THE LAW SOCIETY
OF NEW SOUTH WALES

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Mr Marcus Ray
Director, Assessment Systems
Department of Planning and Infrastructure
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Dear Mr Ray,

Draft State Environment Planning Policy (State and Regional Development) 2011(draft SEPP)

I am writing to you at the request of the Law Society's Environmental Planning and Development Committee (Committee).

The 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 instrumentality, corporate and private clients.

The Committee appreciates the opportunity to comment on the draft SEPP and strongly endorses the process of public exhibition of draft State Environmental Planning Policies as well as any new proposed regulations and legislation.

Identification of State significant development (SSD) and State significant infrastructure (SSI)

The draft SEPP provides that development specified in the relevant schedules is SSD or SSI (as the case may be). This removes a defect in the (soon to be former) Major Development SEPP which only made projects Part 3A Projects once the Minister formed the required opinion that the development was of a type specified in the relevant schedules. The clear identification of what constitutes development that is SSD or SSI removes what was a considerable source of uncertainty under Part 3A and is to be commended.

The Committee suggests, however, that if these developments were identified in the *Environmental Planning and Assessment Act 1979* (Act) or the *Environmental Planning and Assessment Regulation 2000* (Regulation), rather than in the draft SEPP, as provided under the new section 89C, then the object of achieving the appropriate level of public participation at the strategic level of the planning process would be better promoted.

Clauses 8(2) and 14(2) operate so that, where part of a development is SSD or SSI, then the remainder of the development will also be SSD or SSI, unless the Director-General determines that part of a project is not sufficiently related to the SSD or SSI. This is again a very sensible approach, which will avoid the difficulties inherent in one project spanning separate approval regimes.

Exempt and complying development

Clauses 9 and 17 operate to exclude certain exempt or complying development from becoming SSD or SSI providing that the exempt or complying development is not part of a wider project which is SSD or SSI. This remedies a defect in the former Part 3A regime whereby even previously exempt or complying development required assessment and approval under Part 3A once the Minister formed the opinion the development was of a type specified as being a Part 3A project. This is commendable. However, the proposed provisions do not go far enough in the Committee's view for the reasons set out below.

The proposed new sections 89J (3) and 115ZG (4), like the current section 75U (4) of the Act, provide exemptions from a range of legislation from "any investigative or other activities that are required to be carried out for the purpose of complying with any environmental assessment requirements" for SSD and SSI projects. The effect of this is, for example, that a proponent will not be in breach of the *National Parks and Wildlife Act 1974* if an Aboriginal object is inadvertently disturbed during the course of preliminary investigations required to meet environmental assessment requirements (EARs).

However, the exemptions contained in the proposed new sections 89J (3) and 115ZG (4) do not extend to prevent a breach of the Act if a proponent carries out preliminary works, such as geotechnical investigations, which (whilst forming part of a wider SSD or SSI project) are also either exempt development (under, for example, clause 82(a) of SEPP Infrastructure) or arguably not development at all. As a result, a person carrying out preliminary geotechnical investigations for the purpose of complying with EARs (which obviously needs to be done prior to any grant of consent for a SSI or SSD Project) will still run the risk of breaching the Act by technically speaking, carrying out SSI or SSD without consent.

This problem could be avoided by amending the draft SEPP to make it clear that any preliminary investigations carried out for the purpose of complying with EARs for SSI or SSD are not themselves SSI or SSD development. If this amendment were made then clauses 8(2) and 14(2) would also require amendment to carve out such preliminary investigations.

Critical State significant infrastructure (Schedule 5)

The Committee endorses the need to exercise caution in designating a development as critical State significant infrastructure, given that this restricts the availability of merit appeals.

Amendments to the Regulation

The implementation of the draft SEPP will involve the amendment of the Regulation as noted in the policy statements issued by the Department. The Committee would appreciate the opportunity to comment on a consultation draft of the amendments to the Regulation when available.

Particularly the Committee understands that a savings provision will be included to preserve applications currently before a Joint Regional Planning Panel (JRPP), so that JRPPs will remain the determining authority in such cases.

If you have any queries about this submission, please contact in the first instance Liza Booth, Policy Lawyer, Environmental Planning and Development Committee by telephone on 9926 0202 or by email to liza.booth@lawsociety.com.au.

Yours sincerely,

Stuart Westgarth
President