Environmental Defenders Office

1 July 2021

Committee Secretary
Legislative Council Regulation Committee
Parliament House, Macquarie Street
Sydney NSW 2000
By email: regulation.committee@parliament.nsw.gov.au

Dear Committee,

Inquiry into environmental planning instruments (SEPPs) — answers to questions on notice

The Environmental Defenders Office (**EDO**) appeared at the Inquiry into environmental planning instruments (SEPPs) (**Inquiry**) on 7 June 2021. During the hearing EDO took some questions on notice, which we answer below.

Questions on Notice from the Hearing

1. **Question from the Hon Catherine Cusack**

The Hon Catherine Cusack asked about the viability of a low-cost administrative appeals process for certain matters under a SEPP. Specifically, we were asked our opinion on "the concept of a low-cost method of appealing the detail of any SEPP."

It is not clear whether this question refers to the ability to seek review of the making of the SEPP itself (e.g. to challenge a clause of a SEPP as inconsistent with an Act or otherwise *ultra vires*); or whether the question refers to seeking review of a decision that involves implementing a clause of a SEPP in relation to a development decision or piece of land. There is also some confusion in the transcript questions regarding the role of the IPC compared to the Land and Environment Court or an independent administrative review tribunal. We attempt to clarify these in turn.

Review rights do not displace the need for other forms of scrutiny

A key focus of this inquiry is whether SEPPs should be disallowable, and it is suggested by some that SEPPs do not need to be disallowable as there are rights available for seeking review in Court. As noted in our evidence, review rights are often limited for third parties and are not easily or regularly exercised (and certain SEPPs actually reduce third party review rights by designating certain development pathways). Review rights are therefore not sufficiently broad (or available) to displace the need for other forms of scrutiny and accountability – such as a disallowable motion in Parliament. In addition, upfront scrutiny and consultation creates better policy, thus hopefully reducing the need to use review rights once the policy is implemented.

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Seeking review of individual decisions implementing SEPPs

As we noted in our evidence to this Inquiry, the option of developing a low-cost rapid review pathway is something that has also recently been posited in the context of decisions made under the federal environmental law – the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

In his 2020 review of the EPBC Act, Professor Graeme Samuel recommended a "limited" merits review process for development assessment and approval decisions made under the EPBC Act. Prof. Samuel proposed that this limited merits review should:[1]

- be available to proponents and those with standing under the EPBC Act;
- be limited to the material available at the time of the original decision;
- apply to the approval decision and the application of conditions;
- relate to consideration of decisions where the exercise of discretion was incorrect in the circumstances or the decision was unreasonable in the circumstances; and
- result in either the decision being affirmed or referred to the original decision-maker with recommendations on remaking or varying the decision.

However, Prof. Samuel did not make a recommendation as to who ought to conduct this review. We are of the view that review generally ought to be conducted by an independent body such as (for decisions under Commonwealth law) the Administrative Appeals Tribunal, rather than an internal review conducted by another delegate of the Minister.

To a certain extent low-cost review does exist in relation to certain decisions (e.g. development application decisions) made under the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**)[2] in that there is the opportunity for proponents to seek internal review of certain decisions.

The access to information regime in NSW also provides for low-cost review of decisions regarding the release of information, either through an internal review process by the relevant agency or through the Information Commissioner. Administrative review by the NSW Civil and Administrative Tribunal (**NCAT**) is also available.[3]

However, as we noted in our evidence before the Inquiry, we would support a rapid low-cost merits review process applying to decisions implementing SEPPs, including for third parties. This is because SEPPs deal so frequently with matters of natural resource management, which affect the community more generally. As we noted in our submission and evidence before the Inquiry and as ICAC has found, simply the existence of third-party merits appeal rights improves the quality and probity of decision-making.

However, it is unclear for which decisions under which SEPPs it was envisaged that low-cost merits review be available. We note that decisions affecting individual rights are rarely made "under a

[1] See: Chapter 4 - Trust in the EPBC Act | Independent review of the EPBC Act (environment.gov.au).
[2] See EP&A Act, Div 8.2.
[3] See *Government Information (Public Access) Act 2009* (NSW), Pt 5.

SEPP", but tend to be decisions made under Pt 4 of the EP&A Act (that is, development consents), and the SEPP dictates how Pt 4 applies. In addition to the existing review pathways in the EP&A Act, we would be in favour of limited merits review of decisions on development consents in the manner proposed by Prof Samuel in relation to decisions made under the EPBC Act, subject to the following qualifications:

- review be available to third parties as well as proponents; and
- review be conducted an independent body such as NCAT.

2. Question from the Hon Ben Franklin

The Hon. Ben Franklin asked for more clarity on how an "exceptional circumstances" SEPP-making power might work, including criteria for the exercise of such a power, and how the imperative for an urgent instrument could be balanced with the need for genuine public consultation, review etc.

In our opening statement, in addition to the matters discussed in our written submission, we raised that in certain, exceptional, circumstances a SEPP may need to be made swiftly by the Executive. These exceptional circumstances, however, should be limited to preventing imminent environmental harm. For instance, SEPP 46 was made to prevent "panic clearing" in the lead up to the making of the *Native Vegetation Conservation Act 1997*.

Where provision is made for an "exceptional circumstances" SEPP to be made, with limited consultation requirements, there would need to be strict criteria around its use and a 12-month review or sunsetting clause in lieu of disallowance.

We propose that the following preconditions be required to enliven the power to make an "exceptional circumstances" SEPP:

- that there is imminent risk of serious environmental harm;
- that the proposed instrument be for the purpose of avoiding or mitigating that harm; and
- that no other mechanism under the EP&A Act or any other Act is available that could be applied to avoid or mitigate that imminent harm in a timely manner.

Such an instrument would not be disallowable, nor would there be a requirement for public consultation, but would otherwise be made in much the same way SEPPs are currently made (subject to the preconditions set out above).

However, it is necessary to balance the competing interests of the imperative to avoid serious environmental harm, and the public consultation, oversight, and probity reasons raised in our written submission in relation to the current SEPP-making framework.

To strike this balance, we suggest that any "exceptional circumstances" SEPP be subject to review or sunsetting after 12 months. Such a review must include similar procedural elements as recommended in our written submission for the making of a SEPP, that is review of:

- the evidence-based rationale for the SEPP. In the case of an exceptional circumstances SEPP this would include examination of the status of imminent environment threat, and any measures taken to ameliorate the threat under the SEPP;
- there must be a reasonable opportunity (at least 28 days) for public comment on the operation of the "exceptional circumstances" instrument and the proposed substantive SEPP;

- any proposed substantive SEPP arising out of the review should be disallowable;
- public comments should be demonstrably taken into account when drafting and making the substantive SEPP; and
- the substantive SEPP must be consistent with the principles of ESD.

During the hearing, there was the suggestion that a tiered approach to SEPPs may be desirable, whereby certain SEPPS are deemed to be of lower impact and therefore requiring less scrutiny. As stated in our verbal evidence, we think that such a system would be too complex, provide too much discretion and be open to pressure by various interests. We are of the view that, having regard to all the matters we raised in our written submission about the significant power of SEPPs and the probity issues inherent in that, and for consistency and public certainty, it is appropriate to have only SEPPs and interim "exceptional circumstances" SEPPs. The proposed "exceptional circumstances" SEPP making power would not be based upon the impact level of the instrument, but rather, the imminence of the environmental harm it seeks to mitigate or prevent. We envisage that the power to make a SEPP in "exceptional circumstances" would be very rarely used.

Conclusion

We thank the Committee for the opportunity to provide these answers to questions on notice.

Yours sincerely,
Environmental Defenders Office

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