Second Reading

The Hon. MICHAEL VEITCH (Parliamentary Secretary) [6.03 p.m.], on behalf of the Hon. Tony Kelly: I move:

That this bill be now read a second time.

I am very pleased to introduce the Planning Appeals Legislation Amendment Bill 2010, which has been developed in conjunction with my colleague the Attorney General. The bill amends the Land and Environment Court Act 1979, the Environmental Planning and Assessment Act 1979 and the Environmental Planning and Assessment Amendment Act 2008. The primary purpose of the bill is to provide quick, just and cost-effective appeals and reviews for users of the planning system. In particular, it aims to make it easier and cheaper for home owners to have local council decisions on development applications and modification applications reviewed by the Land and Environment Court by introducing a new conciliation-arbitration scheme designed specifically for disputes involving small-scale development.

The New South Wales Government has a longstanding aim to reduce the costs of, and time taken for, appeals in the Land and Environment Court for reviews of council decisions on smaller-scale developments with lesser environmental impacts. Small-scale development proposals make up the vast majority of development applications and modification applications lodged with councils. For example, in 2008-09, 59 per cent of all development applications were for new dwellings or alterations and additions to existing dwellings, and 93 per cent of all development applications were for development with a construction cost of less than $500,000, the average being $288,000 for new dwellings and $74,000 for alterations and additions to existing dwellings. Despite this, only 23 per cent of merit appeals to the court in 2008-09 concerned development applications for single dwellings and alterations and additions to existing dwellings. This figure is too low. The Government is keen to make it easier for homeowners to seek a review of councils' decisions on their development applications so they can exercise their rights as quickly and as cheaply as possible.

In 2008 the Government legislated to establish a scheme of private independent planning arbitrators to review council decisions on small-scale development quickly and cost effectively. The Government remains committed to the original purpose behind the introduction of the planning arbitrators: the need for a fair, quick and cheap way of reviewing council decisions. With the introduction of the new conciliation-arbitration scheme in this bill to achieve those very aims, we propose to repeal the planning arbitrator provisions. Following further stakeholder consultations the Government has developed this new scheme of conciliation-arbitration in the Land and Environment Court. The chief judge of the court has been consulted and supports the proposed scheme.

The conciliation-arbitration scheme will provide a fair, quick and cost-effective way of reviewing council decisions on development applications and modification applications for single dwellings and dual occupancies. The Government is of the view that this scheme is best run by the court given its specialist jurisdiction and the extensive planning experience of its judges and commissioners. The new conciliation-arbitration scheme will supplement the existing alternative dispute resolution mechanisms currently run by the court. Over the last few years the court has sought to promote and expand the use of conciliation as an alternative to dealing with disputes by way of full hearings. As evidence of its success since 2007 the court has successfully increased the use of conciliation with a 158 per cent increase in the number of conciliation conferences and subsequent improvements in clearance rates. The proposed conciliation-arbitration scheme will build on the court's success by introducing a new hybrid conciliation-arbitration model designed specifically for small-scale development.

Schedule 2 to the bill provides for the conciliation-arbitration scheme by inserting new provisions in the Land and Environment Court Act 1979. The key features of the new conciliation-arbitration scheme are that reviews of council decisions on development applications and modification applications for single dwellings and dual occupancies, including subdivisions, will be automatically fast tracked to mandatory arbitration-conciliation at the first call over. The court will also be able to transfer other individual matters into the scheme at the request of the parties or on its own motion where the case is suitable for this type of dispute resolution. A commissioner will be allocated to assist the parties in trying to reach agreement by way of conciliation. Conciliation conferences will typically be held on-site providing an opportunity for neighbours, objectors and other members of the community to express their views on the proposed development. The parties' experts will also be provided with an opportunity to participate in the process, and applicants and councils will be entitled to be legally represented. In the event the parties are unable to reach agreement the commissioner will without further adjournment immediately determine the matter by way of arbitration.

The commissioner's decision will be binding on the parties as there will be no right to further merit appeal. Further appeal will be available in respect to questions of law, thus guaranteeing parties the same rights as if their appeal was decided after a full hearing. Both parties will therefore need to ensure that they are authorised to enter into a binding agreement when they attend the conciliation conference. One of the greatest barriers in the court's existing conciliation procedures is that many council staff or legal representatives do not attend conciliation conferences with sufficient authority to be able to negotiate a settlement. This will not be acceptable

under the new scheme as it is one of the key reasons for unnecessary adjournments and consequent delays and increased costs in appeals. The parties in conciliation or the commissioners in arbitration will be able to amend proposals through agreement or by the imposition of conditions. However, there will be limited opportunity for applicants to significantly amend their plans once the review has commenced. The court's analysis of the causes for delays in existing appeals reveals that amending plans during the proceedings effectively doubles the cost and time taken to conclude appeals.

The mandatory nature of the scheme and the requirement for the matter to be disposed of by the same commissioner who presided over the conciliation are essential and necessary components of the scheme, designed to deliver demonstrable time and cost savings for both parties and the court. A party's ability to voluntarily opt in and opt out of existing conciliation conferences is one of the main barriers to achieving timely and cost-effective resolution of disputes currently. Of course, the new scheme provides the necessary safeguards to protect the interests of the parties. Commissioners will be specifically trained to ensure that they can fulfil the dual role of conciliator and arbitrator fairly and equitably without prejudice to either of the parties. In addition, the practices of the court will facilitate the proper administration of the scheme. For example, all proceedings will be required to be held in plenary session with no opportunity for ex parte negotiations. Ultimately the court may on application of the parties or on its own motion terminate the proceedings at any time and refer the matter back to the court for reallocation where the circumstances warrant. This may include cases involving questions of law or complex issues where multiple experts may be required to give evidence, where substantial amendments are required to the applicant's plans, where a party might have genuine concerns about the same commissioner determining the matter by arbitration or where reallocation is required in the interests of justice.

Any perceived concerns about the dual role of a commissioner presiding over a conciliation conference before needing to make a binding decision by way of arbitration is not supported by the current experience of the court. For example, in relation to existing conciliation practices, 85 per cent of matters that go to a section 34 conciliation conference are disposed of by the commissioner who undertook the initial conciliation either because the parties reached agreement or otherwise agreed to the same commissioner disposing of the matter. Over 48 per cent of matters not settled by agreement during conciliation were later disposed of by the same commissioner that conducted the conciliation.

A court practice note will be developed to address practical implementation issues and to ensure proper management of the scheme. The practice note will address such matters as requirements for on-site conferences; procedures for amending plans and submitting draft conditions of consent; the procedures for allowing neighbours, objectors and other members of the community to have their say; the role of the parties' experts and the means by which they can participate at different stages in the process; and requirements for parties to be suitably empowered to enter into binding agreements. This practice note will be developed in consultation with the court users group and court practitioners to ensure it addresses all the relevant implementation issues.

Feedback from consultations with stakeholders stressed the importance of ensuring that the new scheme is well publicised so that councils and applicants are aware of the new requirements for this class of appeal. In this regard a range of promotion initiatives is proposed, including promoting the scheme through the court users group and other practitioner forums; on-line information on the court website; user-friendly brochures and information that will be available at the court registry and distributed to councils for display in public areas; and user-friendly information being available on the Department of Planning's website with links to the court's website for easy access to on-line forms.

The new conciliation-arbitration scheme is specifically designed for dealing with disputes concerning small-scale development. It aims to deliver significant time and cost savings for applicants, councils and the community alike. With a benchmark to be set by the court of 95 per cent of all matters to be resolved within 90 days, less than half the six-month benchmark set by the court for class 1 appeals, the new scheme will greatly assist in making the court more accessible to homeowners as well as delivering flow-on benefits across the planning system as a whole. If conciliation-arbitration is successful, it will be open to the Attorney General to expand by regulation the types of small-scale development that can be included in the scheme.

I now move to other aspects of schedule 1 to the bill, amending the Environmental Planning and Assessment Act 1979 for appeals and reviews. The bill makes an amendment to section 97B of the Environmental Planning and Assessment Act 1979, which deals with the requirement for the court to make mandatory cost orders where an applicant amends plans during the course of the proceedings. This provision was inserted in the Act in 2008 to provide a disincentive for applicants amending plans during the course of the proceedings. As mentioned earlier, amending plans has the effect of doubling the time and cost of the proceedings because of the need for adjournments to allow for assessment of the revised plans by the consent authority. The amendment to section 97B brings it closer to the original purpose of the provision; namely that it is only the costs of the consent authority thrown away as a result of having to consider the proposed amendments that should be taken into account in determining the quantum of costs and not the assessment of the development application as a whole.

The bill also amends the statutory limitation period for merit appeals from twelve to six months. This is instead of

the three-month limitation period introduced in 2008 but which we have not commenced. The six-month limit strikes a better balance, bringing us closer to the time period for appeals in other States while still allowing for reconsideration of the proposal. It balances the need to speed up the time taken to resolve reviews to reduce cost and uncertainty for applicants and neighbours whilst also providing applicants with sufficient time to negotiate with council or explore the option of internal review under section 82A of the Environmental Planning and Assessment Act 1979 before deciding if they will commence an appeal in the court.

I am pleased to advise that the bill also provides for expanded rights to internal review for applicants. These internal reviews, which are based on the well-established practices under section 82A of the Environmental Planning and Assessment Act, will now extend to determinations of modification applications as well as development applications. In addition, there will be a new right to internal review where a council determines to reject a development application for reasons of inadequacy or failure to comply with statutory requirements. This is an important addition to applicants' review rights given the reforms the Government is currently undertaking in respect to "stop the clock" procedures applying to the assessment of development applications. It will ensure that councils are made accountable for decisions to reject a development application.

The bill also includes amendments to the Environmental Planning and Assessment Act to require councils to notify a joint regional planning panel, or the Planning Assessment Commission where there is an appeal to the court concerning a decision of the panel or the commission. The council as the consent authority is the relevant party to the appeal. However, this amendment ensures that the panel or the commission, as the case may be, whilst not being a party is still able to be heard during the proceedings. The amendment is in the same terms as existing provisions in the planning Act that enable concurrence authorities to be heard in appeal proceedings. It is an appropriate amendment that recognises the important role of the panels and the commission in the decision-making process and corrects an anomaly in the existing Act. Schedule 3 to the bill repeals the existing planning arbitrator provisions in the Environmental Planning and Assessment Amendment Act 2008 and makes necessary consequential amendments for the remaining parts of that Act.

In conclusion, the Planning Appeals Legislation Amendment Bill includes important reforms aimed at delivering quick, fair and cost-effective appeals and reviews for all users of the planning system. The introduction of the conciliation-arbitration scheme in the Land and Environment Court for single detached dwellings and dual occupancies will make the court more accessible to homeowners and applicants for minor development, thereby making the planning system more equitable. In addition, the extension of internal reviews to include modification applications and rejected development applications provides increased rights for applicants as well as making councils more accountable for their decisions. The bill is an important further step in building Australia's best planning system. For these reasons I commend the bill to the House.