THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Epd:JD:lb746078

28 June 2013

New Planning System
GPO Box 39
SYDNEY NSW 2001

Dear Sir/Madam

A New Planning System for New South Wales – White Paper

I write to you on behalf of the Environment Planning and Development Committee ("Committee") of the Law Society of New South Wales and provide its attached submission in response to the White Paper and the draft planning legislation.

The Committee represents the Law Society on all matters relating to environmental planning and development law and advises the Council of the Law Society on issues relevant to that area of practice. Membership of the Committee is drawn widely from experienced professionals whose expertise has been developed in representing the interests of local government, government instrumentality, corporate and private clients.

The Committee applauds the initiative of the NSW Government in embarking on the most comprehensive and radical reform of the planning system for over thirty years with the aim of building a world-class planning system.

If you have any questions in relation to this submission, please contact Liza Booth, Policy Lawyer for the Committee, by telephone on (02) 9926 0202 or by email to liza.booth@lawsociety.com.au.

Yours faithfully,

John Dobson
President

Environmental Planning & Development Committee submission on A New Planning System for New South Wales – White Paper

Consultation

The NSW Government has released a White Paper and draft legislation following the earlier release in July 2012 of "A New Planning System for New South Wales – Green Paper". The White Paper and two exposure draft Bills, the Planning Bill 2013 ("Planning Bill") and the Planning Administration Bill 2013 provide some detail of how the Government proposes to make its transformative changes to the planning system. While the Government has invited further public comment, with submissions due by 28 June 2013, it has also signalled its intention to introduce the new planning legislation to the NSW Parliament later in 2013 with commencement of the legislation on proclamation but with some parts of it at least to commence in 2014.

Overview

Given the "broad church" represented by the Committee's membership, the Committee has chosen to focus on whether the transformative changes to the planning system proposed in the White Paper and planning legislation are guided by rule of law principles, particularly the requirements for transparency and certainty. This has been the framework for all comments made by the Committee during the whole of the review process.

The Committee stated in earlier submissions that public confidence in the Australian legal system rests in part on the "rule of law". The Committee's comments on the White Paper and Planning Bill focus on whether the core attributes of the new planning system align with rule of law principles. These include:

- The continued right to approach the Land and Environment Court ("LEC") to restrain a breach of the planning laws by any person (open standing);
- The continued role of the LEC both as a court of judicial review and in respect of merit appeals for planning decisions;
- The planning laws (and subordinate provisions, regulations, State policies, local plans) should be readily available, understandable and applied consistently by consent authorities;
- Where there is proposed to be a change in the planning laws or provisions then generally there should be advance notice and an opportunity to comment on these changes.

The aim of the review as set out in the White Paper is to implement a new planning system that is simpler, more certain and more transparent, as well as more strategic and performance based. The Committee supports these aims but is concerned that there is a contradiction between these aims and some of the provisions of the Planning Bill.

The Committee is particularly concerned at the number and breadth of Ministerial discretions which undercut the requirements for both certainty and transparency within the planning system. This contradiction also applies to the White Paper statement that decision review rights remain largely unchanged when proposed section 10.12 of the Planning Bill significantly restricts the ability of the community to challenge plans and some decisions even in the case of legal error.

The Community Participation Charter, a centrepiece of the new reforms, is welcomed by the Committee. Its value however is greatly diminished by lack of detail on implementation and enforceability. The Committee comments on these matters in more detail below.

Community participation

One of the fundamental reforms of the new system is shifting community involvement to the strategic planning stage rather than allowing objections to individual development applications.

The White Paper notes at page 50:

> Achieving early community involvement in planning will be a challenge....
>
> Planning at the regional and subregional levels can be complex but, is where major planning decisions are made and is the best level to achieve multiple objectives....
>
> With a shift to greater community participation early on in the plan making process, there is less need for the community to be involved in development assessment that is consistent with the plans that have already been prepared with community participation....
>
> Decisions taken and solutions developed with community involvement through a strategic plan will not generally be revisited at subsequent stages of planning....

Community Participation Charter

A Community Participation Charter which sets out seven high-level principles relating to partnership, accessibility, early involvement, right to be informed, proportionality, inclusiveness and transparency is set out in Part 2 of the Planning Bill.

The emphasis is on front end consultation.

These seven principles constitute the framework for the community participation guidelines to be prepared by the Department of Planning and Infrastructure with key stakeholders. The guidelines will provide practical guidance for planning authorities and set the key standards the planning authorities are required to meet in preparing their community participation plans. The community participation plan will describe how the community will be given the opportunity to participate in all types of plan making and development assessment processes undertaken by the authority.

There are a number of aspects of the shift to upfront community participation which are a cause of concern to the Committee. The specific consultation requirements are not prescribed but rather to be set out in the community participation plans, which are not mandatory. While this is designed to allow flexibility so that planning authorities can tailor the details of their plans to reflect the requirements of their particular communities, it does present problems of enforceability.

The real danger of the potential failure to engage the community at this stage has been widely recognised. It is difficult to expect the general public to be engaged on hypothetical future development - rather than reactively as a result of a specific proposal. In order to engage the general public in the consultation processes on a State, regional and subregional level and in relation to local plans and complying development, it will be necessary to commit substantial resourcing. The Committee also submits that rights of review and appeal rights are essential to ensure that the consultation that is envisaged can take place.

Even if it is possible to adequately engage the community in front end consultation in the development of local or subregional plans, the effectiveness of community consultation in strategic planning is undermined by the broad Ministerial discretions proposed in the Planning Bill. These allow the Minister to make plans overriding local and subregional plans (see section 3.14) without any requirement for the Minister to consult and no requirement for the Minister to have regard to the relevant strategic planning. Effective community consultation is also undermined by the fact that under section 3.8, local and subregional plans must "give effect" to the relevant regional plan. The Committee notes that the draft Sydney Metropolitan Plan is already on exhibition and is likely to become the first regional plan under the new planning system.

The breadth of the Ministerial discretions raises legitimate concerns in terms of perceptions of probity in planning decision-making.

Finally, proposed section 10.12 of the Planning Bill provides that none of the provisions of Part 2 (other than minimum time periods for exhibition) are mandatory, and excludes third party environmental appeal proceedings and judicial review proceedings in respect of breaches of Part 2. The Committee's concerns regarding section 10.12 are discussed in further detail below.

Exhibition periods

The Committee considers that 28 days is not a sufficient minimum exhibition period for draft infrastructure plans, community participation plans and Environmental Impact Statement ("EIS") assessed development. These can be lengthy and technical documents and in order for genuine consultation to take place, adequate time needs to be allowed for the community to seek any necessary advice or assistance before responding to these complex documents. In the Committee's view, a minimum exhibition period of 60 days for these documents would be a more realistic period to enable the community to participate in a meaningful way.

Strategic planning

The White Paper notes that the new planning system will create a major shift towards evidence-based strategic planning and the preparation of plans with community and stakeholder engagement.

There will be a hierarchy of plans consisting of four different layers which seeks to address the previous lack of alignment between the statutory plans and non-statutory strategic plans.

The Director General is to prepare NSW Planning Policies and draft Regional Growth Plans for any region in the State, and the Subregional Planning Board is to prepare a draft Subregional Delivery Plan for that region. The Minister may make those plans in the form in which they are submitted or with such modifications as the Minister considers appropriate.

As noted above, the Minister may make, amend or replace provisions of local plans by an instrument published on the NSW legislation website. This may be done without compliance with the procedural requirements of the planning legislation relating to the conditions precedent to do so in order to achieve matters that give effect to strategic plans or infrastructure plans, or matters that are of State, regional or subregional significance. This gives the Minister a very wide discretion to amend local plans. If one of the purposes of the new legislation is to minimise the risk for actual or perceived corruption in decision-making in the planning sphere, the breadth of the Minister's discretionary powers is of concern.

Development assessment

The White Paper identifies development assessment as one of five areas of fundamental reform. Development assessment "will be transformed" through a performance based system which makes greater use of code complying development and removes layers of assessment. The new system incorporates five assessment tracks with developments streamed into these tracks depending on the level of impact of a proposed development- exempt, complying, code, merit and prohibited.

A NSW Planning Policy will establish targets for each assessment track for council areas.

With the benefit of recent experiences in NSW, benchmarking against other Australian systems and considering the reform program set out in the White Paper, it is reasonable to propose a measure of 80 per cent of all assessments carried out by councils should go through either complying or code tracks. (page 123, White Paper)

Code assessment

While exempt and complying development tracks are familiar concepts, code assessment is new and essentially involves building envelope controls being developed. Codes can be included in the "development guide" provisions that form part of a local plan.

Local councils cannot refuse code-compliant development and there are no consultation rights in relation to it once the council determines that the development meets the performance criteria in the local plan. The community consultation is restricted to the "front end" when the community engages in strategic planning for a subregion or locally and "signs off" on the types of developments and the standards that development must meet to align with the plan.

The risk of the community feeling excluded from decision making at a local level is exacerbated by the imposition of targets for development imposed at a regional level and a mandatory target of 80 per cent exempt complying and code development at the local level. The Committee is concerned that the new system needs to provide some counterbalance to offset the cumulative effect of this top down determinism to minimise the risk of community disenfranchisement.

Merit appeal and decision review rights

While the White Paper indicates that decision review rights remain largely unchanged, the Committee has serious concerns about the terms of proposed section 10.12 which significantly restricts the ability of the community to challenge plans and some decisions even in the case of legal error.

Subsection 1 excludes legal proceedings in respect of a declaration of public priority infrastructure or any amendment or revocation of such declaration. Subsection 2 provides that no proceedings can be instituted to invalidate an instrument or decision under the planning legislation because of a breach of those provisions including conditions precedent to the making, amending or replacing of the provisions for a local plan or any other strategic plan or of any infrastructure plan, and includes conditions precedent to the making of State significant development and the provisions of Part 5 relating to approval for State infrastructure development.

There appears to be a disconnect between the stated intention to continue the open standing provisions of the current Act as set out in the White Paper and the terms of the draft legislation.

This disconnect is also apparent in such fundamental areas as community participation, strategic plans and State significant development approvals where significant rights of review have been removed by provisions of the Planning Bill.

The Committee also notes that a provision such as section 10.12 of the Planning Bill may be subject to constitutional challenge.

Very quick-stream appeals

The Committee considers that the current mandatory conciliation and hearing (quick-stream appeal) process has worked well. The Committee is concerned, however, that the very quick-stream appeal system proposed in the White Paper will not bring about the just, quick and effective resolution of the residential development appeals for which it is proposed. The ability to achieve a just outcome is seriously compromised by the mooted turn-around time of five days. This timeframe should be reconsidered.

Ministerial discretion

The Committee is concerned at the number and breadth of Ministerial discretions which undercut the requirement for certainty within the planning system.

It has been noted above that the Minister has a very wide discretion to amend local plans by an instrument published on a NSW legislation website. This very wide discretion allows the Minister to effectively by-pass procedural requirements, including requirements for community participation.

Examples of Ministerial discretions provided in the Planning Bill include:

Part 3 Strategic planning

Division 3.2 NSW planning policies, regional growth plans and subregional delivery plans

Section 3.7(2)	The Minister may make a NSW planning policy, regional growth plan or subregional delivery plan as submitted or with such modifications as the Minister considers appropriate.

Division 3.3 Local plans – general

Section 3.12(1)	The Minister may amend or replace provisions of local plans.
Section 3.13(4)	The Minister may make modifications as he/she considers appropriate to a local plan submitted to the Minister.
Section 3.14	The Minister may amend or replace any provisions of a local plan without compliance with the requirements of the planning legislation relating to the conditions precedent to doing so in order to deal with matters that give effect to strategic plans or infrastructure plans that are of State, regional or sub-regional significance or to rezone land or make other changes (sub clause (e))

Division 3.4 Local plans – planning control provisions

Section 3.21(4) The Minister may, at any time, alter a gateway determination.

Section 3.24(1) The Minister may make planning control provisions of a local plan in terms the Minister considers are appropriate.

Part 4 Development (other than infrastructure), assessment and consent

Division 4.4 Code and merit assessment

Section 4.20(3) Subsection (2), requiring a consent authority to not determine an EIS assessment application if submissions had been made during the period of public exhibition, until the expiry of the period of 21 days following the date on which copy of submissions is forwarded to the Director General, does not apply if the consent authority is the Minister or the Director General.

Division 4.6 State significant development – additional provisions

Section 4.29(3) Any development for which consent is granted (or purports to be granted) by the Minister as State significant development is taken to be State significant development, and to have been such development for the purposes of any application or other matter under this Part in relation to the development.

Section 4.30(4) Development consent may be granted for State significant development despite the development being partly prohibited by the planning control provisions of the local plan.

Section 4.30(6) The Minister may also grant development consent for State significant development with such modifications of the proposed development as the Minister may determine.

Section 4.30(7) The Minister may impose such conditions on the State significant development as the Minister determines despite any restriction in this Part on the kinds of conditions that may be imposed.

Part 5 Infrastructure and environmental impact assessment

Division 5.2 State infrastructure development

Section 5.16(3) State infrastructure development may be approved under this Division with such modifications of the development or on such conditions as the Minister may determine.

Division 5.3 Public priority infrastructure

Section 5.25(2) The Minister may, by an instrument published on the NSW legislation website, make or amend the planning control provisions of a local plan so that the local plan reflects the land use authorised by this sectionor to change land use and development controls for land in the vicinity.

Part 6 Concurrences, consultation and other legislative approvals

Division 6.2 Concurrences, consultation and other legislative approvals – general provisions

Section 6.9 The Minister may amend a local plan for the purpose of removing consultation concurrence and other legislative provisions for the purpose of facilitating the carrying out of any particular development or any particular kind of development to remove the requirement for consultation or concurrence.

Part 7 Infrastructure and other contributions

Division 7.5 Planning agreements

Section 7.37(i) The Minister may determine:

(a) the procedures to be followed in negotiating or planning agreement, or

(b) the publication of those procedures, or

(c) other standard requirements with respect to planning agreements.

This is not an exhaustive list but is included to illustrate the breadth and number of Ministerial discretions which will affect the potential for achieving a new planning system that is "simpler, more certain and more transparent" in accordance with the Government's stated objective.

Ancillary provisions

The Committee is also concerned that a number of other provisions in the legislation provide for either the Minister or another consent authority to not be bound by the planning legislation. This completely undermines the principles of certainty and transparency that are a much vaunted part of the new planning system.

Clause 10.39 Enforcement by order of the Court.

The effect of this provision is to fetter the discretion of the Court.

Clause 11.1 Regulations – miscellaneous
Regulations may be made, in particular, for or with respect to the following:

(a) exempting specified or classes or persons, premises or other matters from any specified provision of the planning legislation,
(b) any function conferred by the planning legislation on any person.

Section 149 certificate reform

The planning information certificate (currently section 149 certificate) will be the delivery system for planning information for many members of the local community. This certificate is the means by which a potential purchaser obtains information about strategic planning and development controls applying in their new area.

Under the new planning system, a potential purchaser will not have participated in the community consultation that set the parameters for planning controls in that local area and will not have objection rights in relation to most development that may affect his or her property.

The Law Society, both through the Committee and its Property Law Committee, is very interested in improving the delivery of planning information through the section 149 certificate. The Committee is keen to pursue its long standing interest in this area and considers that there is now an opportunity to update the certificate and make it an appropriate and relevant document for use by all stakeholders in the conveyancing process as well as providing an opportunity for developers and other users to obtain reliable information about a range of issues in the planning process.

The Committee and the Property Law Committee have given detailed consideration to the content and the format of the certificate and would be keen to pursue reform in this area directly with the Department. Copies of previous submissions are attached. The matters raised in these submissions will largely be regulated by Regulation. The Committee would be happy to participate in a working group with the aim of developing a certificate that represents the delivery of the benefits of the new planning system advocated in the White Paper, including the ePlanning initiatives.

Objects of the new Act

The importance given to economic growth and efficient decision-making in the proposed new legislation highlights the change in emphasis between the existing Act and the proposed new legislation.

The current objects provide for the "orderly" economic use and development of land. References in the current objects to "ecologically sustainable development" have been replaced with "sustainable development" and the promotion of "economic growth and environmental and social wellbeing through sustainable development".

Proposed section 1.3(2) provides:

> Sustainable development is achieved by the integration of economic, environmental and social considerations, having regard to present and future needs, in decision-making about planning and development.

The Committee considers that this is not a minor change and reflects the prioritisation of growth and economic considerations rather than a focus on ecologically sustainable development.

When other provisions of the Planning Bill are considered, the significance of this change becomes clearer. The requirement for consideration during a merit assessment of "public interest" is modified by section 4.19(3)(d) by the inclusion of the words "in particular whether any public benefit outweighs any adverse impact of the development". In the absence of a focus on ecologically sustainable development in the objects, this is likely to have the consequence that intergenerational equity, the precautionary principle and other environmental benefits will be outweighed by perceived public benefit in economic and social terms.

Building regulation and certification

The White Paper provides for a number of changes to the building and subdivision certification requirements and procedures to address long standing concerns with the current

regime. The Committee is concerned, however, that while clarification is necessary and desirable, the additional requirements and paperwork may threaten the achievement of a simpler, streamlined process.

> Accredited building designers, along with registered architects, will be responsible for preparing plans for more complex building types (townhouses, large retail shops and factories that contain an office) and will have to sign off their designs. (page 185, White Paper)

It is not clear how this will work in practice. If a further compliance certification is to be introduced, the level of detail, in plan form, required for practitioners to sign off on their designs will create additional costs and further slow or delay the approval process. Consideration needs to be given the relevant standard(s) and the development of guidelines to assist designers.

The Committee also notes that plans have to be certified and submitted before work starts on critical aspects such as structural, mechanical, electrical and fire systems through prescribed standard conditions. It is suggested that standard conditions will need to be developed and consideration given to consistency between the form, the type and number of conditions a certifier can impose.

Given the extent of proposed compliance certificate certification, a flow on effect will no doubt be increased insurance premiums and increased construction costs (passed on to the builder/owner).

Clarification on what is consistent with the development consent needs to be considered. The test as it presently stands is subjective. It may be appropriate for the Building Professionals Board ("BPB") to provide a checklist for accredited certifiers. Case law on this particular issue is complex and evolving. Recent amendments to the current Act have not adequately addressed this problem.

> To increase confidence that what is constructed is consistent with the development consent and complies with the applicable requirements, once a construction certificate or complying development certificate is issued, all relevant documentation will be distributed to relevant parties. There will be clear requirements on the building certifier to provide copies of construction plans, specifications, compliance certificates and compliance reports to the applicant, council, consent authority and landowner. There will also be clear requirements regarding the documentation the applicant must provide to the builder. (page 192, White Paper)

While this is a step in the right direction, it comes at a cost to all concerned. Costs aside, owners and builders will continue to "amend" building design and construction after an approval is given, more often than not, without the knowledge of the Principal Certifying Authority ("PCA"). It is not until the PCA conducts a mandatory inspection (assuming one is booked) that the PCA becomes aware of all or any variations. Owners and builders need to take greater responsibility and be held liable for variations.

It should be mandatory that an accredited certifier or PCA issue a Notice of Intention if unauthorised building works are observed. Given this is currently a discretionary power, accredited certifiers and PCAs generally notify the council or consent authority of the anomalies and it is for the council or consent authority to investigate and issue Notices/Orders.

> It is proposed that critical stage inspections be improved by mandating inspections that relate to the risks and complexity of a building's design and construction. These will include inspections of elements of building work that are commonly subject of building defects, including fire safety, structure and sound insulation. (page 193, White Paper)

Again, this is a step in the right direction. An offence should be created, or penalties imposed, for any person who does not book a mandatory inspection.

Key details in Regulations

Some key details in relation to a number of important reforms will ultimately be contained in Regulations. These include the ancillary provisions in Schedule 11 referred to earlier relating to persons, premises or matters that may be exempted by regulation from any specified provision of the planning legislation. Clause 5.8 (b) of Schedule 5 enables regulations to be made requiring owners of land on which State infrastructure development is proposed to be carried out to consent to applications for approval under that Division. These are critical matters affecting stakeholders' rights but are not part of this consultation as the Regulations have not been finalised or made available for comment at this stage. Stakeholders are not in a position to consider or evaluate the reforms as a whole.

Transitional issues

Given the size of the task and the fundamental nature of the reforms it is clear that significant effort will have to be put into the drafting of savings and transitional provisions to provide clarity for projects and planning proposals which are under way or about to commence.

The Committee notes that it will be necessary for the Government to allocate substantial resources to implement the proposed reforms, and that substantial procedural and cultural change will be necessary. In view of these factors it will be incumbent on the Government to ensure there is a workable framework for participants in the planning system during this transitional phase.

Conclusion

The Committee appreciates the opportunity to participate in the reform process and looks forward to the opportunity to comment further during the transitional and implementation phases.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: MM:lb:041110
Direct line: 9926 0202

5 November 2010

Policy, Planning Systems and Reform
NSW Department of Planning
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SYDNEY NSW 2001

Email: innovation@planning.nsw.gov.au

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:

Items1 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

THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: MM:LJB:Property Law 2010
Direct Line: 9926 0202

20 April 2010

Ms Sarah McGirr
Team Leader, Natural Resources Policy
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Dear Ms McGirr

Review of Section 149 Certificate Process

Thank you for the draft background paper on possible options for reform of Section 149 Certificates. As indicated in our previous letter and in our meeting with you, the Law Society through its Property Law Committee (Committee) generally supports the initiatives being taken. Using your headings, the Committee has the following comments:

Issue: Increasing complexity and length of certificates

The Committee supports reducing the mandatory number of items to appear in the 149(2) Certificate to essential information required for conveyancing.

In relation to the content of that certificate and the supplied table, there are two matters of concern:

1. The reference to hazard risk restrictions is indicated on the table as moderate – high, depending on the level of restriction and relevance to the site. However, the Department proposes making that matter mandatory on 149(5) Certificates only. The Committee does not support this change and considers this item should be included in the 149(2) Certificate. However, the question posed in the certificate should be twofold:

   (a) Is there a council policy or public authority policy that applies to the Local Council area, or otherwise, which imposes restrictions for development due to:
   - i) land slip,
   - ii) bush fire,
   - iii) tidal inundation,
   - iv) subsidence,
   - v) acid sulphate soils or
   - vi) other risks ?

(b) Has the land been identified under such a council policy or public authority policy as being subject to restrictions for development due to:
   i) land slip,
   ii) bush fire,
   iii) tidal inundation,
   iv) subsidence,
   v) acid sulphate soils or
   vi) other risks ?

2. The second matter relates to Nation Building legislation. As the Committee understands it, the Nation Building disclosure only applies to public land. If the legislation extends the Nation Building legislative change to private land, then the matter should be reviewed.

Issue: Absence of Important Information

Two other matters arise and which have been previously sought to be included:

1. The matter of outstanding notices – the Committee considers this matter is very important as part of the conveyancing process and information should be readily available within council. The zoning certificate is an appropriate place to include information about outstanding notices, and we ask that this item be reconsidered.

2. Further, the question of whether or not section 28 of the *Environmental Planning & Assessment Act* 1979 has been addressed in the relevant Local Environmental Plan (**LEP**) should be reconsidered. It can be a standard item and the question can simply pose as to what clause, if any, in the LEP contains such restrictions.

   It is considered that this reference to section 28 could be added to the section 149(5) certificate.

Otherwise, the Committee supports the initiatives proposed in this part of the paper.

Issue: Challenge of managing s149 information

The Committee strongly supports the prescription of a planning certificate template for both 149(2) and 149(5). Ideally, the certificate should be framed so that the majority of questions can be posed in a form that admits only a "Yes" or "No" answer. As the planning system moves to adopt the standard instrument state-wide, there should be no reason for different certificates being provided in different forms. To the contrary, variances should be discouraged.

However, to achieve this process it may be necessary to make a minor alteration to s149 (5) as that subsection does not make provision for prescribing the form and manner in which the information is provided (unlike s149 (4)).

Thank you for the opportunity to provide these comments.

Yours sincerely

Mary Macken
President

THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: MM:LJB:1303306
Direct Line: 9926 0202

12 March 2010

Ms Sarah McGirr
Team Leader, Natural Resources Policy
Policy, Planning Systems and Reform
Department of Planning
GPO Box 39
SYDNEY NSW 2001

Dear Ms McGirr

Review of Section 149 Certificate Process

The Law Society of New South Wales appreciates very much the opportunity to be involved in the process of reviewing the Section 149 Certificate as part of the review of the *Environmental Planning and Assessment Regulation 2000* (EP & A Regulation).

As you would be aware, the Society through its Property Law Committee (Committee) is very interested in this area and has been advocating significant change for many years. It is very exciting that there is now an opportunity to update the certificate and make it an appropriate and relevant document for use by everyone in the conveyancing process, as well as providing an opportunity for developers and other users to obtain reliable information about a range of issues in the planning process.

As requested, attached is a table with the Committee's comments completed, indicating whether the need for the information in the items included in the existing Schedule 4 of the E P & A Regulation (Schedule) are to be categorised as "high", "medium" or "low" with an additional column for comments.

The Committee would like to make a number of particular comments:

Purpose of Certificate

1. In making these comments, it is important to recognise that the certificate under Section 149(2) of the *Environmental Planning and Assessment Act* (Act) is primarily a disclosure document as it provides information about the "true status" of the land. As such, it is a snapshot of the land use restrictions applicable to the property as at the date of the certificate.

2. The Committee does not see the Section 149(2) Certificate as a general information provision document. If it is to perform that function, that will unnecessarily dilute and confuse its primary purpose. Although this difference may appear a subtle one, it is vital that persons proposing to purchase in particular understand the characteristics of the land they are considering purchasing. The provision of this certificate is the only formal means of achieving that knowledge.

3. In this light, the Committee also strongly recommends the Department ensures that the review of the items in the Schedule is carried out in co-ordination with the review of the *Conveyancing (Sale of Land) Regulation 2005.*

Expanded Use of Section 149(5) Certificate

4. The Committee suggests that as a complement to the use of the Section 149(2) Certificate, the use of Section 149(5) should be expanded and in that process, its emphasis shifted from the conveyancing process to the wider development community so it would be seen as the main means of providing a wider more detailed range of information concerning the property.

More Prescriptive Certificate Format

5. The Committee considers that the form of the certificate needs to be more prescriptive, with simpler questions. Ideally, the certificate should be framed so that the 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. The Committee can see no reason why the same form cannot be used for the provision of the same information. The Department 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.

6. 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.

Notices

7. A critical item for any purchaser is whether or not a notice or order issued by council applies to the land. The Committee considers this a very overdue and necessary inclusion. Some councils include this information as part of a Section 149(5) Certificate. However, in view of the importance of the information and the fact that the Schedule is used for bringing in information from other Acts, it appears to the Committee to be highly appropriate to include relevant information from council's own files.

Section 28 of the Act

8. The issue of the application of Section 28 of the Act does need to be addressed. Councils, with a few exceptions (notably Woollahra Council), do not include a copy of the relevant environmental planning instrument which zones the land, in the certificate. The

practice of including a full copy of the LEP as part of the Section 149(2) certificate should not be encouraged. However, it is highly relevent in the conveyancing process, to learn whether or not the relevant instrument has a suspension of regulatory instruments clause of the type sanctioned by Section 28 of the Act. Again, it can be a standard item which draws to the attention of the reader of the certificate, whether or not an environmental planning instrument has specified any regulatory instruments pursuant to section 28 (in the form of a yes/no answer as per item 5 above). If the answer is "yes", the certificate should then provide particulars of that EPI and of the classes of regulatory instruments affected.

Timing of Changes

9. The timing of changes to the Schedule as raised in the meeting needs to be addressed. The Committee appreciates the issue is problematic and changes to the law are not matters that can be always predicted. However, information which is provided must be reliable. If the information is wrong because of a problem in its notification, then the certificate has the potential to be extremely dangerous in its use and can create havoc in the conveyancing process and other areas. The Law Society has written to the Department previously on this subject.

10. The Committee considers that a procedure needs to be established to avoid those consequences. The Committee's suggestion is that a change to the Schedule should not take effect until thirty days after the relevant information is made available to the public as a prospective change. The Committee would be happy to discuss the means of dissemination of that information but at the very least suggest that publication on the Legislation Website, E Plan and a Planning Circular, as well as notification to the Law Society, should occur at least thirty days before the implementation of any change which will affect the structure or content of the Section 149 Certificate.

Examples of Certificates

11. The Committee has, as a separate exercise, prepared examples of certificates which have been provided by members. These will be forwarded to you separately. The certificates warrant analysis as to the manner of presentation of information and the Committee would be most interested in being involved in an exercise to explain which of these are useful certificates and which are not.

The Committee appreciates that many of the matters raised will require further discussion and input and welcomes very much the opportunity to remain closely involved in the process to ensure a better outcome for all users of planning information. Once again, thank you for the opportunity to provide these comments to you.

Yours sincerely

Mary Macken
President

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Attachment A – Prescribed planning certificate provisions

Certificate Requirement	Details – Schedule 4 of the EP&A Regulations 2000	How is council made aware of the information requirements for the s149 certificate?	Need for information high/mod/low	Comments [see note at end to explain high/mod/low]
EPIs and DCP	List each EPI, DCP, planning proposal and draft EPI applying to the land	Council policies (except SEPPs)	High	1. SEPPs which do not zone land should be excluded from the certificate, but a general reference made as to where they could be sourced. 2. in each case, a means to obtain further information should be provided.
Zoning and land use under LEPs	Land use zone; development permitted with consent, without consent or prohibited in the zone; fixed minimum land dimensions for erecting dwellings; critical habitat; land in conservation area; environmental heritage	Mostly council policies. *Threatened Species Conservation Act 1995* (s48 & s54) requires councils be given notice and provided with a map of declared critical habitat.	Land use zone (H); development permitted with consent, without consent or prohibited in the zone(ALL M); fixed minimum land dimensions for erecting dwellings (M); critical habitat (M); land in conservation area(M); environmental heritage (H)	The land use is a critical piece of information and deserves prominence in the certificate, before other EPI's and any DCP. Permissible/ prohibited development also needs to be clearly stated. Whether the land contains a heritage item is also a critical piece of information
Complying development	Whether complying development under *SEPP (Exempt and Complying Development Codes) 2008* can be carried out. Reasons why cl1.19 of the Codes SEPP might preclude complying development.	No statutory council notification process. Changes to the Codes SEPP are notified to councils through DoP practice (e.g. planning circulars and Fact Sheets).	H	The general view was that whether or not complying development could be carried out on the land was important information for purchasers, and if it was to be included in the certificate, then it needed to be a very clear statement as to the availability of the SEPP.
Coastal protection	Land affected by the operation of s38 or 39 of *Coastal Protection Act 1979* – concurrence for certain development in the Coastal Zone.	Applies to mapped Coastal Zone. s4B(3) of CP Act requires maps be available for inspection at councils. Only a s149 requirement if council has been notified that land is affected.	L	Coastal protection matters appeared less relevant
Mine subsidence	Land proclaimed to be in a mine subsidence district within the meaning of s15 of *Mine Subsidence Compensation Act 1961* (MSC Act)	Mine subsidence districts proclaimed under s15 of the MSC Act and published in the Gazette. Councils consult with Mine Subsidence Board on mine subsidence districts when preparing LEPs (s117 Direction 4.2 – Mine Subsidence).	H	
Road widening and road realignment	Land affected by any road widening or road realignment under Div.3 Part 3 of *Roads Act 1993* or any EPI or council resolution.	Road widening under Div 3 Part 3 of Roads Act, s25 requires that road widening orders be published in Gazette, and road authority must lodge the order survey plan with the council.	H	The Conveyancing (Sale of Land) Regulation (CSOLR) does not extend to road widening in the same manner as Sch 4 item 6. The affectation is the same, - regardless of the source of authority. Other sources of road widening (refer CSOLR sch 3, part 3 item 1) should be included here, and vice versa.
Hazard risk restrictions	Land affected by a council policy or public authority policy that restricts development due to land slip, bushfire, tidal inundation, subsidence, acid sulphate soils or other risks.	Either council policy or for other public authorities, council must be notified of policy's application to s149 certificates.	H	It would be very useful to know if the relevant policy is site/area specific or of general application. i.e. - Is the land affected because the policy applies in the area generally, or because of a particular characteristic of that land.
Flood related	If development on land for dwelling houses, dual	Council's LEP developed with consideration for flood	H	Same point applies as for hazard Risk

Attachment A – Prescribed planning certificate provisions				
Certificate Requirement	**Details – Schedule 4 of the EP&A Regulations 2000**	**How is council made aware of the information requirements for the s149 certificate?**	**Need for information high/mod/low**	**Comments (see note at end to explain high/mod/low)**
development controls	occupancies, multi-dwelling housing or residential flat buildings or for any other purpose is subject to flood related development controls.	prone land as identified through council's flood studies under the NSW *Floodplain Development Manual 2005* (s117 Direction 4.3 – Flood Prone Land).		
Land reserved for acquisition	Land identified in an EPI or proposed EPI providing for acquisition of the land by a public authority.	Council policy (for LEPs) No automatic council notification for SEPPs with acquisition provisions.	H	
Contribution plans	Name of each contributions plan applying to the land	Council policy Nb: "Contributions plan" only includes plans under s94EA (local council plans). Special infrastructure contributions under s94EF are not captured under this item in Schedule 4.	L	These are not seen as relevant to the conveyancing process
Bush fire prone land	A statement of whether or not all or any of the land is in bush fire prone land.	Council responsible for recording bush fire prone land (designated by the NSW RFS) on a bush fire prone land map for the area as referred to in section 146 (2) of the Act.	H	
Property vegetation plans	A statement if a property vegetation plan under the *Native Vegetation Act 2003* applies to the land (if council has been notified).	No formal council notification requirement for PVPs under the NV Act. PVPs only a s149 requirement if council has been notified of the existence of the plan by the person or body that approved the plan under the NV Act. Currently, PVPs may be registered (if the landholders and others consent) by the Registrar-General on the General Register of Deeds and make an entry in Register kept under the *Real Property Act 1900*.	L	Separate disclosure of a PVP would also be expected from the vendor, if applicable.
Tree dispute orders	Orders made under the *Trees (Disputes Between Neighbours) Act 2006* to carry out work in relation to a tree on the land.	*Trees Act* requires that Court provide a copy of any order it makes to the relevant council. Only s149 requirement if council notified of the order.	L (if the proposal that tree disputes be removed from the CSOLR is adopted); otherwise M	This is a topic which in the Committee's view should be excluded from the warranties in the CSOLR. If that view were adopted as part of the review of the CSOLR,, the existence of orders notified to Council would be a matter best included pursuant to s149(5).
Directions under Part 3A	Statement of any directions by the Minister under s75P(2)(c1) of the Act that prohibitions or restrictions in an EPI do not have effect.	No formal council notification requirement for directions under s75P(2)(c1).	L	This notification would only occur as a result of the approval of a project, so its relevance is limited in the conveyancing process.
Site compatibility certificates – seniors housing	Site compatibility certificate for seniors housing under *SEPP (Housing for Seniors or People with a Disability) 2004* applying to the land, period of validity and terms imposed as conditions of consent to a DA.	No statutory notification in SEPP - SCCs notified to councils as a matter of DoP practice. Only a s149 requirement if council is aware of the SCC.	L	Limited utility
Site compatibility certificates – infrastructure	Site compatibility certificate under *SEPP (Infrastructure) 2007* in respect of proposed development on the land and period for which the certificate is valid.	No statutory notification in SEPP - SCCs notified to councils as a matter of DoP practice. Only a s149 requirement if council is aware of the SCC.	L	Limited utility
Site compatibility certificates – affordable rental housing	Site compatibility certificate for affordable rental housing under *SEPP (Affordable Rental Housing) 2009* applying to the land, period of validity and terms imposed as conditions of consent to a DA.	No statutory notification in SEPP - SCCs notified to councils as a matter of DoP practice. Only a s149 requirement if council is aware of the SCC.	L	Limited utility

Attachment A – Prescribed planning certificate provisions				
Certificate Requirement	**Details – Schedule 4 of the EP&A Regulations 2000**	**How is council made aware of the information requirements for the s149 certificate?**	**Need for information high/mod/low**	**Comments (see note at end to explain high/mod/low)**
Contaminated land management	Provisions under the *Contaminated Land Management Act 1997* (CLM Act). If the land is: significantly contaminated land; subject to a management order; the subject of an approved voluntary management proposal; subject to an ongoing maintenance order; or the subject of a site audit statement.	S.59 of CLM Act requires councils to be informed by DECCW of land declared to be significantly contaminated land, management orders, voluntary management proposal or maintenance orders. S.53B requires site auditors to provide councils with copies of site audit statements relating to site audits.	H	Expand the note so it clearly forms part of the certificate. The topic should be dealt with as an enumerated item, as was the case prior to 1 July 2009.
Nation Building and Jobs Plan provisions	Provisions under the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009* (NBJP Act). Advice about any exemption under s23 or authorisation under s24 of the NBJP Act.	Under s26 of NBJP Act, Co-ordinator General may provide council with a copy of s23 exemption or s24 authorisation. Only a s149 requirement if council is provided with a copy of the exemption or authorisation by the Co-ordinator General.	L	Relevance is questionable. In addition, the method of disclosure (reference in the Act, not the Schedule to the EP & A Reg., should be discouraged).

HIGH/MODERATE /LOW

a. "High" – something so important that every prospective purchaser should have that information before them before they sign a contract to purchase (the "vendor disclosure" test).
b. "Moderate" – something of importance to a significant number of purchasers so that if the information is different from what is disclosed in the certificate attached to the contract the purchaser should, in some circumstances, have a right to rescind (the "vendor warranty" test).
c. "Low" – information which may be of interest to a vendor, who may want to preclude objection by a purchaser to that information, and to a limited class of purchaser, but not of sufficient significance to ground a right of rescission (the "section 149(5)" test).