



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Policy, Planning Systems and Reform  
NSW Department of Planning  
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Dear Sir / Madam,

**Environmental Planning and Assessment Regulation 2010**

Thank you for the opportunity to comment on the draft Regulation.

The draft Regulation has been considered by the Law Society's Environmental Planning and Development Law Committee (EP&D Committee) and its Property Law Committee (PL Committee) (together "the Committees").

The EP&D Committee has responsibility to consider and deal with any matters relating to or associated with environmental planning and development law, and to advise the Council of the Law Society on all issues relevant to that area of practice. Membership of the Committee is drawn widely from experienced professionals whose expertise has been developed variously in representing the interests of local government, government instrumentalities, corporate and private clients.

The PL Committee has responsibility to consider and deal with any matters relating to property law and to advise the Council of the Law Society on all issues relevant to that area of practice. The members of the PL Committee are senior property law practitioners and experts. Their focus in considering the draft Regulation relates mainly to its impact on conveyancing practice, particularly changes relating to planning certificates.

**COMMENCEMENT**

Clause 2 of the draft Regulation currently provides that the Regulation will commence on the day on which it is published on the New South Wales legislation website.

The Law Society, particularly through the PL Committee, has had lengthy discussions with the Department of Planning (NSW Planning) about the need for "lead-in" time in relation to changes to planning certificates to minimise disruption to

the conveyancing process. The need for such lead-in time is, in fact, implicitly recognized in the NSW Planning Fact Sheet titled " *Planning certificates changes proposed in the draft 2010 Regulation*":

"The proposed change may however require Councils to change their planning certificate templates and potentially reorganize information systems for generating the certificates".

The Committees suggest that a minimum lead-in time of 60 days is required to enable stakeholders in the conveyancing process to take the necessary steps to avoid disruption to the conveyancing process. Councils will no doubt make their own submissions to relation to the need to implement changes to their systems to accommodate any changes to planning certificates.

## **CHANGES TO PLANNING CERTIFICATES**

As you may be aware, the Law Society, particularly through the PL Committee is very interested in this area and has been advocating significant change for many years.

While generally supportive of the changes to planning certificates introduced by the draft Regulation, the Committees suggest that the matters set out below require further consideration in order to achieve the benefits specified in the Regulatory Impact Statement (RIS) and Fact Sheet published on this topic.

### **Change to the Act**

The Regulation introduces two different types of Section 149 (2) certificates for conveyancing purposes – namely, one containing the information prescribed in Part 1 of Schedule 5 and the second containing the information in both Parts 1 and 2 of the Schedule.

The Committees consider that an immediate legislative amendment to the *Environmental Planning and Assessment Act 1979* (Act) is necessary to make the changes contained in the draft Regulation workable.

This appears to be contemplated by the drafters of the Regulation as the Fact Sheet relating to planning certificates contains the following note:

"Note: The following proposed planning certificate provisions may be subject to an amendment to the Act".

While the Committees consider that the amendment to the Act is not significant enough to postpone until the next full review of the Act (and it is required in any case, as noted above to make the Regulation workable), the Committees would appreciate confirmation that the necessary amendment to the Act (by way of miscellaneous statute amendment) will be made at the same time as, or prior to, the introduction of the Regulation and that the Regulation will have a delayed commencement to allow the lead-in time required as previously discussed.

### **Clause 305**

The Committees note that proposed clause 305 provides the same fee is to be charged whether the additional (Part 2) information is provided, or not. It seems to the Committees that in the absence of a differential fee structure, applicants for Section 149 (2) certificates would probably apply for a planning certificate containing the information in Parts 1 and 2 in every case and that this would defeat the purpose of introducing a system of 'basic' and "full' planning certificate.



## **Clause 356**

The Committees note that subclause 2 states:

“(2) The matters set out in Part 2 of schedule 5 are additional matters that **may** be specified in a planning certificate.” (bold emphasis added)

The Committees suggest that the word “must” needs to replace the word “may” in order to reflect the intention of the legislation as stated in both the RIS and Fact Sheet which refer to the matters listed in Part 2 of the Schedule 5 as being **prescribed**.

## **Schedule 5 Part 1**

The Committees suggest that in order to achieve the objective stated in the RIS, namely to streamline the information requirements to better serve the information needs of landowners and prospective buyers, that a renumbering of the order of the items in Part 1 should take place. The renumbering would reflect the importance of the information and regroup similar affectations in a more logical sequence. The suggested renumbering is as follows:

**Items 1 to 3** remains the same.

**Item 4: Land reserved for acquisition** (currently item 8).

**Item 5: Road widening and road realignment** (currently item 5).

**Item 6: Flood related development controls information** (currently item 7).

**Item 7: Council and other public authority policies on hazard risk reductions** (currently item 6).

**Item 8: Bush fire prone land** (currently item 9).

**Item 9: Mine subsidence** (currently item 4)

The Committees also consider that the items that are currently the subject of notes i.e.: *Contaminated Land Management Act 1997* matters and the note relating to the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009* should be dealt with as enumerated items. The item relating to contaminated land management should remain in Part 1 with the item relating the Nation Building and Jobs Plan provisions included in Part 2.

## **Part 2 Additional Matters**

The Committees note that the items relating to the *Coastal Protection Act 1979* may need to be revisited in view of the passing of the *Coastal Protection and Other Legislation Amendment Act 2010*.

## **More Prescriptive Format**

The Committees have previously, in submissions made to NSW Planning advocated a more prescriptive form of certificate. Ideally, the certificate should be framed so that questions can be posed in a form that admits only a “yes” or “no” answer. This prescription should apply to all councils so that the information received is consistent across the State. Section 149(4) expressly contemplates that the form and manner in which information is set out in a planning certificate might be prescribed, and the

Committees believe that a prescriptive approach is now appropriate. The Committees can see no reason why the same form cannot be used for the provision of the same information across all Councils. NSW Planning could perhaps assist with the development of a standard software template and other resources which could then be supplied to councils. It would be unfortunate indeed, if the advances made in relation to the information to be provided, were to be let down by individual councils being allowed to present the information in different ways. This is particularly the case as the standard instrument is adopted more widely.

When providing information, it would be very useful that the source of the information be referenced. Particularly, directing the reader to where he or she can receive further information (including telephone numbers and url links), would make the certificate far more informative and relevant, and should lead to a reduction in the resources consumed by numerous annexures to certificates.

## **REQUESTS FOR FURTHER DA INFORMATION**

The current Regulation allows for additional information to be requested under clause 54. Currently, an applicant may be asked several times throughout the DA assessment process for further information once the assessment period has been suspended in what is known as the stop- the- clock period.

Clause 78 of the draft Regulation limits requests for further information to only one request from the consent authority and only within the first 21 days after DA lodgement. This includes requests for additional information from concurrence authorities and approval bodies via the consent authority.

If additional information is requested, the assessment period can be stopped only once for a period of up to 21 days. There is no provision for late information to be provided by an applicant. If the applicant does not respond within 21 days they are deemed have denied to giving the information.

The EP&D Committee considers that 21 days for a response is not a reasonable time to impose in relation to every development application. It would be difficult for consent authorities to identify every issue in complex matters within 21 days. The EP&D Committee considers that the current Regulation imposes an objective test which is much more appropriate as development applications can cover a wide range of matters and it is not appropriate to impose such a limited timeframe in relation to all applications.

### **Other drafting matters**

The Committees suggest the following drafting amendments:

#### *Clause 8 – Building Code of Australia*

The reference in Clause 8(1) (a) (ii) to the year “2009” should be replaced with the year “2010”.

#### *Clause 213 – Form of occupation certificate (cl 155 2000 Regulation)*

The following words should be added to the end of subclause 2:

“for the avoidance of doubt the documents referred to in subclause (2) do not form part of the occupation certificate”.

#### *References to approved insurers under the Home Building Act 1989 (HB Act)*



The Committees noted that several of the clauses (for example clauses 133, 184, 315 and 316) require the provision of the name of the insurer for the purposes of the HB Act. Since the Self Insurance Corporation is, since 1 July 2010, the only insurer operating in the HWI sector (see Schedule 4 cl 89 HB Act), the Committees suggest the requirements to provide the name of the insurer be limited to those circumstances where SICorp is not the insurer.

Thank you once again for the opportunity to comment on the draft Regulation.

I would be happy to further discuss the Committees' comments as your convenience.

Yours faithfully



**Mary Macken**  
President

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