Submission No 7

INQUIRY INTO ENVIRONMENTAL PLANNING INSTRUMENTS (SEPPS)

Organisation: Environmental Defenders Office (EDO)

Date Received: 21 May 2021

Environmental Defenders Office

Submission to the Inquiry into environmental planning instruments (SEPPs)

21 May 2021

T +61 2 9262 6989 F +61 2 9264 2414
E info@edo.org.au W edo.org.au

Level 5, 263 Clarence St, Sydney NSW 2000
ABN: 72002 880 864

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

Committee Secretary
Legislative Council Regulation Committee
Parliament House, Macquarie Street
Sydney NSW 2000

By email: regulation.committee@parliament.nsw.gov.au

For further information on this submission, please contact:

Rachel Walmsley
Head of Policy and Law Reform

Rachael Chick
Solicitor

Executive Summary

Environmental Defenders Office (**EDO**) welcomes the opportunity to make a submission to the *Inquiry into environmental planning instruments (SEPPs)*.

State Environmental Planning Policies (**SEPPs**) are powerful legal instruments given effect under the *Environmental Planning and Assessment Act 1979* (NSW) (**Planning Act**). They affect how land is developed and how natural resources are used, managed and conserved across NSW, and it is vital that they are made in a consistent and transparent manner, are evidence-based, and have appropriate parliamentary scrutiny. This is currently not necessarily the case.

As a community legal centre specialising in public interest environmental and planning law, EDO has made numerous submissions on various SEPPs in recent years where there have been opportunities to do so. We have engaged directly with the planning Department on various review processes of varying quality in terms of detail, transparency and timeliness. There has been no consultation on some SEPPs, and never-ending review on others.

This submission discusses the need for improvements to the process of making SEPPs and makes the following recommendations:

- **The process for making SEPPs must be clear, consistent, transparent, include community consultation, and include oversight mechanisms.**
    - **SEPPs should be disallowable.**
    - **There must be a reasonable opportunity (at least 28 days) for public comment on both the Explanation of Intended Effect and the proposed draft SEPP.**
    - **Public comments should be demonstrably taken into account when drafting and making the SEPP.**
- **The evidence-based rationale for the SEPP should be made clear.**
- **SEPPs must be consistent with the principles of ESD- ie the object of the Planning Act.**
- **SEPPs should be subject to review after 5 years. Public consultation should take place as part of the review process.**

This submission addresses:

- The power of SEPPs
- SEPPs should be disallowable
- There must be opportunities for public comment on draft SEPPs
- SEPPs must be evidence-based with clear policy objectives
- SEPPs must be clearly drafted
- SEPPs must be consistent with the principles of ESD

1. The power of SEPPS

SEPPs are powerful instruments that make significant substantive rules governing land and natural resources use across NSW, and affect the rights of communities to participate in decision-making.

Historically, certain SEPPs have been used effectively to put in place important environmental protections. However, more recently SEPPs have been used to redefine development pathways and, in some cases, reduce environmental protections and community rights.

Through SEPPs, the executive has been able to unilaterally and without parliamentary oversight effectively remove the appeal rights of community members in relation to swathes of classes of development. The Planning Act empowers SEPPs to make declarations classifying a range of developments (for example, as state significant infrastructure (**SSI**) or as state significant development (**SSD**)). The classification of a development dictates the mode of environmental assessment, degree of community consultation, and, crucially, the review rights available to communities.

The *State Environmental Planning Policy (State and Regional Development) 2011* (**State and Regional Development SEPP**) utilises that power and classifies a range of development types as SSD or SSI, and provides that the Minister may declare any specific development SSD or SSI. It also designates the Independent Planning Commission (**IPC**) as the consent authority for certain types of development, which, if the IPC holds a public hearing, extinguishes merits appeal rights.

The *State Environmental Planning Policy (Infrastructure) 2007* (**Infrastructure SEPP**), permits a range of infrastructure development to occur without requiring the proponent (often a council, state agency or utility provider) to obtain development consent under Part 4 of the Planning Act. However, the determining authority (often the proponent themselves) must still assess the impacts of the proposal under Part 5 of the Act, or otherwise meet standards for 'exempt' and 'complying' development.

Removing the merits appeal rights of community members is contrary to ICAC recommendations that third party merits review rights be expanded over a range of projects, including those that are significant and controversial.[1] ICAC has also observed that limitations on third party appeals mean 'an important disincentive for corrupt conduct is absent.'[2] For community merits appeal rights to be able to be effectively removed by ministerial fiat without any parliamentary oversight is a probity issue as well as undermining public confidence in the planning system.

These examples illustrate that to some extent, the use of some SEPPs runs counter to the advice of the Parliamentary Counsel's Office in its submission to the Legislative Council's Inquiry into the making of delegated legislation in NSW (**Delegated Legislation Inquiry**), that "substantive law-

[1] ICAC, Anti-corruption safeguards in the New South Wales planning system (2012).
[2] ICAC, Submission regarding a new planning system in NSW (White Paper and Accompanying Bills) (2013), p. 4; at icac.nsw.gov.au.

making should be confined to primary legislation to the greatest extent practical".[3] EDO submits that provisions that significantly affect community rights or reduce environmental protections should be addressed in primary legislation, not in subordinate instruments that can be made with limited parliamentary scrutiny.

EDO supports, in principle, SEPPs as necessary for consistency and to provide clear guidance on state-wide planning, environmental, and natural resource management issues. However, as instruments that can have far-reaching and significant consequences, there is remarkably little oversight to their making or implementation. This should not be the case.

2. SEPPs should be disallowable

EDO supports improved scrutiny of the making of SEPPs, through both parliamentary oversight and public participation.

As the Delegated Legislation Inquiry noted "robust parliamentary oversight [is] a critical check on the use of delegated legislative power to prevent executive overreach and preserve the Parliament's constitutional role as lawmaker in chief."[4]

Currently, a significant component of parliamentary oversight of delegated legislation – the ability of either house of parliament to disallow a statutory instrument within a certain period of time from its commencement – does not apply to environmental planning instruments such as SEPPs. This is notwithstanding that SEPPs can have pervasive and powerful effects on local planning, development and environmental outcomes.

In our system of governance, there is a separation of the executive from the legislature. Where the legislature is not able to scrutinise a legislative instrument such as a SEPP, it puts that instrument only in the sphere of the executive. This is inappropriate, particularly for instruments as powerful as SEPPs.

It is important to note that simply because a legislative instrument is disallowable does not mean it will be disallowed. As the Delegated Legislation Inquiry observed:

> *compared to the power to debate and amend primary legislation, the disallowance mechanism applicable to delegated legislation is blunt and severe and, perhaps as a consequence, is rarely successfully used.*[5]

Although it is an imperfect oversight mechanism, given it is the primary tool of scrutiny available for delegated legislation, the disallowance provisions of the *Interpretation Act 1987* should apply to environmental planning instruments, especially SEPPs. The very fact that an instrument has the

[3] Legislative Council Regulation Committee, *Making of delegated legislation in New South Wales* (2020), available at https://www.parliament.nsw.gov.au/lcdocs/inquiries/2581/Regulation%20Committee%20-%20Report%20No%207%20%20-%20Making%20of%20delegated%20legislation%20in%20NSW.pdf (**Delegated Legislation Inquiry Report**), para 1.6.

[4] Delegated Legislation Inquiry Report, para 1.14.

[5] Delegated Legislation Inquiry Report, para 1.6.

potential to be disallowed may function to improve the process in terms of ensuring a more rigorous, evidence-based and transparent process for developing robust SEPPs.

3. There must be opportunities for public comment on draft SEPPs

In determining how the process for making SEPPs could be improved, it is useful to examine processes for making other subordinate instruments and rules. SEPPs are **not** classed as statutory rules for the purposes of the *Subordinate Legislation Act 1989*, which sets out certain requirements for the making of statutory rules, including that (for principal statutory rules):

- a regulatory impact statement is prepared in relation to the substantive matters to be dealt with by the rule;[6]
- A public notice in relation to the proposed statutory rule is published, inviting comments and submissions; [7]
- Consultation with affected stakeholders takes place; [8] and
- All the comments and submissions received are to be appropriately considered. [9]

The *Subordinate Legislation Act* further requires that before a statutory rule is made, the responsible Minister is to ensure that, as far as reasonably practicable, the guidelines at Schedule 1 (**Statutory Rule Guidelines**) are complied with. [10] The Statutory Rule Guidelines state:

1. *Wherever costs and benefits are referred to in these guidelines, economic and social costs and benefits are to be taken into account and given due consideration.*
2. *Before a statutory rule is proposed to be made—*
    a. *The objectives sought to be achieved and the reasons for them must be clearly formulated.*
    b. *Those objectives are to be checked to ensure that they—*
        - *are reasonable and appropriate, and*
        - *accord with the objectives, principles, spirit and intent of the enabling Act, and*
        - *are not inconsistent with the objectives of other Acts, statutory rules and stated government policies.*
    c. *Alternative options for achieving those objectives (whether wholly or substantially), and the option of not proceeding with any action, must be considered.*
    d. *An evaluation must be made of the costs and benefits expected to arise from each such option as compared with the costs and benefits (direct and indirect, and tangible and intangible) expected to arise from proceeding with the statutory rule.*
    e. *If the statutory rule would impinge on or may affect the area of responsibility of another authority, consultation must take place with a view to ensuring in advance that (as far as is reasonably practicable in the circumstances)—*
        - *any differences are reconciled, and*
        - *there will be no overlapping of or duplication of or conflict with Acts, statutory rules or stated government policies administered by the other authority.*
3. *In determining whether and how the objectives should be achieved, the responsible Minister is to have regard to the following principles—*
    a. *Administrative decisions should be based on adequate information and consultation concerning the need for and consequences of the proposed action.*

[6] Subordinate Legislation Act 1989, s 5(1).
[7] Subordinate Legislation Act 1989, s 5(2)(a).
[8] Subordinate Legislation Act 1989, s 5(2)(b).
[9] Subordinate Legislation Act 1989, s 5(2)(c).
[10] Subordinate Legislation Act 1989, s 5(2)(c).

b. *Implementation by means of a statutory rule should not normally be undertaken unless the anticipated benefits to the community from the proposed statutory rule outweigh the anticipated costs to the community, bearing in mind the impact of the proposal on the economy and on consumers, members of the public, relevant interest groups, and any sector of industry and commerce, that may be affected.*
c. *The alternative option that involves the greatest net benefit or the least net cost to the community should normally be chosen from the range of alternative options available to achieve the objectives.*

4. *A statutory rule must be expressed plainly and unambiguously, and consistently with the language of the enabling Act.*

In contrast, the requirements governing the making of a SEPP are scant, and contained within just two provisions of the Planning Act.

Section 3.30 provides the "consultation requirements" for the making of a SEPP. Public consultation is an entirely discretionary ability of the Minister to take steps, as the Minister considers appropriate and necessary, to publicise an explanation of the intended effect of the proposed SEPP and to seek and consider submissions of the public on the matter. This means there is no guarantee that public consultation will occur.

Given SEPPs have such wide-ranging and significant impacts, public exhibition and community consultation should be mandatory, as it is with other statutory instruments.

This public exhibition and consultation should not be limited to an explanation of intended effect (**EIE**), but should also include consultation on a draft SEPP itself. Although EIEs are useful for understanding the rationale and intent of a future SEPP, they do not provide enough detail on the actual operation of the proposed SEPP to enable meaningful input from the community. Much of the effect of any legal instrument comes down to the specifics of its drafting. Consultation on a draft SEPP would also demonstrate if, and how, feedback on the EIE has been taken into account. Therefore, EDO recommends that mandatory consultation must occur on both an EIE and a draft SEPP. The public must be given sufficient time- at least 28 days- to consider and make comments. We strongly recommend the Planning Department provide specific analysis, guidance material and consultation on how proposed SEPPs will affect the environment, to enable full public consideration of the potential consequences.

4. SEPPs must be evidence-based, with clear policy objectives

There is currently no requirement for the rationale behind making a SEPP to be made public. There is the discretionary option to publish an EIE, however this is not mandatory, and when done, often does not set out the rationale or evidence base for the proposed SEPP.

As noted: the making of SEPPs is discretionary; there are few requirements relating to the SEPP-making process; there is no parliamentary oversight through disallowance; and SEPPs deal with issues of significant import and public and commercial interest. This makes the current process for making SEPPs ripe for politicisation.

Two recent examples of this are the Koala SEPP and the Native Vegetation SEPP.

Koala SEPP

A SEPP (purportedly) for the protection of koalas and their habitat has been the subject of intense political debate and pressure for the best part of a decade. The most recent iteration - the *State Environmental Planning Policy (Koala Habitat Protection) 2021* (**Koala SEPP 2021**)- was made following a period of conflict and brinkmanship between the two coalition government parties.[11] The result, unsurprisingly, is an instrument that has little basis in scientific evidence, weakens the already inadequate protections for important koala habitat, is overly complicated, and is reliant on a number of codes, some of which have not yet been developed.[12]

Non-Rural Vegetation SEPP

Following years of political conflict in relation to the protection of native vegetation, in 2016 the NSW government implemented an overhaul of the scheme, which has resulted in soaring rates of land-clearing without oversight.[13] In relation to native vegetation in non-rural areas, this was done by SEPP - the *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017* (**Non-Rural Vegetation SEPP**)*,* which again is complicated, relying on a poorly defined concept (the Biodiversity Offsets Scheme Threshold) and characterised by a lack of critical information available to the public.[14]

The politicisation of SEPPs has also seen amendments to SEPPs being made entirely to benefit individual developments, including in response to adverse court decisions.

For example, in 2013, following the decision of the Land and Environment Court[15] and then Court of Appeal[16] not to approve the expansion of the Mt Thorley Warkworth coal mine, the *State Environmental Policy (Mining, Petroleum Production and Extractive Industries) 2007* (**Mining SEPP**) was amended so that the decision-maker was directed to give greater weight to the economic impact of a proposal than the social or environmental impacts. This amendment meant that when a second application was made in relation to the expansion of the Mt Thorley Warkworth coal mine, it was approved. This SEPP amendment was later revoked as it was clearly inconsistent with the object of the Planning Act – Ecologically Sustainable Development (**ESD**).

---

[11] See, for example: https://www.smh.com.au/national/nsw/liberals-back-down-on-koalas-after-barilaro-bluster-20201016-p565uf.html; https://www.abc.net.au/news/2020-09-09/nsw-government-koalas-fight-escalates-under-barilaro-threats/12646696; https://www.abc.net.au/news/2021-03-08/nsw-coalition-strikes-deal-on-koala-policy/13227862; https://www.smh.com.au/environment/conservation/another-blow-fears-over-koala-habitat-veto-for-barilaro-s-office-20210318-p57c0y.html.

[12] See EDO's analysis at https://www.edo.org.au/2021/04/08/new-koala-sepp-commences-in-nsw-but-worse-is-yet-to-come/; https://www.edo.org.au/2021/03/12/nsw-koala-protections-back-on-the-political-agenda-for-2021/.

[13] See, for example, Auditor General Report (2019) - *Managing Native Vegetation*, available at: Managing native vegetation | Audit Office of New South Wales (nsw.gov.au); Natural Resources Commission (2019) *Land management and Biodiversity Conservation Reforms*; EDO, Native vegetation clearing in NSW - Regulatory failure confirmed, (2020) https://www.edo.org.au/2020/04/02/native-veg-clearing-nsw-regulatory-failure/ .

[14] See EDO's analysis at https://www.edo.org.au/publication/implementation-of-the-nsw-land-clearing-laws-part-2-clearing-in-urban-areas-and-e-zones/.

[15] *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48.

[16] *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105.

In 2019, when the gateway certificate for the proposed Kepco coal mine at Bylong was due to expire, the Mining SEPP was again amended to provide for an extension to the duration of gateway certificates, which enabled the assessment and decision on that project to continue.

Process and legislative requirements can be used to ameliorate the risk of politicisation (and to some extent, the probity risks that are inherent in entirely discretionary and unilateral rule-making). The process set out in the *Subordinate Legislation Act*, including the Statutory Rule Guidelines as quoted above, provides an example of such requirements, including (relevantly):

- a clear formulation of the objectives sought to be achieved and the reasons for them. These objectives must be reasonable and appropriate, accord with the "objective, principles, spirit and intent of the enabling Act", and must not be inconsistent with the objectives of other Acts, statutory rules, and government policies.
- a regulatory impact statement, which must set out the objectives to be achieved by the rule and the reasons for those objectives, a discussion of alternative options, an assessment of costs and benefits, and a statement on the community consultation to be undertaken; and
- community consultation on the draft instrument.

Drawing on this, EDO recommends that a clear process could be mandated for SEPPs. In addition, while a full regulatory impact statement may not be necessary, clear requirements to provide objectives and reasons based on best-available science and evidence; and requirements to demonstrably take submissions into account, would help to combat the politicisation of the exercise of discretionary powers.

Further, we note that the *Subordinate Legislation Act* provides that costs and benefits refer to the economic and social costs and benefits. If such a regime were adopted for SEPPs, costs and benefits must include the *environmental* costs and benefits of the proposed SEPP. This is necessary for consistency with and to put into effect the objects of the Planning Act, including the principles of ESD.

5. SEPPs must be clearly drafted

The Statutory Rule Guidelines provide that "a statutory rule must be expressed plainly and unambiguously, and consistently with the language of the enabling Act." This ought to be true of all subordinate legislation, including SEPPs.

Unfortunately, it is not the case for a number of SEPPs, which are at best complex, and at worst almost incomprehensible. For example, the Non-Rural Vegetation SEPP, which is at once complex and incomplete, and creates a process that is extremely difficult to navigate.[17]

Unlike with primary legislation, there is no second reading speech or explanatory statement setting out the purpose of the SEPP, and as noted the process for SEPP making can be rushed and politicised (as was the case with the Koala SEPP and the clumsy and contradictory amendments to

[17] See EDO's analysis at https://www.edo.org.au/publication/implementation-of-the-nsw-land-clearing-laws-part-2-clearing-in-urban-areas-and-e-zones/.

the Mining SEPP). These factors make interpretation difficult, which therefore makes certainty difficult for the community.

6. SEPPs must be consistent with the principles of ESD

A fundamental principle governing delegated legislation is that it must be consistent, or at the very least not be inconsistent, with its enabling legislation.

The Planning Act encourages 'ecologically sustainable development' (**ESD**). ESD requires the effective integration of environmental, social and economic considerations in decision-making, including via the precautionary principle, biodiversity conservation, intergenerational equity considerations, and improved valuation of environmental assets, costs and services.

Certain SEPPs, particularly those arising out of a politicised process, do not operationalise the principles of ESD, and arguably are not consistent with the Planning Act. For instance, the former cl 12AA of the Mining SEPP, which required a decision-maker to prioritise social and economic considerations over environmental, was contrary to the principles of ESD.

EDO recommends that SEPPs must be made in accordance with a clear evidence-based, consultative process. As part of this, we recommend that explanatory materials must address how the final SEPP achieves the aim of ESD, including with reference to the principles of ESD.

Where relevant, the SEPP making process should also require the climate impacts of a proposed SEPP to be presented and analysed. SEPPs have a role in ensuring climate change mitigation and adaptation occurs, including by contributing to reducing greenhouse gas emissions across sectors, in accordance with state and national targets, global goals and the best available science. This is consistent with the ESD principle of intergenerational equity.

We look forward to discussing these recommendations further at hearing.