Submission
No 74

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

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environmental defender's office new south wales

Submission to the Legislative Council inquiry into the New South Wales planning framework

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The EDO Mission Statement:

To empower the community to protect the environment through law, recognising:

- *the importance of public participation in environmental decision making in achieving environmental protection*
- *the importance of fostering close links with the community*
- *the fundamental role of early engagement in achieving good environmental outcomes*
- *the importance of indigenous involvement in protection of the environment*
- *the importance of providing equitable access to EDO services around NSW*

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EXECUTIVE SUMMARY

The Environmental Defender's Office (EDO) is a community legal centre specialising in public interest environmental law. We welcome the opportunity to make comment to the Legislative Council inquiry into the NSW planning framework.

The EDO has a long history of engagement with the planning system in NSW and we currently occupy a position on the Planning Implementation Advisory Committee (IAC) to guide the roll-out of the latest reforms. Moreover, we have commented extensively in relation to the recent reforms that have significantly restructured the NSW planning system.[1]

We submit that there is a clear need for further development of the NSW planning system in the next 5 years and beyond to return the planning system to its roots – genuine public participation and comprehensive environmental assessment. This change to the planning regime needs to be focused on an overarching environmental paradigm guided by the principles of ecologically sustainable development (ESD). This will ensure that economic, environment and social considerations are integrated into all decision-making processes to ensure that the planning framework leads to sustainable outcomes, which is especially important in an age of climate change and increased biodiversity loss. Another key step that is required is to better incorporate climate change both from a mitigation and adaptation perspective into the planning system.

Our key recommendations are:

- Further development of the planning system is needed to reduce the system's complexity and return it to its core principles – community involvement and comprehensive environmental assessment;
- The principles of ESD should be the guiding principles of the Act to ensure sustainable outcomes and bind the terms of decision-making;
- Significant reform to the *Environmental Planning and Assessment Act 1979* is needed to introduce a new framework for major projects, ensure broad community consultation, limit exempt and complying development and to strengthen environmental impact assessment provisions;
- The EDO is concerned with plans to expedite infrastructure projects across NSW in line with the COAG reform agenda. There is a danger that any alternate assessment process for these projects will not incorporate environmental protections and appropriate assessment processes;
- The EDO does not believe there is any inappropriate duplication in approval processes between NSW and the Commonwealth *EPBC Act*. We submit that separate approval processes must be maintained to ensure that there are 2 levels of scrutiny and accountability and that the Commonwealth plays a gatekeeper role;
- The current planning framework does not adequately incorporate the consideration of the potential impacts of climate change. Reform is needed to

[1] Environmental Defender's Office (NSW), *Submission on the proposed SEPP (Repeal of Concurrence and Referral Provisions) 2008*- 22 August 2008, *Submission on the NSW Complying Development Planning Codes* - 4 July 2008, *Submission on the Environmental Planning and Assessment Amendment Bill 2008* - 24 April 2008, *Submission on the Discussion Paper: Improving the NSW Planning System* - 8 February 2008. These can be found at www.edo.org.au/edonsw.

introduce a systematic process of assessment for high-emitting projects and the introduction of adaptation measures for coastal areas;

- Natural resource considerations should be better integrated with the planning system. Approvals and concurrences from other agencies should be required regardless of the consent authority or category of development, to ensure that relevant government expertise informs decision-making. Furthermore, Catchment Action Plans must be systematically linked with the plan-making and development assessment process; and
- The EDO does not support any further attempts to implement Competition Policy into the planning assessment and approval process. Any 'anti-competitive' provisions are justified in the public interest.

We provide comment on the following terms of reference:

(a) the need, if any, for further development of the NSW planning legislation over the next 5 years, and the principles that should guide such development

(b) the implications of the Council of Australian Governments (COAG) reform agenda for planning in New South Wales

(c) duplication of processes under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 and NSW planning, environmental and heritage legislation

(d) climate change and natural resources issues in planning and development controls

(e) appropriateness of considering competition policy issues in land use planning and development approval processes in New South Wales

(a) the need, if any, for further development of the NSW planning legislation over the next 5 years, and the principles that should guide such development

(i) Is there a need for further development of planning legislation in NSW?

The planning system is becoming increasingly complex. The *Environmental Planning and Assessment Act 1979* is a complicated and multi-layered piece of legislation, accompanied by the Regulations and a myriad of environmental planning instruments, regional strategies and planning policies. Furthermore, the Act has been amended numerous times, with 8 major tranches of reforms since 1993. The last wave of reforms in 2008 has significantly restructured the NSW planning system. Changes to plan-making, development assessment, exempt and complying development and private certification have been implemented. Moreover, there are now 6 layers of development assessment and review by six different bodies: the Minister for Planning, the Planning Assessment Commission, Joint Regional Planning Panels, local councils, planning arbitrators and the Land and Environment Court.

This complex new system flies in the face of the government's push to 'streamline' the planning system and reduce the regulatory burden on developers. Indeed, the complicated rules and various layers of assessment means that it is not easy to determine

how a proposal will be assessed, or by whom. This will lead to poorer decisions and less confidence in the planning system.

In addition to introducing significant complexity to the planning system, reforms to the Act since 2005 have lead to the erosion of the Act's founding principles – public participation and comprehensive environmental assessment. The Act is now largely a technocratic and discretionary regime, with environmental assessment and public participation largely dependent on the subjective discretion of the Minister for Planning.[2] This is most apparent in Part 3A which introduced an ad hoc system of assessment and limited public consultation and appeal rights in relation to major projects.

This paradigm shift represented a significant retrograde step. The Act established in 1979 was one of most progressive in the world at the time, as it recognised the value of genuine public participation – not only in terms of democracy and good governance but the implicit recognition that community consultation leads to better decisions. Similarly, the introduction of a system of environmental impact assessment meant that in theory, all potential impacts of a development were identified and considered in the determination of development applications, which is consistent with ecologically sustainable development and the precautionary principle.

The EDO submits that in light of the above, further development of the planning system is needed to reduce the system's complexity and return it to its core principles – community involvement and comprehensive environmental assessment. This can be achieved in the context of an overarching sustainability framework which is discussed below.

(ii) What principles should guide any future development of planning legislation in NSW?

The EDO submits that the principles that should guide the future development of the *Environmental Planning and Assessment Act 1979* in NSW are the principles of ecologically sustainable development (ESD). Indeed, the principles of ESD, which include the precautionary principle, inter-generational equity and the conservation of biodiversity, are fundamental to ensuring that the Act achieves the most sustainable outcomes.

The 2002 *World Summit for Sustainable Development* reaffirmed the three pillars of sustainable development - economic development, social development and environmental protection. The concept was a result of international attempts to ensure both economic and social progress *and* the maintenance of a healthy, biodiverse environment. ESD therefore represents an overarching paradigm which should frame all decision-making. That is, all decisions must demonstrate they are sustainable or cannot proceed. However, it is important to note that this does not mean that undue weight is given to environmental factors at the expense of economic factors. Instead, it provides a sound framework for making decisions about development in a way which respects the right of future generations to a healthy and productive environment whilst ensuring that there is also economic and social prosperity.

Despite the fact that ESD is meant to be an overarching guiding principle, at present ESD plays only a minor role in the *Environmental Planning and Assessment Act 1979*. The Act does have as one of its objectives "the promotion of ecologically sustainable

[2] Robert Ghanem, "Amendments to the NSW planning system – sidelining the community" (2008) 14 *LGLJ* 140-149.

development" but it is it is simply one of a list of unprioritised and inconsistent objects, and the clause only requires the 'promotion' of ESD rather than achievement.[3] Moreover, there is no requirement to even consider ESD under Part 3A of the Act, which relates to major projects. Indeed, a recent decision, *Minister for Planning v Walker* [2008] NSWCA 224, has confirmed that a failure to consider ESD does not necessarily invalidate the Minister's decision to grant approval under Part 3A.[4] This means that ESD may not apply to those projects that are likely to have the greatest environmental impacts. Furthermore, where ESD *is* required to be considered (such as under Part 4), there is only a requirement to have regard to ESD rather than make a decision consistent with its principles. The decision-maker is free to give greater weight to other considerations once he or she has turned their mind to it.

The above shows that ESD does not currently play a prominent role in development assessment in NSW. To be given proper effect, ESD needs to move beyond the realm of merely being a consideration in decision-making. Reform is therefore needed to ensure that the principles of ESD are the guiding principles of the Act and that they bind the terms of decisions made under it. We discuss how to implement such changes in further detail below.

(iii) What further changes to the planning legislation are needed?

The EDO has consistently made recommendations on how to improve the NSW planning system in previous submissions, which the committee can refer to for more detail.[5] However, we provide a summary of the 5 key areas requiring amendment:

1. Repeal Part 3A

Prior to the Part 3A reforms in 2005, the EDO is on record as saying that the NSW environmental and planning laws were among the best in Australia if not the world; maintaining the difficult balance between the interests of the community, developers and the government.

In contrast, Part 3A introduced a largely unaccountable planning regime for major projects, with no assurance that comprehensive environmental assessment of projects is undertaken. The role of the community was sidelined by Part 3A and, in turn, the community has lost confidence in it. It should therefore be repealed. Broad consultation needs to be undertaken to establish a new approach to planning for major projects in NSW. The pathway to a new approach would require 3 key steps.

First, there is a need to better differentiate between the nature of major projects. For example;

- Critical infrastructure projects based on objective criteria not the discretion of Minister;
- Other major government projects that demonstrate that the projects are of regional of state significance; and
- Private developments

[3] Section 5, *Environmental Planning and Assessment Act 1979.*
[4] This case is currently under appeal to the High Court.

Second, there is a need to simplify and legitimate the pathways to decision-making, including reinstating removing the new multi-layered forums (arbitrators, Joint Regional Planning Panels, etc) and increasing the checks and balances of the Planning Assessment Commission (PAC) through legislation to ensure clarification around its role and its independence.

Third, any new approach must build in rigorous environmental assessment requirements and community involvement to ensure good and legitimate decisions are made.

The EDO acknowledges that these are extremely complex issues which require close analysis and elucidation. However, these issues must be addressed as it is clear that the current approach to major projects under Part 3A is not working

2. Make Ecologically Sustainable Development the overriding objective

ESD is a fundamental principle in planning and development and the protection of the environment. Decisions made under the *Environmental Planning and Assessment Act 1979* should be bounded by sustainability as an overriding objective. This will better consolidate the principles of ESD into the decision-making framework in order to achieve positive environmental outcomes and place fetters on the discretion of decision-makers to approve land uses or development proposals which may significantly threaten the environment.[6] However, it is important to note that such a provision would not mean that actions that are potentially harmful to the environment could never proceed. The principles of ESD require a balance between the developmental and environmental needs of the community. Therefore it cannot be said that giving overriding effect to principles of ESD would give undue weight to environmental factors at the expense of economic or social factors. Instead, it would provide a sound framework for making decisions about development in a way which respects the right of future generations to a healthy and productive environment and which is consistent with Australia's international obligations. This would be a more transparent process and lead to better outcomes.

To operationalise the primacy of ESD principles, we recommend making ESD the overarching objective of the Act to bind the terms of decisions made under it.[7]

3. Ensure broad community consultation

In addition to fostering an inclusive and democratic society, public consultation and participation leads to better decisions by assisting decision-makers in identifying public interest concerns. The community must therefore be able to participate in a genuine and meaningful manner in relation to all aspects of the planning system, ranging from plan-making to development assessment and post-approval monitoring.

As we have submitted previously, impediments to public participation introduced by Part 3A and other recent reforms should be removed. Moreover, merits review and appeal

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[6] Sperling, K. 1999, 'If caution really mattered' (1999) 16 (5) *Environmental Planning & Law Journal* 425 at 425. See also Pearson, L. 1996, 'Incorporating ESD principles in Land-Use decision-making: some issues after Teoh' *Environmental Planning and Law Journal* at 47-53.

[7] This has been adopted in New Zealand under the *New Zealand Resource Management Act 1991*. Section 5 of that Act provides that: "the purpose of this Act is to promote the sustainable management of natural and physical resources."

rights for objectors should be reinstated for all major projects, and should be broadened in line with ICAC recommendations.[8]

4. Limit exempt and complying development

The Department of Planning has established a target of 50% exempt and complying development for NSW. We believe that this target should be revisited. The figure is arbitrary and may not be suitable in all circumstances. Uniform housing codes which are being rolled out are problematic, as demonstrated by recent trials.[9] We submit that exempt and complying development categories should only be determined at a localised scale, taking into account particular characteristics of local government areas, and should not be determined by a quantitative target. Moreover, the prohibition on exempt and complying development in environmentally sensitive areas should be reimposed.[10]

5. Strengthen environmental impact assessment

Environmental impact assessment provisions in the NSW planning system need strengthening to ensure that planning decisions are informed by rigorous and independent environmental assessment processes. A systematic process for capturing the true environmental impacts of development is needed. This could be achieved through the following:

- Establishing a pool of Department of Planning accredited environmental assessors. Proponents would be allocated an assessor at random who would conduct the required environmental assessment. This would ensure that consultants are independent and objective;
- Implementing external auditing and quality assurance requirements through a Peer Review Panel or new government authority, such as the Canadian Environmental Assessment Agency. Its role would include assessing the accuracy of environment impact statements, species impact statements and assessments, ensuring that ongoing management conditions are complied with and assessing mitigation measures. There is currently no feedback or accountability loop; and
- The agency or panel should report to the Minister for Planning who would be required to table an annual report in parliament providing statistics and updates on environmental assessments. Any such reports should be publicly available.

(b) the implications of the Council of Australian Governments (COAG) reform agenda for planning in New South Wales

Discussions at the COAG level are important to the future development of the NSW planning framework. Indeed, as indicated by the Discussion Paper, many of the recent reforms to the Act have come about as a result of COAG discussions and determinations.

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[8] The ICAC recommended that several new categories of merits appeals should be introduced, including developments where a council is the applicant and the consent authority, major and controversial developments (such as large residential flat developments), and developments which are the subject of planning agreements. See Independent Commission Against Corruption, (2007), *Corruption Risks in NSW Development Processes*'.

[9] Sydney Morning Herald, *"DA codes to be rewritten"*, October 16, 2008.

[10] This was previously found in s76A of the Act.

Although a coordinated national approach to planning is supported, the EDO has observed that COAG planning discussions of late have been focused on 'streamlining' and 'reducing the regulatory burden' rather than on implementing best practice planning laws across Australia. Indeed, we are particularly concerned about the current COAG reform agenda and how it will affect the NSW planning system.

COAG agreed on 26 March 2008 that there is a need to develop a nationally-coordinated approach to infrastructure delivery to better coordinate infrastructure planning and investment across Australia. As a result of these discussions, the Federal Government legislated to create a new body in April 2008, *Infrastructure Australia*. This body is a statutory advisory council whose functions include providing advice to governments, investors and owners of infrastructure on matters relating to infrastructure, including identifying impediments to investment in nationally significant infrastructure and providing advice to facilitate the harmonisation of policies and laws relating to the development of infrastructure.[11] As indicated by The Hon. Anthony Albanese, Minister for Infrastructure, Transport, Regional Development and Local Government, this will involve standardising project approval techniques and streamlining planning and approval processes for infrastructure by 'harmonising guidelines, legislation and regulation across jurisdictions.'[12] Infrastructure Australia is currently developing an Infrastructure Priority List for COAG consideration by March 2009.

While we acknowledge the necessity for key infrastructure (such as hospitals and rail infrastructure) to be delivered expeditiously, the EDO has significant concerns with this agenda. Although the harmonisation and consistency of planning laws across Australia is a good end in itself, there is a danger that this will instil a 'lowest common denominator' approach to assessment in order to ensure consistency and agreement between states. We submit that harmonisation should only occur if environmental protections and best practice assessment processes are assured.

Despite this, the focus on the efficient delivery of infrastructure and encouraging investment reveals that Infrastructure Australia has a predominantly economic focus. Indeed, the body has 12 members drawn from industry, government and the private sector, but with no environmental input. Given that infrastructure projects have potentially significant environmental impacts (as they are usually large in scale) it is imperative that these projects are comprehensively assessed. We are therefore concerned that the lack of environmental input into the harmonisation process, and the increasingly observed trend of winding back environmental regulation, will lead to the watering down of NSW environmental assessment processes and protections in order to ensure the efficient delivery of infrastructure. Indeed, as announced by the Premier in early February, the position of NSW Infrastructure Coordinator General has been created who has the primary role of fast-tracking the approval process for important infrastructure projects in NSW. This will involve exemptions from the usual planning processes in Part 4 and 5 (and presumably even Part 3A).[13] Given the above discussion, it is hard to have confidence that any alternative assessment process for infrastructure will build in

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[11] See http://www.infrastructureaustralia.gov.au/ (3 March 2009).

[12] See http://www.minister.infrastructure.gov.au/aa/releases/2008/January/AA005_2008.htm (3 March 2009).

[13] The Age, February 18 2009, 'Rees to fast track stimulus projects'. Found at: http://news.theage.com.au/breaking-news-national/rees-to-fasttrack-stimulus-projects-20090218-8b2y.html (3 March 2009).

appropriate environmental protections or even require an assessment of potential environmental impacts.

c) duplication of processes under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 and NSW planning, environmental and heritage legislation

At the outset it must be emphasised that the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* and the NSW planning framework play concurrent, but *different* roles. The NSW system is by nature focussed on state and regional issues. On the other hand, the *EPBC Act* is directed in scope towards matters of national environmental significance. This distinction must be kept in mind when attempting to harmonise state and federal processes.

A bilateral agreement between the Commonwealth and NSW was finalised on 18 January 2007. Under that agreement, where a controlled action under the *EPBC Act* occurs in NSW, the Commonwealth Minister may rely on the NSW environmental assessment instead of requiring one to be undertaken at a Commonwealth level. This means that only one assessment is undertaken for both processes. As previously submitted, the EDO does not oppose the idea of bilateral agreements in theory as long as the state process being accredited is robust and comprehensive. That is, it does not matter on what bureaucratic level the assessment occurs at as long as it is done properly.

In this regard we have significant concerns with the accreditation of assessment processes conducted under Part 3A, as that process grants a wide discretion on how environmental assessment is done and public participation is significantly restricted.[14]

In relation to plans to further reduce duplication between the *EPBC Act* and the NSW planning process, we oppose any suggestion to accredit NSW approval processes (which would effectively make the Commonwealth's role superfluous). As above, Part 3A does not ensure the protection of environmentally sensitive areas and there is a lack of genuine public participation in the approval process. It is therefore important that the Commonwealth, through the *EPBC Act*, maintains a gatekeeper role and the power to veto developments. This 'safety net' ensures that there are 2 levels of scrutiny and accountability, which reduces the possibility that bad decisions are made and increases the likelihood of sustainable outcomes.

(d) climate change and natural resources issues in planning and development controls

(i) Is the current framework adequate to consider the potential effects of climate change?

The current NSW planning framework does not adequately incorporate the consideration of the potential effects of climate change. Indeed, climate change is not expressly integrated into the DA process under the *Environmental Planning and Assessment Act 1979* both from a mitigation and adaptation perspective.

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[14] See EDO submission on Draft Agreement between the Australian Government and the State of New South Wales , 11 December 2006. Found at http://www.edo.org.au/edonsw/site/policy/epbc_assessment_bilateral_comment061205.php (3 March 2009)

Recently, the EDO, in conjunction with the Sydney Coastal Councils Group (SCCG) conducted an audit of legislation to determine amongst other things, the extent to which climate change is incorporated into Australian legislation.[15] Specifically, the report examined federal, state (NSW) and local legislative instruments to identify instruments that contained the words 'climate change', 'sea level rise' and 'greenhouse' and then determined the responsibilities these instruments placed on local councils. The report found that the *EPAA Act* does not contain any terms that refer to 'climate change', 'greenhouse', or 'sea level rise'. However, five LEPs contained provisions directly relevant to climate change impacts in the coastal zone. The report found that these LEPs place no direct obligations on decision-makers in relation to coastal adaptation. These merely contain climate change factors in objects clauses or as matters for consideration which can be given minimal weight at the discretion of decision-makers.[16]

Specifically in terms of *mitigation*, the Act does not adequately promote the mitigation of greenhouse gas emissions. Indeed, no climate change assessment is expressly required under either 79C or Part 3A. The consideration of climate change impacts of new projects is currently occurring in an ad hoc manner under either a general requirement to consider environmental impacts under s79C or as elements of the Director-General's environmental assessment requirements under Part 3A (which are up to the complete discretion of the DG). It is clear that a more systematic process is needed.

Similarly, the planning system does not require the explicit consideration of *adaptation* to climate change impacts. Recent studies have show that even if greenhouse gas emissions are significantly reduced today, temperature increases and sea level rise are almost certain to occur over the next 50 years due to the time-lag effect of climate change.[17] Therefore, there is a need to establish an adaptation framework in preparation for these impacts, and avoid risky development, especially on the coast. Despite this identified need for clear adaptation laws, an examination of the current statutory framework in Australia reveals that there is no mandatory consideration of adaptation issues.[18] Additionally, the NSW Court of Appeal recently overturned a favourable Land and Environment Court ruling that held a concept plan approval invalid on the basis that there had been a failure by the Minister to consider whether the flood risk present on the site in question would be exacerbated by climate change.[19]

In summary, it is apparent that the NSW planning system is currently inadequate to consider the impacts of climate change both from a mitigation and adaptation perspective. It is therefore clear that legislative change is needed to accommodate climate change in a fulsome and robust manner into the planning system.

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[15] NSW Environmental Defender's Office, Coastal Councils and Planning for Climate Change: An Assessment of Australian and NSW Legislation and Government Policy Provisions Relating to Climate Change Relevant to Regional and Metropolitan Coastal Councils (2008). A copy of this report can be obtained from info@sydneycoastalcouncils.com.au

[16] *Ibid.*

[17] Tom Wigley, 'The Climate Change Commitment' (2005) 307 *Science* 1766; Gerald Meehl et al 'How Much More Global Warming and Sea Level Rise?' (2005) 307 *Science* 1769.

[18] See n18.

[19] *Minister for Planning v Walker* [2008] NSWCA 224. This case is on presently on appeal to the High Court.

(ii) How should climate change be addressed in the planning framework?

In terms of mitigation, legislative amendment is needed to provide that climate change impacts are a mandatory consideration to be taken into account by decision-makers under the *Environmental Planning and Assessment Act 1979*. However, the introduction of mandatory matters of consideration is of itself insufficient. These amendments must be accompanied by guidelines that codify a comprehensive and systematic system of assessment for projects that are likely to generate significant emissions, such as new coal mines and power stations. This should include the introduction of criteria that require new plants to use best practice technology and also prescribe mitigation measures and/or appropriate conditions that must be considered before a project can be approved. These guidelines should be given legislative force to make their application mandatory, either through the Act directly or in a State Environmental Planning Policy.

In terms of coastal adaptation, significant amendment is needed to adopt a consistent approach across the state (rather than the ad hoc approach currently which depends on LEPs). As the EDO has previously submitted, robust laws could include planned retreat policies in especially vulnerable areas, buffer zones in local planning policies, restrictive zoning, setbacks, resilience building measures (such as dune re-vegetation), early warning systems and emergency response plans. Requiring such measures to be undertaken through the use of legally enforceable legislation will go a long way to ensuring that a precautionary approach to coastal climate change impacts is taken throughout Australia.[20]

Of course, the planning framework is not the only area of law that needs to better accommodate climate change. The EDO has done extensive work on identifying the important federal and state based laws initiatives that are necessary to address climate change in a holistic manner.[21] However, the planning system, with its linkages to most NRM systems, is a crucial element.

(ii) How should natural resources issues be taken into account in the planning and development assessment framework?

The is the centrepiece of natural resource management (NRM) in NSW. This is because all actions that may affect natural resources including biodiversity, water, mining and coastal resources are regulated, either directly or indirectly, through the planning system. Therefore the *Environmental Planning and Assessment Act 1979* must ensure that all potential impacts and NRM issues are considered by decision-makers in making new plans and determining development applications that may affect these resources. Despite this important role, the Act as it currently stands fails to adequately ensure the protection of these resources.

The process of integrated development was introduced into the Act in 1997. Section 91 provides that integrated development is development which, in addition to development consent, requires one or more approvals from other Government agencies which include:

- *an environment protection licence (in relation to pollution or waste management);*

[20] Robert Ghanem, Kirsty Ruddock and Josie Walker, "Are our laws responding to the challenges posed to our coasts by climate change?' (2008) 31(3) UNSWLJ Forum, pp40-46.
[21] See EDO Model Climate Law Project – Discussion Paper (April 2008). Found at: http://www.edo.org.au/edonsw/site/pdf/pubs/model_climate_law_project080417.pdf (3 March 2009).

- *a consent to damage or destroy Indigenous cultural heritage; and*
- *an approval to construct or alter a dam, floodgate, causeway or weir.*

For integrated development, the normal assessment and notification procedures are followed, but the consent authority must also ask the authority responsible for giving the other approval in advance whether it will consent to the proposal, and if so, on what terms.

Integrated development was a welcome introduction as it requires expertise from other agencies and allows them to veto developments that are inappropriate on environmental and technical grounds, or to ensure that appropriate conditions are attached to any approval. It also streamlines the process for proponents who did not have to approach each agency individually. However, the effectiveness of integrated development has been watered down to a significant extent by Part 3A. It provides that certain licences and approvals required by other Acts either do not apply,[22] or must be granted consistently with any Part 3A approval.[23] This was a retrograde step because these approvals constitute important safety nets, and help ensure that all potential impacts of a development are adequately considered when the Minister makes his decision. There is therefore a need to ensure that referrals relating to the environment, threatened species, native vegetation etc. are maintained, as these agencies have the relevant expertise to address these issues and ensure that developments are ecologically sustainable and do not have unacceptable impacts, especially in light of the ever increasing risk of climate change. We recommend that these additional approvals should be reinstated for Part 3A projects. These approvals should be required regardless of the consent authority or category of development, to ensure that relevant government expertise informs decision-making.

There was also a recent push, with the proposed *SEPP (Repeal of Concurrence and Referral Provisions) 2008* to remove concurrences and referrals from other agencies in relation to biodiversity. The EDO strongly opposed the removal of any referral provisions in the *Threatened Species Conservation Act 1995*, the *Fisheries Management Act 1994*, the *National Parks and Wildlife Act 1974* or any moves to undermine the ban on broad scale clearing enshrined in the *Native Vegetation Act 2003*.[24] We also opposed the replacement of concurrence requirements with heads of consideration because requirements for decision-makers to consider matters when making decisions is qualitatively different from a concurrence or referral requirement to an expert agency such as DECC. Indeed, decision-makers can dismiss significant environmental impacts as long as they have 'considered' them. In contrast, concurrence from an agency with relevant expertise, such as DECC, allows the agency to refuse consent to a development with potentially significant impacts. The EDO welcomed the recent decision by the Department of Planning to retain these concurrences.

Finally, there is a need to better integrate Catchment Action Plans (CAPs), made by Catchment Management Authorities (CMAs) in partnership with local communities, into the planning framework. These plans are intended to facilitate community action and government investment in natural resource management and to prescribe on-the ground actions for preserving natural resources in partnership with local communities and

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[22] Section 75U, *Environmental Planning and Assessment Act 1979*.
[23] Section 75V, *Environmental Planning and Assessment Act 1979*.
[24] See *Submission on the proposed SEPP (Repeal of Concurrence and Referral Provisions) 2008*- 22 August 2008. Found at http://www.edo.org.au/edonsw/site/policy/080822concurrences_sepp.php (3 March 2009).

private landholders. However, a recent report by the Natural Resources Commission found that the NRM policy environment is not sufficiently integrated into the planning system for CMAs to implement CAPs effectively.[25] As a result, Local Environmental Plans (LEPs) and policies can often undermine initiatives in CAPs as there is no legal requirement to consider CAPs when making LEPs or when assessing development applications. This needs to be addressed through amendment to the Act.

(e) appropriateness of considering competition policy issues in land use planning and development approval processes in New South Wales

The EDO does not support any further attempts to implement National Competition Policy into the planning assessment and approval process. Competition policy issues should not considered in local planning decisions. We are concerned that the implementation of competition policy would result in the removal of legislative processes, such as development assessment on the basis that they restrict competition, which in turn will lead to the erosion of public participation and environmental assessment processes.

Our primary view is that legislative restrictions in are justified where this happens in the public interest. Indeed, Competition Policy itself foreshadows that there will be situations where anti-competitive laws are justified for social, economic, or environmental reasons in the public interest. We submit that planning laws are such an area, as they are crucial to the achievement of ESD, which integrate environmental, economic and social concerns, and also enshrine public participation and consultation processes. Thus, the 'anti-competitiveness' of the planning process is justified through its importance in assuring environmental protections and democratic processes.

We also submit that a good planning system can only be achieved through statutory processes. Non-statutory and/or market mechanisms are inappropriate and unproven. Furthermore, any 'costs' of development assessment processes, such as restrictions on competition, are outweighed by the public interest benefits. These benefits include providing transparency and accountability in decision-making and opportunities for the public to have a say on the developmental vision of their areas.

A good illustration of the inappropriateness of introducing competition into the planning system is the private certification regime, which introduced competition into the building certification process. In the EDO's experience we have fielded many complaints from members of the public relating to the independence, performance and integrity of private certifiers. There is a real perception in the community that the private certification industry is neither impartial nor accountable. To address these issues the government recently introduced a range of new accountability mechanisms. These include increased training, reporting and auditing requirements for private certifiers, enforcement powers for the Building Professionals Board and for local councils, and strong investigative powers. This highlights that the market was unworkable when left unregulated. This is likely to be the experience with any further attempts to introduce competition into other aspects of the NSW planning framework.

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[25] Natural Resources Commission, *Progress Report on Effective Implementation of Catchment Action Plans*, November 2008. Found at: http://www.nrc.nsw.gov.au/content/documents/Progress%20report%20on%20effective%20implementation%20of%20CAPs.pdf (3 March 2009).

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