: section 75(H)(7)
- the Director General to include submissions in the report to the Minister: section 75I(2)
- the Minister to take such submissions into account in making his/her decision: section 75J(2)
- independent panels, when constituted, to hear from the community: section 75G(4)
- any community consultations provisions to be abided by except to make the environmental assessment available to the public: section 75X(5).

These deficiencies have been exposed on a preliminary analysis of the Bill. We would like to urgently seek a meeting with you to discuss these and other matters further. In particular, the EDO seeks amendment to the proposed legislation to uphold third party standing rights, and community consultation and participation processes that have been entrenched in NSW environmental law since 1979. The EDO also seeks a different regime for major developments, as compared to minor developments (such as the abovementioned pergolas) where more discretionary and flexible provisions may be appropriate. Finally, we would like to discuss a number of other serious flaws in the Bill, regarding concept plans (and the fact they are not tied to land), the lack of criteria under which decisions can be made, and the ability to dispense with landowner consent for developments.

For this purpose, I can be contacted on 9262 6989.

Yours sincerely
Environmental Defender's office

Jeff Smith
Director