THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Submission on the Environmental Planning and Assessment Bill 2017

5 April 2017

Planning Legislation Updates 2017

NSW Department of Planning and Environment
GPO Box 39
SYDNEY NSW 2001

Email *http://planspolicies.planning.nsw.gov.au/index.pl?action=view_job&job_id=8188*

Contact: **Emily Ryan**
President, NSW Young Lawyers

Ross Mackay
Chair, NSW Young Lawyers Environment and Planning Law Committee

Contributors: Jessica Baldwin, Peter Clarke, James Fan, Alistair Knox, Nicholas Latham, Ross Mackay, Emily Ryan, Nicholas Southall, Christiane Swain

THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

The NSW Young Lawyers Environment and Planning Law Committee makes the following submission in response to the Environmental Planning and Assessment Bill 2017.

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Environment and Planning Law Committee (**Committee**) comprises of a group of approximately 640 members interested in our environment. The Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

Summary of Recommendations

1. The proposed reference to Aboriginal cultural heritage in the new objects should be adopted, but be amended so that the object is to promote conservation of Aboriginal cultural heritage.
2. The proposed reference to ecologically sustainable development in the new objects should be adopted, but be amended so that:
    a. references to social and economic considerations is removed from that particular object; and
    b. that object be the overarching object or, alternatively, be listed first among the objects of the Act.
3. That an object be included referring to consideration, minimisation, mitigation and management of climate change impacts.
4. The Committee supports the adoption of community participation plans and principles, however suggests that provisions be added strengthening the relationship between the plans and the principles.
5. The proposed specific thresholds and conditions under s 76(6)(b) for regionally significant development should be set within the Environmental Planning and Assessment Act.
6. Set review periods for SEPPs and LEPs should be adopted, subject to further regulatory provisions.

7. urther policy and regulation in relation to the establishment of the Commission as a Consent Authority should be introduced, including accountability provisions and increased training and resources.
8. There should be specific community consultation on the thresholds proposed for regionally significant development.
9. The proposed s 76A(8) should be amended so as to remove the power of the Minister to direct Councils as to when they are to delegate decision-making functions to Council delegates
10. The proposal for transferrable conditions of consent in the proposed s 80A(4A) should not be adopted.
11. The clarification that consent authorities can impose conditions requiring financial assurance should be adopted. However further information on the parameters proposed to be included in the Regulations together with an analysis of the effectiveness of the model in Part 9.4 of the *Protection of the Environment Operations Act 1997* should be exhibited for public consultation upon before the final form of the proposed s 80A(4B) is adopted.
12. The Committee supports the proposal to prescribe types of complying development as being certifiable only by Council. However, the detail of the regulations prescribing the types of development subject to these restrictions should be provided for public consultation before the proposed amendments are passed.
13. The proposal to introduce deferred commencement certificates should be adopted.
14. The proposed changes to s 87 allowing complying development certificates to be judicially reviewed on the basis of non-compliance with complying development rules should be adopted.
15. The proposals to vest Council with enforcement responsibilities and resources should be adopted.
16. The proposed changes to s 89D, allowing for subsequent stages of a Staged State Significant Development to be approved by the relevant should be adopted. However a limitation should be included that only stages of State-significant developments that are consistent with the Concept Plan Approval be handed back to Councils for determination.
17. The proposal to allow the Planning Secretary to act on behalf of an approval body should not be adopted unless and until appropriately drafted State Assessment Requirements, which would prevent approvals bodies from being wilfully bypassed, are also proposed.

18. The proposed changes to s 96AA(1A) and s 96(3) should be adopted.
19. The proposed s 96(3A) should be adopted.
20. The proposed changes to s 76B should be adopted.
21. The proposed changes to s 122C should require:
    a. That any decision leading to variation or revocation of conditions of consent must identify a specific change in information, best practice standards or concurrent regulatory regimes which make the conditions of consent redundant.
    b. That any variation or revocation of conditions of consent require consultation with the relevant environmental regulatory agency.
22. The proposal to introduce infrastructure corridors should be adopted.
23. Provisions should be introduced to improve independence and accountability of experts engaged in conducting environmental assessments under part 4 and part 5 of the Act.
24. The proposed power to declare a certificate to be invalid if the plans and specifications or standards of building work or subdivision work as specified in the certificate are not consistent with the relevant development consent be adopted subject to further regulations being drafted around these powers.
25. The proposal that the voluntary planning agreement scheme is expanded to include application of these agreements to CDCs should be adopted. However the drafted provisions should amended to require a causal link between the property the subject of the CDC and the public purpose for which the agreement has been voluntarily entered into.
26. Expansion of the application of voluntary planning agreements to CDCs made between project proponents and private certifiers should be considered.
27. The Committee supports the proposed ability for the Minister to direct that SICs be a requirement as a condition of consent for the granting of a CDC in a special contribution area.
28. SICs should be required with direct application to offsetting the carbon emissions, both embodied and operational, from CDCs issued in special contributions areas.
29. Merits appeal rights for all decisions of the Independent Planning Commission should be reinstated into the Act.
30. Deemed refusal periods should be extended, particularly for developments of greater capital

investment value.

31. The proposed clause 8.10 should be amended so that deemed refusal periods have no expiry, allowing an applicant to approach the Court indefinitely whilst an application remains undetermined.
32. The provision deeming development consents ceasing to have effect upon commencement of appeal should be limited to objector appeals.
33. No changes should be made to the costs thrown away provisions.
34. The Committee supports the introduction of a system of enforceable undertakings, however sufficient regulations or further provisions within the legislation should be included as to the form of undertakings and the circumstances in which undertakings can be enforced.
35. If powers are granted to authorise officers of a Council to suspend the carrying out of work pursuant to a CDC for a period of up to seven days pending investigations, sufficient regulations or further provisions within the legislation should be included to require the giving of reasons for such orders and allow compensation for losses incurred where the exercise of power to issue such an order was without basis, reckless or for a malicious purpose.
36. The Committee supports the repeal of Schedule 6A of the Act.
37. The Committee does not support the introduction of Regulations allowing for a 'two month window' in which holds of former Part 3A approvals can be modified under the former s 75W of the Act.
38. The Committee does not support the introduction of Regulations which provide that, for former Part 3A approvals, the test for whether s 96(2) applies should be assessed with reference to the development approval as most recently modified.

Introduction

The Committee welcomes the opportunity to comment on the Environmental Planning and Assessment Bill 2017 (**Bill**).

On balance, the Committee supports the Bill and notes that quite a number of the proposed amendments are "housekeeping" in nature, as well as amendments in response to Court decisions which have resulted in unfavourable planning outcomes.

However, the Committee is concerned that the opportunity has been missed in the Bill to introduce

significant amendments to better enshrine and promote the principles of ecologically sustainable development (**ESD**) in the primary piece of planning legislation in NSW, the *Environmental Planning and Assessment Act 1979* (NSW) (**the Act**).

Schedule 1 – Objects

The Committee agrees that the time is right to modernise the objects of the Act.

The Committee supports the inclusion of a reference to Aboriginal cultural heritage in the proposed s 1.4(e).[1] However, the Committee submits that it would be preferable to include a reference to conservation, rather than sustainable management, of Aboriginal cultural heritage, to align with the equivalent object of the *National Parks and Wildlife Act 1974* (NSW).[2] This also better aligns the Act with the principles of the Burra Charter[3] (see especially Art 2) and the provisions of Art 31 of the United Nations Declaration on the Rights of Indigenous Peoples.[4]

> ***Recommendation: That the proposed reference to Aboriginal cultural heritage in the new objects be adopted, but be amended so that the object is to promote conservation of Aboriginal cultural heritage.***

The Committee welcomes the inclusion of a reference to ESD in the proposed s 1.4(b). The Committee notes that the object is worded differently to the drafting of the other objects, using the term 'promote' rather than 'facilitate'. Without any analysis being provided in the Summary of Proposals of the intended effect of this, the Committee is unable to comment on this proposed wording.

The Committee submits that the references to economic and social considerations should be removed from this object, as they water down the meaning and intent of using the term 'ecologically sustainable development', and are otherwise provided for in the proposed s 1.4(a). This would be consistent with references to ESD in the objects of the *Protection of the Environment Operations Act 1997* (NSW) (s 3(a)) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (s 3(1)(b)), and with the discussion of ESD in the National Strategy for Ecologically Sustainable Development.[5] The Committee also

---

[1] Environmental Planning and Assessment Bill 2017 (NSW) cl 1.1[1].

[2] *National Parks and Wildlife Act 1974* (NSW) s 2A(b).

[3] *Burra Charter* 2013 ICOMOS
http://australia.icomos.org/wp-content/uploads/The-Burra-Charter-2013-Adopted-31.10.2013.pdf

[4] *United Nations Declaration on the Rights of Indigenous Peoples 2007*
http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

[5] National Strategy for Ecologically Sustainable Development 1992 http://www.environment.gov.au/about-us/esd/publications/national-esd-strategy

notes that this is consistent with our previous submissions on planning reforms in NSW.[6]

The Committee recommends that the promotion of ESD should be the overarching objective of the Act. Alternatively, the Committee submits that the object relating to ESD be moved to the first object listed, to reflect the primary importance of ESD as a planning principle.

> ***Recommendation: That the proposed reference to ecologically sustainable development in the new objects be adopted, but be amended so that:***
>
> ***a) References to social and economic considerations is removed from that particular object; and***
>
> ***b) That object be the overarching object or, alternatively, be listed first among the objects of the Act.***

Finally, the Committee is concerned that the proposed Bill has not taken advantage of the opportunity to insert new objects into the Act regarding climate change impacts. The vast majority of authorised greenhouse gas emissions which occur in NSW are permitted and controlled under the Act. Therefore it is appropriate and indeed incumbent to recognise this by including an object requiring climate change impacts to be considered in the administration of the Act, particularly in making decisions on development which will increase greenhouse gas emissions. The failure to do so represents a failure to adhere to the principles of intergenerational equity and a failure to draft legislation consistently with the long-term objectives of the NSW Climate Change Policy Framework.[7]

> ***Recommendation: That an object be included referring to consideration, minimisation, mitigation and management of climate change impacts.***

Schedule 2 – Administration

The Committee supports the adoption of community participation plans and principles.[8] However, the Committee notes there is no guarantee the principles will be reflected in the plans, as planning authorities are only required to consider the principles when formulating the plan, not implement them or show how their plan complies.

---

[6] Submission on A New Planning System for NSW: Young Lawyers Environment and Planning Law Committee, p 10 https://www.lawsociety.com.au/cs/groups/public/documents/internetyounglawyers/777062.pdf

[7] NSW Climate Change Policy Framework State of NSW and Office of Environment and Heritage 2016 file:///C:/Users/AKnox/Downloads/nsw-climate-change-policy-framework-160618.pdf

[8] Environmental Planning and Assessment Bill 2017 (NSW) Division 2.6

Recommendation: The Committee supports the adoption of community participation plans and principles, however suggests that provisions be added strengthening the relationship between the plans and the principles.

Schedule 3 – Planning Instruments

Review of SEPPs and LEPs

The Committee acknowledges the introduction of a set review period for State Environmental Planning Policies (**SEPPs**) and Local Environmental Plan (**LEPs**)[9]. It is unclear what form these reviews would take and therefore the Committee recommends that these details be provided in the Regulations. The Committee welcomes the introduction of a periodic review system for SEPPs and LEPs, but is cautious that the expense of such reviews may affect the ability for these provisions to be complied with.

Recommendation: That set review periods for SEPPs and LEPs be adopted, subject to further regulatory provisions.

Greater Sydney Commission's expanded roles

The Committee acknowledges that the Greater Sydney Commission will have a larger range of functions under the proposed amendments, including a new role as a consent authority.[10] The Committee recommends training, increased resources, and increased collaboration with the Minister, particularly in regard to Development Control Plan standardisation, be provided. This will ensure consistency in decision-making.

The Committee notes that accountability and other issues surrounding this increase in functions have not been addressed by the proposed amendments. The Committee believes further policy and regulation needs to be introduced to complement these increased roles.

Recommendation: That further policy and regulation in relation to the establishment of the Commission as a Consent Authority be introduced, including accountability provisions and increased training and resources.

Schedule 4 – Development Assessment and Consent

Clarification of Consent Authorities

[9] Environmental Planning and Assessment Bill 2017 (NSW) cl 3.1[13]
[10] Environmental Planning and Assessment Bill 2017 (NSW) cl3.1[4]

The Committee welcomes the inclusion of a definition of 'consent authority' within the substantive provisions of the Act.[11] The proposed provisions in s 76(6) clearly delineate the relevant consent authority for each category of development, which improves the clarity and accessibility of the Act.

Regionally Significant Development

The proposed removal of the Schedule 4A provisions leaves the threshold for specifying when a development becomes 'regionally significant' to be determined entirely by Environmental Planning Instrument (**EPIs**), as per the proposed s 76(6)(b)[12].

The Committee does not support changes which would allow the scope of regionally significant development to be determined solely through the future drafting of an EPI. Taken together with the operation of the proposed provisions within s 76A(8),[13] the amendments could see developments of greater than $20 million capital investment value directed by the Minister to be determined by council delegates.

Although the move to clarify which development goes to the Planning Panels is welcome, the Committee is not able to make comment on the thresholds proposed in the Summary of Proposals, which will be drafted into EPIs and activate the application of the proposed s 76A(6)(b). Given the fact that these thresholds effect a delocalisation in planning decisions, it is appropriate that the community be specifically consulted on any amendments proposed, or whether there should be amendment of the current thresholds laid out in Schedule 4A of the Act.

In this regard, the Committee notes the Summary of Proposals is unclear whether the following thresholds will be altered:

- Council-related development greater than $5 million where there is not a local planning panel (currently cl 4 of Schedule 4A), noting that the proposed threshold of $5 million for Council-related development where there is a local planning panel is a new threshold, not an existing threshold as the Summary of Proposals suggests;
- Crown development greater than $5 million; and
- the criteria of coastal subdivisions which meet the threshold (currently detailed in cl 9 of Schedule 4A of the Act).

Recommendations:

[11] Environmental Planning and Assessment Bill 2017 (NSW) cl 4.1[3]
[12] Ibid.
[13] Ibid.

a) ***That the proposed specific thresholds and conditions under s 76(6)(b) for regionally significant development should be set within the Environmental Planning and Assessment Act.***

b) ***Recommendation: There be specific community consultation on the thresholds proposed for regionally significant development.***

Section 117 Directions and Delegated Approvals

The Committee does not support the proposal to insert s 76A(8) which allows the Minister to direct Councils on the circumstances in which they are to delegate decision-making functions to Council delegates.[14] Whilst the Committee accepts the argument that this may improve efficiency in the system by shortening approval times, the Committee submits that it may also have implications for accountability and the role of elected representatives in the planning system. The Committee believes it is appropriate for elected representatives at Council to retain the power to determine when decision-making powers should and should not be delegated.

> ***Recommendation: That the proposed s 76A(8) be amended so as to remove the power of the Minister to direct Councils as to when they are to delegate decision-making functions to Council delegates.***

Transferrable Conditions of Consent

It is proposed that consent may be granted subject to specified conditions that cease to have effect on the issue of an authorisation under another Act relating to the development, if the consent authority is satisfied that the matters regulated by those conditions will be adequately addressed by such an authorisation when it is issued.[15]

The Committee does not support the proposal for transferrable conditions contained in the proposed s 80A(4A). The Committee acknowledges this may improve efficiency by removing potential duplication, however the Committee believes this does not outweigh the negative consequences of the proposal and that the case for change has not been sufficiently made.

Where a consent authority has chosen to impose certain conditions, despite the fact that they may be duplicated in subsequent authorisations, one must assume that the consent authority has considered that the parameters contained in those conditions are necessary to the consent granted. Therefore it is

[14] Environmental Planning and Assessment Bill 2017 cl 4.1[3]
[15] Environmental Planning and Assessment Bill 2017 cl 4.1[6]

appropriate that the consent authority retain the power to ensure compliance with those conditions. The Committee notes in this regard that, in the Committee's experience, consent authorities in practice generally defer to the other relevant authorities to enforce conditions which are duplicated in the consent, and only step in to ensure compliance action where those other authorities have failed to effectively do so. Therefore the effect of duplicate conditions is not of significant practical effect.

Further, the introduction of transferrable conditions would allow limits on development, originally imposed by consent authorities, to be later changed by other authorities. Such a change to limits may be contrary to the consideration of the consent authorities in the exercise of their decision-making power. The Committee notes that the Summary of Proposals indicates that any amendments to conditions would only be permitted if they would not permit greater impacts than allowed under the original consent,[16] however the Committee could not identify any provisions in the Bill to this effect.

Recommendation: That the proposal for transferrable conditions of consent in the proposed s 80A(4A) not be adopted.

Financial Assurance Conditions

The Committee supports the clarification made by the proposed s 80A(4B) that consent authorities can impose conditions requiring financial assurance to fund decommission or rehabilitation work in the event works or programmes required under a consent are not carried out.[17] However, much of the detail on how these conditions would work will be subject to yet-to-be-drafted Regulations, which touches on a number of important outstanding issues such as how these would interact with similar financial assurances which may be required and how they would be imposed and managed for staged projects or modified consents.

The Committee also notes that the proposed s 80A(4B) incorporates the relevant provision of Part 9.4 of the *Protection of the Environment Operations Act 1997* (NSW). However there is no analysis in the Summary of Proposals of how those provisions have worked in practice and whether they adequately ensure that remediation and decommission is carried out as necessary, and that they have been workable and not excessively onerous for developers. Therefore the Committee cannot support the incorporation of those processes until such an analysis has taken place, and amendments to those processes be considered and adopted as necessary.

Recommendation: That the clarification that consent authorities can impose conditions requiring financial assurance be adopted. However further information on the parameters

[16] At p 27.
[17] Environmental Planning and Assessment Bill 2017 (NSW) cl 4.1[6]

proposed to be included in the Regulations together with an analysis of the effectiveness of the model in Part 9.4 of the Protection of the Environment Operations Act 1997 be submitted for public consultation before the final form of the proposed s 80A(4B) is adopted.

Complying Development Certificates

As the proposed amendments aim to expand the breadth and encourage a greater percentage of complying developments, the Committee welcomes the tightening of the regulation surrounding complying development certificates (**CDCs**), including:

a) Introduction of specific kinds of development for which an accredited certifier is not authorised to issue a CDC.[18] However, without any detail on what development will be specified for the purpose of these provisions, the Committee cannot comment on the appropriateness of this proposal in context.

b) Introduction of deferred commencement certificates, similar to the use of deferred commencement conditions of consent.[19] The Committee welcomes this approach as it will bring the complying development process in line with the development approval process, thus facilitating better planning and development outcomes, as preliminary works usually included in deferred commencement conditions can be monitored.

The Committee welcomes the introduction of the power for the Court to make an order declaring a CDC invalid. This power will overcome the 'jurisdictional fact' burden that Council could not make out in *Trives v Hornsby Shire Council* [2015] NSWCA 158. This will no longer require the person bringing the challenge against the CDC to show that the certifier acted unreasonably given the information before them. Rather, it will allow the person bringing the challenge against the CDC to simply show that the development does not comply with the Code. This is a strengthening of the Act and will help to improve the legitimacy of and public confidence in complying development, by allowing such developments to be tested for legislative compliance by the Court.

The Committee welcomes the introduction of the two new subsections to s 105 which will allow for the reimbursement of costs incurred by Council in investigating and enforcing compliance with CDCs, by empowering to Council officers to suspend work under a complying development certificate for up to 7 days pending an investigation. [20] These mechanisms will support the above proposed amendments to improve the

[18] Environmental Planning and Assessment Bill 2017 (NSW) cl 4.1[7]
[19] Environmental Planning and Assessment Bill 2017 (NSW) cl 4.1[8]
[20] Environmental Planning and Assessment Bill 2017 (NSW) cl 4.1[17]

robustness and integrity of complying development. However, the Committee notes that regulations supporting these powers have not yet been seen and therefore cannot be commented on specifically.

Recommendations:

a) ***The Committee supports the proposal to prescribe types of complying development as being certifiable only by Council. However, the detail of the regulations prescribing the types of development subject to these restrictions should be provided for public consultation before the proposed amendments are passed.***

b) ***The proposal to introduce deferred commencement certificates should be adopted.***

c) ***The proposed changes to s 87 allowing complying development certificates to be judicially reviewed on the basis of non-compliance with complying development rules should be adopted.***

d) ***The proposals to vest Council with enforcement responsibilities and resources in respect of complying development should be adopted.***

Staged State Significant Development

It is proposed under an amended s 89D that the consent authority for a Staged State Significant Development may determine that a subsequent stage of the development may be approved by the relevant Council.[21] The development will cease to be State significant development for that stage.

The Committee welcomes this proposal, as it will give some power to Councils to make decisions at a local level, within parameters set at the State level. The Committee encourages the implementation of training for Councils in relation to this proposed amendment. While the Committee encourages this proposed amendment, the Committee recommends that the power be limited to circumstances where the stage of the development is consistent with the staging of the Concept Plan Approval, in order to ensure that developers cannot partition small elements of the project to avoid the State development assessment pathway.

Recommendation: The proposed changes to s 89D, allowing for subsequent stages of a Staged State Significant Development to be approved by the relevant be adopted. However a limitation should be included that only stages of State-significant developments that are consistent with the Concept Plan Approval be handed back to Councils for determination.

[21] Environmental Planning and Assessment Bill 2017 (NSW) cl 4.1[10]

Planning Secretary to Act on Behalf of Approval Bodies

The Committee holds concerns about the proposed amendment that will allow the Planning Secretary to act on behalf of an approval body for the purpose of informing the consent authority in relation to integrated development.[22] While the Committee can see the benefits of streamlining concurrences for integrated development, the Committee is cautious of bypassing approval bodies who often provide expert, specialised, and relatively independent consideration of specific aspects of integrated development. The Committee believes that the key to finding the correct balance between these two perspectives is through the framing of the State Assessment Requirements.

> ***Recommendation: The proposal to allow the Planning Secretary to act on behalf of an approval body should not be adopted unless and until appropriately drafted State Assessment Requirements, which would prevent approvals bodies from being wilfully bypassed, are also proposed.***

Modifications of Consent

The Committee welcomes the proposed amendments to s 96AA(1A) and s 96(3) which require that decision makers, in considering the modification of a consent, must take into account a consent authority's reasons for the grant of consent in its original form.[23] These amendments will ensure that s 96 applications to vary conditions of consent will be subject to merit considerations that are at least as stringent as those taken into account by the original consent authority. This will discourage the misuse of the modification process, whereby developers are able to incrementally weaken conditions of consent through multiple successive modification applications.

The Committee supports the proposed new s 96(3A) which specifies that modifications cannot be made to authorise development that is carried out in contravention of development consent.[24] The Committee agrees without reservation to the justification for this proposal outlined in the Summary of Proposals, and believes it will add further integrity to the planning system.

> ***Recommendations:***
>
> ***a) That the proposed changes to s 96AA(1A) and s 96(3) be adopted.***
>
> ***b) That the proposed s 96(3A) be adopted.***

[22] Environmental Planning and Assessment Bill 2017 (NSW) cl 4.1[12]
[23] Environmental Planning and Assessment Bill 2017 (NSW) cl 4.1[14]
[24] Environmental Planning and Assessment Bill 2017 (NSW) cl 4.1[15]

Penalties for Prohibited Development - s 76B

The Committee welcomes the addition of tier 1 monetary penalties for carrying out development without consent and carrying out prohibited development.[25] This will act as a deterrent for fundamental breaches of the Act. Carrying out development without consent and carrying out prohibited development are offences against the very core of the Act. The Committee therefore welcomes the strengthening of these provisions.

Recommendation: The proposed changes to s 76B should be adopted.

Environmental Auditing and Monitoring Conditions

The current provisions only allow for revocation or variation of environmental monitoring conditions imposed after approval is granted. The proposed changes to s 122C would allow conditions imposed at the approval stage to be similarly revoked or varied by the Minister.[26]

The Committee acknowledges that clarification of the responsibilities of various environmental regulatory authorities and avoidance of duplication in environmental monitoring regimes is a desirable outcome. However, the proposed changes may allow politically contentious projects to be approved conditional upon stringent monitoring and environmental protections that are subsequently weakened over time. The proposed process does not explicitly take into account whether such a variation of conditions is necessitated by changes in information, best practice standards or the existence of any concurrent monitoring and protection regimes.

Recommendation: The proposed changes to s 122C should require:

a) That any decision leading to variation or revocation of conditions of consent must identify a specific change in information, best practice standards or concurrent regulatory regimes which make the conditions of consent redundant.

b) That any variation or revocation of conditions of consent require consultation with the relevant environmental regulatory agency.

Schedule 5 – Infrastructure and Environmental Impact Assessment

Infrastructure corridors

The Committee supports the proposed introduction of Division 5.3 of the Bill which introduces the concept of

[25] Environmental Planning and Assessment Bill 2017 (NSW) cl 4.1[4]
[26] Environmental Planning and Assessment Bill 2017 (NSW) cl 4.1[18]

'Infrastructure corridors'.[27] The Committee submits that concurrence with infrastructure agencies for development within the corridors is a sensible option and would allow for those authorities and consent authorities to co-ordinate medium and long-term infrastructure planning. However, the Committee submits that it would have been useful to have further discussion in the Summary of Proposals around how the Division would work in practice, to allow examination of how the Bill fulfils the intention outlined the Summary of Proposals.

The Committee particularly supports the inclusion of the ability for the determining authority to seek review of a decision made unfavourably on their application for concurrence. The Committee notes that the details as to which land will be designated as an infrastructure corridor is left to be determined by SEPPs. However, the Committee considers that this may be necessary given that plans for transport corridors change frequently and require more flexibility than provisions prescribed in an Act will allow.

Recommendation: That the proposal to introduce infrastructure corridors be adopted.

Missed opportunities to reform Environmental Assessment processes

The Committee submits that the Bill has missed an opportunity to work towards making environmental assessment processes more robust. In particular, the reform of the Act brings with it the opportunity to introduce better regulation of consultants engaged to prepare environmental assessments under Part 5 (pursuant to s 112) and Part 4 (pursuant to s 78A). The Committee submits that the Bill should be amended to introduce controls around independence and accountability of experts in the preparation and submission of environmental assessments. Such provisions would not only increase the efficacy of environmental assessment conducted, but also increase public confidence in the robustness of those processes.

Recommendation: That provisions be introduced to improve independence and accountability of experts engaged in conducting environmental assessments under part 4 and part 5 of the Act.

Schedule 6 – Building and Subdivision Certification

Requirements for Certification

The Committee supports the inclusion of the provision to allow the Court to declare a certificate to be invalid if the plans and specifications or standards of building work or subdivision work as specified in the certificate

[27] Environmental Planning and Assessment Bill 2017 (NSW) cl 5.1[1]

are not consistent with the relevant development consent.[28] As the Summary of Proposals released by the department notes, the decision in *Burwood Council v Ralan Burwood Pty Ltd (No.3)* [2014] NSWCA 404 (***Ralan***) left some doubt as to how departures from development consent would be enforced if they were approved by way of construction certificate.

Regardless of the finding of the Court on principles of administrative law, the decision resulted in a poor planning outcome. It is the Committee's view that, where there is a significant departure from the development consent plans through the certification process, the public and government authorities ought to be able to rectify the breach and enforce compliance.

A criticism that has been made in commentary about this proposal is that the result is a certification system that is not sufficiently robust.[29] However, the Committee does not share this criticism. The concept of "robust" should encompass restriction on issuing a construction certificate that is not consistent with the relevant consent.

Importantly, the proposed changes to the legislation will give the community confidence that breaches of development consent, where such a departure should not have been certified, will be rectified, thus enforcing the consent authority's requirements for the development. Particularly, there was concern following the *Ralan* decision that the planning regime would be abused by developers who would make substantive changes to a development via the building certification process which ought properly be approved by way of consent modification.

> ***Recommendation: That the proposed power to declare a certificate to be invalid if the plans and specifications or standards of building work or subdivision work as specified in the certificate are not consistent with the relevant development consent be adopted subject to further regulations being drafted around these powers.***

Schedule 7 – Infrastructure Contributions and Finance

Planning Agreements

The Committee is supportive of the move to allow planning agreements to be made between a project

[28] Environmental Planning and Assessment Bill 2017 (NSW) cl 6.1[1]

[29] *More convoluted, expensive and risky planning laws for NSW? Mills Oakley's review of the Environmental Planning and Assessment Amendment Bill 2017*, January 2017 (http://www.millsoakley.com.au/more-convoluted-expensive-and-risky-planning-laws-for-nsw-mills-oakleys-review-of-the-environmental-planning-and-assessment-amendment-bill-2017).

proponent applying for a CDC and a planning authority.[30] The Committee notes that such planning agreements would only be applicable in circumstances where a Council certifier is issuing the CDC, and, as noted above, suggest that more detail be provided by the Department regarding the exact nature of the CDCs that, according to Schedule 4 of the EPA Bill, are proposed to be issuable only by a Council certifier.

The Committee suggests that there must be a causal link between the property the subject of the CDC and the public purpose for which the agreement has been voluntarily entered into. For example, for a monetary contribution to be made as part of a planning agreement for a CDC, there ought to be a requirement that this monetary contribution be utilised towards the lowering of the purchase price in the circumstances where said property is in a zone earmarked for affordable housing. This ought to be done under the new Ministerial directions provided for by the proposed s 93K(b1).[31]

The Committee has observed the increase in exempt and complying development from 11% of all approvals (CDCs and development consents) in 2008/9 to nearly 30% in 2013/14, and likely even higher figures since these statistics were reported.[32] Further, the Committee notes that private certifiers are issuing at least four times as many CDCs than their counterparts at Council,[33] and would urge the Department to consider a manner in which voluntary planning agreements could be entered into between project proponents and private certifiers, with the inclusion of Council in this process.

Recommendations:

a) That the proposal that the voluntary planning agreement scheme is expanded to include application of these agreements to CDCs be adopted. However the drafted provisions should amended to require a causal link between the property the subject of the CDC and the public purpose for which the agreement has been voluntarily entered into.

b) That expansion of the application of voluntary planning agreements to CDCs made between project proponents and private certifiers be considered.

Special infrastructure contributions

In a similar vein to the previous section, the Committee generally supports the ability for the Minister to direct

[30] Environmental Planning and Assessment Bill 2017 (NSW) cl 7.1[4]

[31] Environmental Planning and Assessment Bill 2017 (NSW) cl 7.1[2]

[32] Lambert, M 'Independent Review of the Building Professionals Act 2005 – Final Report' p 173 (accessed 10 February 2017) http://bpb.nsw.gov.au/sites/default/files/public/Attachment%20A%20-%20Final%20Report.pdf

[33] in 2013/2014, private certifiers issued over 20,000 CDCs while Council certifiers issued less than 5,000 – *Ibid* p 119. It is likely that this difference has continued to increase exponentially in the intervening years.

that special infrastructure contributions (**SICs**) be a requirement as a condition of consent for the granting of a CDC in a special contribution area, particularly as the Exempt and Complying Development Codes SEPP has been adopted with nearly exponential growth since 2008/9[34].

While this recommendation goes beyond the scope of the invitation to comment on the current Bill, the Committee suggests that the Minister require SICs to offset the carbon emissions that are generated by the building construction industry in the erection of the buildings and infrastructure in the special contributions areas designated by the Minister under the Act. This suggestion is made in light of the NSW Government's focus on being a carbon neutral state by 2050, and in alignment with a number of industry bodies such as the Australian Sustainable Built Environment Council and UrbanGrowth.[35] It would also promote ESD, which, as discussed above, the Committee believes should be the overarching objective of the Act.

Recommendations:

a) The Committee supports the proposed ability for the Minister to direct that SICs be a requirement as a condition of consent for the granting of a CDC in a special contribution area.

b) That SICs be required with direct application to offsetting the carbon emissions, both embodied and operational, from CDCs issued in special contributions areas.

Schedule 8 – Reviews and Appeals

Appeals against decisions of the Independent Planning Commission

The Committee notes that there continues to be no right of merits appeal against decisions of the Independent Planning Commission (formerly the Planning Assessment Commission) which have been the subject of a public hearing. The Committee recommends that an avenue for a right of appeal to the Court should be introduced to allow for all planning decisions to be tested by the Courts in order to preserve the rule of law and avoid natural justice issues. The Committee does not consider the holding of a public hearing to be an adequate substitute for merits appeal rights.

The Committee suggests that whether or not a merits appeal right is available should not be determined by the category of the development. Rather, all development should have an appeal avenue to the Court.

Recommendation: Merits appeal rights for all decisions of the Independent Planning

[34] Ibid.

[35] http://www.urbangrowth.nsw.gov.au/sustainability/goals-and-targets/climate-resilience-and-resources/

Commission be reinstated into the Act.

Deemed refusal periods

The Committee acknowledges that it is proposed the Regulations will include a deemed refusal period.[36] The Committee expresses concerns with the current deemed refusal period and encourages the extension of this period as this period is often too short to allow for concurrence authorities to be consulted as well as a review of the development application to be conducted thoroughly, especially in local government areas with high levels of development activity.

The Committee encourages the maintenance of the current distinction between regular development applications and integrated development applications, however the Committee recommends that further distinction is made for developments of differing capital investment value, with longer deemed refusal periods implemented for developments of greater capital investment value.

The Committee also recommends that the expiry of deemed refusal periods (currently 6 months) be removed, allowing an applicant to approach the Court if negotiations with the determining authority breakdown after the deemed refusal period has expired, without needing to seek an application for mandamus in the Land and Environment Court.

The Committee refers to the intention to have development consents cease to have effect upon the lodgement of an appeal, pursuant to proposed s 8.13.[37] This proposed provision will affect situations where an applicant for development consent appeals because of dissatisfaction with conditions imposed. As the power of the Court on appeal is the same as the consent authority in respect of the subject matter, it is therefore open to the Court to impose further restrictions on the consent or even refuse development consent.

However, the refusal of consent by the Court on appeal in such cases is rare and the Court is generally required to give notice to an applicant that it intends to do so as a matter of procedural fairness (unless the respondent to an appeal has specifically pleaded or contended that consent be refused). In such circumstances, an applicant has the ability to discontinue an appeal and rely upon the consent as determined prior to the appeal.

The Committee would support this proposal of deeming a consent for designated development to have no

[36] *Environmental Planning and Assessment Regulation 2000* (NSW) cl 113
[37] Environmental Planning and Assessment Bill 2017 (NSW) cl 8.1[2]

effect where an objector commences an appeal.[38] The Committee believes that it is appropriate to prevent a developer from immediately acting upon such a consent if an appeal was lodged by an objector. However, the Committee does not support this proposal where it relates to an appeal by an applicant.

Recommendations:

a) ***Deemed refusal periods be extended, particularly for developments of greater capital investment value.***

b) ***The proposed clause 8.10 to be amended so that deemed refusal periods have no expiry, allowing an applicant to approach the Court indefinitely whilst an application remains undetermined.***

c) ***The provision deeming development consents ceasing to have effect upon commencement of appeal be limited to objector appeals.***

Joinder of parties to Appeals

The Committee questions whether it is necessary to include the power to join parties to an appeal under the Act, pursuant to proposed s 8.15.[39] It is the Committee's view that the power for joinder is appropriately contained in s 39(2) of the *Land and Environment Court Act 1979* (NSW) as it is the Court's role to manage its affairs. Whilst the Committee does not have any specific concerns regarding the introduction of this provision, it appears to be unnecessary.

Costs thrown away

The Committee notes the intention to exclude the mandatory making of orders for costs thrown away as a result of non-minor amendments in residential development appeals – being those covered by s 34AA of the *Land and Environment Court Act 1979,* pursuant to proposed s 8.15(3).[40]

Whilst the exclusion of residential development appeals from mandatory orders for costs thrown away may be well intentioned in that the costs exposure of conducting such appeals will be limited for "mum and dad developers", the Committee is of the opinion that there are more benefits in applying the mandatory order generally.

The benefit of the costs thrown away provision applying generally is that the Court's effective administration

[38] *Environmental Planning and Assessment Act 1979* (NSW) s98
[39] Environmental Planning and Assessment Bill 2017 (NSW) cl 8.1[2]
[40] Environmental Planning and Assessment Bill 2017 (NSW) cl 8.1[2]

of matters will be aided if such appeals came to the Court in a form that does not require significant amendment prior to hearing. This also has resultant benefits for consent authorities appearing as respondents as they expend public funds in defending such appeals.

Further, it is the Committee's experience that such appeals often relate to highly prized residential land in Sydney. These properties are highly valued by the applicants and the appeals often conducted at great expense to ensure the development potential is maximised. The issues involved in such matters seek to protect the amenity values of neighbouring properties that are equally valuable. Therefore, the Committee is of the opinion that the mandatory costs thrown away provisions should not be excluded from such appeals.

Of course, the Court has the power to make orders for costs thrown away pursuant to the provisions of the *Civil Procedure Act 2001* (NSW). However, the Committee is concerned that this proposed exclusion will lead the Court to interpret these provisions by concluding that such orders are not to be ordered in residential development appeals except in very limited circumstances.

Recommendation: No changes be made to the costs thrown away provisions.

Schedule 9 – Implementation and Enforcement

Enforceable Undertakings

The Committee supports the introduction of a system of enforceable undertakings.[41] This is supported as parties or regulatory bodies may defer taking enforcement action against breaches on the basis of undertakings given.

The Court has considered, at length, the enforceability of undertakings given between parties in *Council of the City of Sydney v Wilson Parking Australia Pty Ltd* [2015] NSWLEC 42 (***Wilson Parking***). There, the Court found that undertakings given between parties could not be enforced either as matter of the Court's jurisdiction, as a contract, or as a matter of estoppel.

Notwithstanding the Committee's support for the concept, there are some concerns regarding its implementation. Particularly, the Committee is of the opinion that sufficient regulations need to be drafted to protect parties from entering into enforceable undertakings if they are not sufficiently advised of the facts to which the undertaking relates.

For example, in *Wilson Parking*, a party resiled from its undertaking on the basis that it was mistaken as to the existence, or lack thereof, of existing use rights to use the land for a particular use.

[41] Environmental Planning and Assessment Bill 2017 (NSW) cl9.1[1]

Whilst the Committee notes there are no similar protections in the *Protection of the Environment Operations Act 1997* (NSW), the Committee is of the opinion that further provisions within the legislation or the regulations ought to set out the form of such undertakings, such as the mandatory matters to be included. Further, the provisions should also set out matters for disclosure by the party seeking the undertaking, such as the facts and circumstances relied upon in giving the undertaking.

> ***Recommendation: The Committee supports the introduction of a system of enforceable undertakings, however sufficient regulations or further provisions within the legislation should be included as to the form of undertakings and the circumstances in which undertakings can be enforced.***

Suspending Work Pursuant to a CDC

The Committee notes the draft bill contains a proposal to authorise officers of a Council to suspend the carrying out of work pursuant to a CDC for a period of up to seven days pending investigations.[42]

The Committee has concerns that such a power may be exercised without reasons being given, but also as to the effect of stop work orders upon a person carrying out development. Particularly, these such orders are likely to be given during times when building work is progressing rapidly in reliance upon the complying development certificate. Delaying building work during such a period would cause particular economic loss if building contractors are not permitted to carry out works.

Accordingly, the Committee is of the opinion that sufficient safeguards should be implemented to ensure that the power is exercised appropriately. One particular measure is to require the authorised officer to give reasons as to why the order is given. A further measure is to allow a person who is the recipient of such an order to seek compensation from the Council if it is found that the exercise of power to issue such an order was without basis, reckless or for a malicious purpose.

> ***Recommendation: If powers are granted to authorise officers of a Council to suspend the carrying out of work pursuant to a CDC for a period of up to seven days pending investigations, sufficient regulations or further provisions within the legislation be included to require the giving of reasons for such orders and allow compensation for losses incurred where the exercise of power to issue such an order was without basis, reckless or for a malicious purpose.***

[42] Environmental Planning and Assessment Bill 2017 (NSW) cl 4.1[17]

Schedule 10 – Miscellaneous

Discontinuing Part 3A

The Committee welcomes the removal of the transitional provisions relating to Part 3A approvals, occasioned by the Bill's proposed repeal of Sch 6A of the Act.[43] The Committee agrees that it is appropriate, given it is over five years since Part 3A was repealed, that proponents be longer able to apply for modification under Part 3A, particularly noting that the modifications process under the former s 75W is significantly different and permits a broader range of modifications than is permissible under the current s 96.

However, the Committee has concerns regarding the rules around this repeal, which the Summary of Proposals indicates will be drafted into future regulations. [44]

The Committee sees no justification for permitting a two month window after the enactment of the Bill to allow proponents to utilise s 75W to have former Part 3A approvals modified. Given the intent is to bring modification processes for former Part 3A projects in line with other development, it is incongruous to permit proponents to continue to utilise s 75W to have modifications approved which would not be approvable under s 96. In practice, the two month window would in fact encourage proponents to do so.

The Committee does support the proposal the test for whether modification of former Part 3A project should be referenced to the development at the time it was last modified.[45] This creates an exceptionalised modification process for former Part 3A projects, where the test for whether they can be modified under s 96(2) is whether the proposed project as proposed to be modified is substantially the same as the project as last modified, rather than being whether it is substantially the same as the project as originally approved. This would allow for former Part 3A project to be modified under s 96 in circumstances where other developments would not be able to modified under s 96.

The Committee is unable to comment on the proposal that 'the ongoing effect of approved Part 3A concept plans will be preserved'[46] as there is not sufficient detail provided on how this proposal would work in practice.

Recommendations:

a) The Committee supports the repeal of Schedule 6A of the Act.

[43] Environmental Planning and Assessment Bill 2017 (NSW) cl 10.1[7]
[44] Summary of Proposals 2017 p29
[45] *Ibid*.
[46] Ibid.

b) The Committee does not support the introduction of Regulations allowing for a 'two month window' in which holders of former Part 3A approvals can apply for modification under the former s 75W of the Act.

c) The Committee does not support the introduction of Regulations which provide that, for former Part 3A approvals, the test for whether s 96(2) applies should be assessed with reference to the development approval as most recently modified.

THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

Contact:

Emily Ryan

President

NSW Young Lawyers

Email: president@younglawyers.com.au

Alternate Contact:

Ross Mackay

Chair

NSW Young Lawyers Environment and Planning Law Committee

Email: envirolaw.chair@younglawyers.com.au