THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Submission on the *Draft Environmental Planning and Assessment Regulation 2021*

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The NSW Young Lawyers Environment and Planning Committee (**Committee**) make the following submission in response to the '*Draft Environmental Planning and Assessment Regulation 2021'*.

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 15 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.

NSW Young Lawyers accepts the science and wide-ranging effects of climate change, including as outlined by the United Nations Intergovernmental Panel on Climate Change in its leading expert reports. NSW Young Lawyers considers that Australia has the ability and a responsibility to rapidly reduce emissions and actively help to keep the world's emissions within its remaining 'carbon budget'.

NSW Young Lawyers recognises that there is a climate emergency, posing an unprecedented challenge for human rights and the rule of law. In order for there to be intergenerational equity and climate justice, as well as interspecies equity and ecological sustainability, the law needs to enable and require Australia to rapidly decrease CO_2 (and other greenhouse gas) emissions and to be legally accountable for their adverse contributions to the impacts of climate change.

The NSW Young Lawyers Environment and Planning Committee comprises of a group of approximately 250 members interested in our natural and built 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.

Introduction

The Committee welcomes the opportunity to comment on the proposed *Environmental Planning and Assessment Regulation 2021* (**Draft Regulation**). This submission addresses development applications, planning certificates, and designated development.

Development applications – Part 3 of the Draft Regulation

1. The Committee welcomes the amendments in the Draft Regulation in relation to development applications.

2. It is acknowledged that the Draft Regulation introduces changes that reflect the uptake in technology in the process of lodging and assessing development applications. The Committee believes this will help reduce the timeframes for processing development applications, but highlights that this should not be at the cost of community consultation and community notification processes.

3. The use of efficient digital communications and technologies will reduce paper and resources but this must not lead to any impact on community consultation with the wider community that may not have access to the internet, especially in a time when Councils are running mostly remotely due to COVID-19 public health responses.

4. The Committee raises a possible further amendment of clarification in relation to development applications. Currently Schedule 1 cl 4(1)(m) of the Draft Regulation requires an application for complying development where there is an easement to be accompanied by a certificate of title and diagram of the lot and each adjoining lot affected by the easement. This requirement for complying development applications is proposed to be included as cl 116(5) of the Draft Regulation.

5. The Committee notes that there is no equivalent requirement for development applications for properties affected by an easement. While it is expected that this would be captured in the environmental assessment of the development application, Young Lawyers suggests that there be a requirement to disclose any easements or restrictions on land as part of the proposed new standard form for development applications, with a similar requirement to attach a copy of the certificate of title and the relevant lot diagrams. This will increase transparency in decision making recognise the importance of easements and other restrictions on land.

6. We are aware of previous development applications that are unsupported by surveys (as there is also no requirement in the *Environmental Planning & Assessment Regulation 2000* (NSW) (**2000 Regulation**) to require a survey) where easements have been overlooked during the assessment process. The Committee suggests that a survey could also become a mandatory document that must be included with a development application. This could be considered further during the development of the standard form.

7. The Committee suggests finally, in respect of the administrative burden associated with post-determination notification, that the operation of the proposed cl 35 of the Draft Regulation be expanded to simplify how an amendment to a development application is to be made and notified when that amendment is made in the course of Class 1 Land and Environment Court proceedings (**Proceedings**).

8. At present, cl 55 of the 2000 Regulation provides that "A development application may be amended or varied by the applicant (but only with the agreement of the consent authority) at any time before the application is determined, by lodging the amendment or variation on the NSW planning portal." While cl 35 of the Draft Regulation simplifies this process, it does not provide any clarity on how a DA is to be modified in Proceedings where the DA itself was the subject of an actual (not deemed) refusal.

9. In those circumstances, the respondent Council in any such Proceedings is no longer the "consent authority". Council is arguably *functus officio* in that respect, as the Court will step into the shoes of the consent authority in reviewing the merits of the DA.

10. Furthermore, in circumstances where a DA has been the subject of formal refusal, the Planning Portal record for the DA is closed and cannot be reopened. Therefore, the Applicant cannot lodge the amendment/variation on the Portal (even if it obtains 'agreement' from the 'consent authority') and is reliant upon Council to create an 'Exhibition' record on the Portal to upload the amended documents to.

11. This has had a serious negative impact to access to information. Formerly, a concerned resident (or their legal advisers) could access the local Council's DA tracking website and see all documentation related to neighbouring development, including amended documents and any eventual determination arising out of Court Proceedings in a single location. As a result of recent changes to the operation of cl 55 of the 2000 Regulation in Proceedings, and the inability for an applicant to upload amendments to the Portal after a DA has been refused, this information is now spread across up to four separate databases:

    a. Council's DA tracking website;

b. The NSW Planning Portal notification website;
c. The NSW Planning Portal exhibition website; and
d. NSW Caselaw.

12. The Draft Regulation should clarify the operation of amending and notifying DAs the subject of Court Proceedings.

Planning Certificates – Schedule 3 of the Draft Regulation

Retain Requirement to List all Relevant Environmental Planning Instruments (**EPI**) and Development Control Plans (**DCPs**)

13. The Committee agrees that the need for draft DCPs to be listed in planning certificates is a positive amendment as it provides potential purchasers with greater transparency of future implications that may arise when considering whether or not to purchase a property. The inclusion of Draft DCPs in the list of relevant planning controls on a planning certificate would assist potential purchasers to consider the impact of proposed DCPs on the development potential of the land in the future. This addition is also consistent with s 4.15(1)(a)(iii) of the *Environmental Planning & Assessment Act 1979* (NSW) (**EP&A Act**) and recent case law (*Britely Property v Randwick Council* [2020] NSWLEC 1367) which requires consent authorities to consider 'any development control plan' when determining a development application.

Requirement for Council to include all applicable State Environmental Planning Policies (**SEPPs**)

14. The Committee appreciates that information on applicable SEPPs is already readily available through the NSW Planning Portal. However, the Committee supports the requirement for Councils to include this information on Planning Certificates as it will facilitate transparency and will be of great utility for potential purchasers to have all the applicable planning policies and instruments accessible in one place.

Draft EPIs and DCPs made within 3 years from date of Exhibition

15. As mentioned above, the Committee supports the inclusion of draft EPIs and draft DCPs as being listed on planning certificates, however, the Committee is of the view that planning certificates should list draft EPIs and DCPs which have not been made within **5 years from the date they were last on exhibition**. This extended timeframe will provide for greater transparency for potential purchasers of

land and is consistent with the timeframe for review of EPIs under s 3.21 of the EP&A Act (which states that Councils shall "*regularly review*" applicable DCPs and LEPs, and that the Planning Secretary is to determine whether to review relevant SEPPs every 5 years).

Rename and Reword Complying Development Clause for Clarification

16. The Committee is in support of changes to planning certificates for complying development under the proposed cl 4 of Schedule 3. It would require the planning certificate to identify whether the land is capable of complying or exempt development, and if it is incapable, then to provide reasons why. The proposed change will provide greater insight to potential purchasers of the development potential of the land, particularly the severity of why complying or exempt development is incapable on the land without the need for the purchaser to obtain legal advice as they themselves can make a reasonable judgement. Alternatively, this may prompt purchasers to obtain further legal advice if the issue directly impacts the proposed purchaser's objective for development capabilities on the land.

Update Hazard and Risk Restrictions

17. The Committee supports the inclusion of the proposed additional hazards and risks at cl 10 of Schedule 3 as it will enable potential purchasers of land to be informed at a very early stage of their interest in the land as to the hazardous risks associated with the property.

18. The Committee additionally supports the requirement to note any bushfire prone land, loose-fill asbestos insulation and mine subsidence on the planning certificate (as proposed in cll 11-13 of Schedule 3) to facilitate greater transparency of the risks associated with the land. Several local government councils already include the proposed additional hazards and risks proposed in cl 10 Schedule 3, which reaffirms the Committee's view that this amendment is welcome and will encourage consistency for planning certificates across all local government councils.

Requirement for Council to identify other additional permitted uses

19. The Committee also supports the inclusion of land which has been earmarked for acquisition or road works by an authority of the State in accordance with cll 7 and 8 of Schedule 3. This proposed amendment will assist potential purchasers by notifying them of any and all proposed state acquisition relating to the land and any proposed road works which will impact the land.

Updating Fees related to Planning Certificates

20. The Committee notes that cl 259 of the 2000 Regulation provides a blanket fee for planning certificates of $53 and any additional fees to not exceed more than $80. The proposed cl 9.7 of Part 9 of this Schedule to the Draft Regulation proposes that the planning certificate fees will now be 0.62 fee units and additional fees to not exceed 0.94 fee units.

21. The Committee acknowledges the need for planning certificate fees to increase to reflect the greater detail which is proposed to be included. However, the proposed calculation of the fees under cl 9.7 is confusing, overly complicated and goes against the objective of the Draft Regulation which is to simplify the existing provisions.

22. The Committee suggests that a standardised monetary fee for planning certificates be applied (similar to the NSW Land Registry Services (**LRS**) regulated fees which increase by a nominal amount each year) as opposed to requiring Council's, lawyers and conveyancers to calculate fees through fee units and CPI indexation.

Designated Development – Schedule 2 of the Draft Regulation

Revise Categories that Trigger Designated Development

23. The inclusion of large-scale battery storage facilities as a new category of designated development[1] is welcomed to provide an approval pathway for this currently undefined development. Given the uncertainty of environmental impacts associated with this type of development, we recommend that guidance be developed to support environmental impact assessment.

24. The Committee notes that energy recovery facilities are listed as designated development[2]. However, the Regulatory Impact Statement indicates that these provisions are not intended to apply to Special Activation Precincts (**SAPs**) in regional NSW[3]. Exclusion of energy recovery facilities within SAPs in regional NSW from the designated development requirements is not supported. Whilst SAPs benefit from alternate planning assessment pathway under the *State Environmental Planning Policy*

[1] Draft *Environmental Planning and Assessment Regulation 2021*, Sch 2 Part 2, Cl 16
[2] Draft *Environmental Planning and Assessment Regulation 2021*, Sch 2 Part 2, Cl 21
[3] NSW Department of Planning, Industry and Environment, *Draft Environmental Planning and Assessment Regulation*, Regulatory Impact Statement (2021) 62.

(Activation Precincts) 2000, the master plan, precinct plan and Activation Precinct Certificate processes do not afford the same targeted environmental scrutiny as environmental impact statements (**EIS**), required for designated development. Given that energy recovery facilities have been identified as designated development due to substantial community concern and uncertainty around mitigation measures and human health,[4] it is unclear whether the SAP process would be sufficiently rigorous.

Exclude Lower Risk Activities from Being Designated Development and Update Categories based on Industry Changes

25. Removal of well-understood low risk developments from the designated development category is supported. However, it is recommended that a consistent suite of standards should be developed to support Councils in assessing these developments that will now avoid the detailed scrutiny under designated development provisions.

Align with POEO Act Activities

26. The Committee supports aligning designated development provisions for activities requiring an environment protection licence with the terminology and thresholds under the *Protection of the Environment Operations Act 2000* (NSW) (**POEO Act**). Consistency will provide certainty for proponents and the community as to what constitutes potential environmental impacts and will reduce the regulatory burden of redefining the same term used between differing legislation.

Update Location-Based Triggers for Designated Development

27. The Committee commends the clarification provided in cl 2(3)(a) of Schedule 2 (Measuring distances between dwellings and development works), which specifies that the dwelling does not include associated works such as access roads. On the other hand, the Committee considers that associated works are relevant to determining the extent of a *proposed development*. For example, cl 2(2)(b) (measuring the development's distance from the coastline) excludes access roads from the extent of the development. Given that certain development is classed as designated development when occurring in proximity to the coastline, it is relevant to take associated works such as access roads into account as these may also have an environmental impact.

[4] NSW Department of Planning, Industry and Environment, *Draft Environmental Planning and Assessment Regulation*, Regulatory Impact Statement (2021) 62.

28. The proposed cl 2 of Schedule 2 of the Draft Regulation would benefit from additional clarity of the meaning of 'development site'. It should be clarified that 'development site' means the spatial extent of work associated with the development, including existing and proposed work or use of land. The proposed cl 2 includes various descriptors to measure distance which infer distinction. Whilst specific details may be added for certain types of developments, consistency in the terminology used within the proposed cl 2 of Schedule 2 of the Draft Regulation is recommended.

Update Designated Development Exclusions

29. cl 48 of Schedule 3 of the Draft Regulation sets out an exception whereby alterations to existing or approved development are not designated development, if in the consent authority's opinion, they do not significantly increase the environmental impacts. The value of excluding modification applications from the provisions of the proposed cl 48 of Schedule 3 is queried. To satisfy the statutory pre-condition of s 4.55(1A) of the EP&A Act, a modification to a development consent must be substantially the same and of minimal environmental impact. A modification application should be afforded the same opportunity for potential exemption from designated development under the proposed cl 48.

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.

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