

Draft
LGNSW Submission on the Department of
Planning & Environment – *Environmental*
Planning & Assessment Regulation 2000 –
Issues Paper

November 2017

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A. Opening

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing all NSW general-purpose councils and associate members including special-purpose councils. LGNSW facilitates the development of an effective community based system of local government in the State.

LGNSW thanks the NSW Department of Planning and Environment (DP&E) for the opportunity to make a submission to the *Environmental Planning & Assessment Regulation 2000* (the Regulation) – *Issues Paper*.

LGNSW welcomes the long awaited review of the regulation. There has been a lot of change since the regulation was last subject of a comprehensive review including a multitude of legislative amendments, increasing digitalisation, new processes and cost movements. The review will be a large task and warrants a comprehensive consultation process with stakeholders, including LGNSW.

This submission is in draft form until it is considered by the LGNSW Board. Any revisions made by the Board at that time will be forwarded in the form of an updated submission.

B. Background

This paper is LGNSW's response to the first stage in the review of the regulation by DP&E. This paper is:

- a preliminary response to the *Review of the Environmental Planning and Assessment Regulation 2000: Issues Paper*, September 2017 (Issues Paper). There are numerous other parts of the Regulation on which we intend to comment on during the process;
- limited to the existing Regulation; and
- primarily focused on planning, as LGNSW understands that the building requirements will be covered by a separate review process¹.

This paper does not cover the matters that will require new or revised regulation with the introduction of the *EP&A Amendment Bill 2017* (Planning Bill 2017)². These matters will include: local strategic planning statements; community participation plans; development control plans; and changes to the enforcement of complying development to name a few. As these issues are of critical importance to sector, it is recommended that they be incorporated into the review process.

This submission generally follows the structure of the Issues Paper, both responding to specific issues raised in the Issues Paper, and identifying other issues with the current Regulation.

C. Specific comments on existing provisions

1. Planning Instruments: Part 2 & 3

- The Planning Bill 2017 will enable the Regulation to standardise DCPs. LGNSW supports the standardisation of the form - but not the substance - of the DCP. Changes

¹ DP&E, Review of the Environmental Planning & Assessment Regulation 2000 – Issues Paper, p 3

² Awaiting assent <https://www.parliament.nsw.gov.au/bills/pages/current-bills.aspx>

are needed to develop a process for the delivery of this goal without jeopardising councils' local planning responsibilities. This is not covered in the Issues Paper and LGNSW will provide a detailed response at the appropriate time.

Issue	Proposal/change	LGNSW position
Development Control Plans (DCPs)	How should the DCP format be standardised and consolidated?	<p>LGNSW supports the standardisation of the form but not the substance of DCPs. Delivery of this goal must not jeopardise or threaten councils' local planning responsibilities.</p> <p>LGNSW supports the use of an Expert Steering Committee to advise DP&E on appropriate models.</p> <p>LGNSW questions the benefit of consolidating 'place based' and 'activity based' DCPs into a single DCP. LGNSW recommends that an IT solution be used to easily access relevant information that is contained in DCPs³.</p>
Re-exhibition of a DCP	DCPs to be re-exhibited where extensive amendments are made.	Support in principle on the proviso that council has the right to make the decision to re-exhibit the plan.
State Environmental Planning Policies (SEPPs)	No change has been proposed and DP&E relies on EIEs to inform councils and stakeholders of proposed changes.	<p>SEPPs should be advertised for a minimum of 28 days to conform with the exhibition requirements for LEPs and DCPs. This process would ensure that councils, other stakeholders and communities have the opportunity to comment on the proposed SEPPs before implementation.</p> <p>The separate review of the draft SEPP would also enable sufficient time for councils to make any changes to s. 149 certificates before the commencement date, where necessary.</p>
Fees payable for planning studies for planning proposals	Support current regulations	<p>LGNSW supports councils retaining the right to charge the applicant a fee on a cost recovery basis.</p> <p>See section 4.</p>

2. Development contributions/Voluntary planning agreements – Part 4

Issues	Proposal/question	LGNSW comment
Section 94 contributions	<p>Does the indexation of monetary s. 94 contributions need to be reviewed?</p> <p>Does the content and basis of a S94 plan need to be reviewed?</p>	Caps on contributions need to be removed and the permissible essential works list needs to be expanded.

³ Online systems are helpful in navigating the planning controls. For example, Liverpool City Council enables the user to interrogate the planning rules by address. Go to: <https://eplanning.liverpool.nsw.gov.au/Pages/XC.Enquire.PA/PA.Start.aspx?key=rQLKoGxUKVCKJovtKZY0>

<i>Issues</i>	<i>Proposal/question</i>	<i>LGNSW comment</i>
Section 94A levies	Is the % of cost of work an appropriate means of determining the S94A levy?	Restrictions on the maximum levy need to be reviewed but otherwise the current system of determined development levies under 94A is supported by local government. Any changes need to be developed with local government.
Voluntary Planning agreements (VPAs)	<p>Do the current provisions for the substance and preparation of a VPA need to be reviewed?</p> <p>Should a VPA be publicly available and if so how and when?</p> <p>How should council register VPAs?</p>	<p>LGNSW supports more transparency and consistency around the application of VPAs across the sector, but opposes the Minister being able to override council practice on VPAs. Many councils have extensive experience in applying VPAs that provide tailored public benefits to local communities.</p> <p>The application of VPAs is a useful tool for developers and councils as a means of incentivising well-designed development and ensuring that the community shares in value uplift.</p> <p>LGNSW supports councils' use of VPAs and strongly recommends that councils be consulted on any changes to the methodology for VPAs that may be under consideration by the Minister⁴.</p> <p>LGNSW supports the registers for VPAs being on-line.</p>

3. Development assessment and consent – Part 6

- LGNSW supports the use of digital technology to improve the efficiency of the DA and CDA processes.
- LGNSW advocates for councils to have the capacity to support ePlanning initiatives.
- LGNSW supports improvement of the DA assessment process by the use of digital business systems, rather than further regulation.
- LGNSW recommends that more emphasis needs to be placed on educating applicants to lodge better applications. Many of the downfalls of the system are because DAs are poorly presented.
- The assessment timeframes for DAs are unrealistic where more applications are assessed as complying development, this restricts the DA pathway to the more complicated DAs.
- The assessment of DAs has become increasingly complex as the level of information required to consider a DA has vastly expanded since 2000. For many councils applicants are increasingly litigious requiring councils to adopt a risk adverse assessment practice.

<i>Issues</i>	<i>Proposal/Question</i>	<i>LGNSW's response</i>
Notification of DAs	Does the current notification process for DAs need to be changed in an IT/social media world?	<p>Yes, but not completely.</p> <p>Most councils support letters to adjoining owners as it is direct and ensures that owners and occupiers are informed. One letter may be adequate to direct the 'interested person' to the website for the plans, process and the notice of determination. No further</p>

⁴ See LGNSW's Submission on VPAs <http://www.lgnsw.org.au/files/imce-uploads/127/lgnsw-submission-to-nsw-dpe-on-improving-voluntary-planning-agreements-jan-2017.pdf>

Issues	Proposal/Question	LGNSW's response
		<p>letters are needed.</p> <p>The timeframes for the notification of DAs can be identified in the Community Participation Plan (CPP) and not specified in the regulations.</p>
Advertising DAs in newspapers	Do the current advertising requirements on print media for DAs need to be changed in an IT/social media world?	<p>While some councils support an eNews methodology that advertises all DAs to residents, other councils are concerned that this does not reach all 'interested persons' including renters. However, most councils agree that advertising in newspapers could be restricted to DAs over certain thresholds.</p> <p>The regulations could restrict advertising in print media to DAs of 'regional significance', with the capacity to widen those categories of development under council's Community Participation Plan.</p>
Information requirements – schedule 1	Are they adequate?	Some councils require more information for a DA beyond that required under the regulations. This practice will be phased out as eLodgement is progressively adopted. Councils will be increasingly required to rely on additional information being supplied by the applicant during the process. See below.
Additional information	Are the requirements to allow councils to request additional information adequate?	<p>Ideally the pre-DA meeting, where used by the applicant, identifies what additional information is required by council staff to support a DA. Otherwise this information is requested in writing by the council staff during the assessment process. This can result in debates with applicants on the quality and substance of material provided, or not.</p> <p>The current 'stop the clock' practice, while not ideal, is a practical means of obtaining relevant information and is a benefit for the applicant.</p> <p>Additional information is usually required to justify an application and assist in council granting a satisfactory approval, subject to conditions. If councils are not able to request additional information the outcome is more likely to be a rejection of the DA.</p> <p>Councils strongly support current practice and being able to request additional information during the assessment process.</p>
Deemed refusal period for DAs	Are the current deemed refusal periods of 40 days for local DAs, 60 for integrated and designated development, and 90 days for SSD realistic?	<p>The expansion of exempt and complying development means the average DA processed by councils has become more complex and therefore takes longer to assess. The 40 day time frame is no longer a realistic assessment time to complete many DAs.</p> <p>Councils are also aware that certain companies are lodging appeals to the Land & Environment Court on the deemed refusal day, forcing the matter to a conciliation meeting (s34 meeting). Additional information is regularly presented at that meeting enabling a decision to be negotiated. This requires councils to brief solicitors and prepares legal statements. This is financially costly</p>

Issues	Proposal/Question	LGNSW's response
		<p>and resource intensive.</p> <p>This is an obstacle for councils being able to deliver an equitable and cost effective service for the assessment of DAs. Deterrents need to be put in place to discourage 'gaming' the system.</p>
<p>DAs referred to local planning panels/ Independent Hearing and Assessment Panels – IHAPs and design panels</p>	<p>Should deemed refusal times take into account DAs that are referred to IHAPs and design panels?</p>	<p>Yes. It is anticipated that for a number of councils a greater number of DAs will be determined by an IHAP rather than under council powers of delegation. The DAs that require a referral are unlikely to be finalised in 40 days.</p> <p>The <i>Development Assessment Best Practice Guide, March 2017</i>, allows 5 days for DAs to be determined by an IHAP to meet the deemed approval time of 40 days⁵.</p> <p>This is will not be practically achievable in many cases and can expose councils to legal action. DAs referred to an IHAP require a more realistic deemed refusal period of at least 50 days.</p>
<p>Existing use activities</p>	<p>Are changes needed to better manage existing use rights?</p> <p>Would it be sensible to support provisions that enable long standing 'existing use' activities to be regularised without requiring a re-zoning process?</p>	<p>Some councils have questioned whether a planning proposal is the most appropriate means of permitting the use, where the 'existing use' is considered to be a minor non-conforming use.</p> <p>LGNSW suggests that the regulations may consider a more simple form of re-zoning in such circumstances, where council supports the application?</p>
<p>Guidelines for State Significant Development</p>	<p>How to consult with council and communities on SSDs/SSIs?</p>	<p>LGNSW supports a more open and transparent consultation process with councils. Consultation must take into account councils' capacity to deliver high level advice at short notice.</p>
<p>Locating public exhibition requirements</p>	<p>Should provisions in councils' Community Participation Plan (CPP) override the regulations where the exhibition periods are lower than in the regulations?</p>	<p>Yes in part. LGNSW agrees that council's' CPP should mandate the required advertising period for all local DAs. However the CPP may override the regulations, irrespective of whether the period is lower or higher.</p>
<p>Notice of determination of a DA Clauses 100 and 101</p>	<p>Can current practice be streamlined?</p>	<p>Yes. The notice of determination of a DA can have effect when placed on the council website and the NSW Portal. Only the applicant needs to be informed by letter.</p> <p>LGNSW agrees that sending out a Notice of Determination with relevant plans to all parties is unnecessarily burdensome on councils. LGNSW also agrees that the Notice can be posted on the website with a link to the relevant information, where the</p>

⁵See p 28 <http://www.planning.nsw.gov.au/News/2017/Development-Assessment-Best-Practice-Guide-cutting-red-tape-for-councils>

Issues	Proposal/Question	LGNSW's response
		adjoining owners have been informed of such practice earlier.
Reason for council decision	The amendments to the EP&A Act will require councils to publish reasons for their decisions.	Currently the applicant is provided with reasons for a refusal, but not always the general public. This information could be posted on the council website and/or the NSW Portal. It is unclear whether the changes in the draft Bill will cover reasons for refusal and approval.
Classes of designated development - Schedule 3	Designated development (DD) allows 3rd party appeals and a longer advertising period of 30 days. Most DDs require an environment protection license and correspond with the list of activities in the POEO Act ⁶ .	LGNSW agrees it is timely to review these categories of development. The objective should be to ensure that the classification covers the full range of development that warrants higher scrutiny due to potential negative environmental impact on the surroundings.
Definition of environmental sensitive area - Schedule 3	The definition and specific locational criteria are to be reviewed. What do we think?	The definition needs to be reviewed to address E Zones and issues arising from the Biodiversity reforms such as areas of outstanding biodiversity value and biodiversity stewardship agreements.

4. Environmental assessment – Part 14

- Part 5 enables government agencies to have projects approved subject to an environmental assessment process only. As the NSW Government has already expanded the Part 5 pathway to both public and private school projects the current environmental assessment practice needs to be reviewed to ensure that it is robust enough, and the process transparent for councils and communities.
- LGNSW agrees that the process for assessing an Environmental Impact Statement (EIS) and Statements of Environmental Effects (SEEs) needs to be more transparent for councils and communities.

Issues	Proposal/question	LGNSW comment
EIS Assessment - Part 14	Does the EIS assessment process need to be reviewed?	Yes. The requirements for an EIS may need to be applied to a wider group of activities including school projects.
Public agencies to publicise environmental assessment	Do public agencies need to publicise their environmental assessment processes?	LGNSW supports making both the review of Environmental Factors and Environmental Impact Statements publicly available before approval of the application. In addition, these assessments should be placed on a register of approvals.
Environmental Impact Assessment Improvement Project by	Has the DP&Es <i>Environmental Impact Assessment Improvement Project</i> improved outcomes?	LGNSW supports improvements to the assessment process to enable early engagement with communities. The consultation process with councils, prior and post approval, can be challenging. Councils find it

⁶ Protection of the Environment Operations Act 1997

Issues	Proposal/question	LGNSW comment
DP&E Schedule 2		challenging to meet timeframes during the assessment process, as well as advising on and monitoring the conditions of consent.

5. Fees and charges – Part 15

- The review of fees and charges for development associated activities is long overdue. Only minor changes have been made since the inception of the regulations in 2000. The new fee structures need to be based on full cost recovery.
- While certain fees are scaled against the cost of development this does not reflect the increasing complexity of assessing a typical DA and the level of expertise required to process even minor matters.
- The fees for DAs do not currently take into account the referral to an IHAP. Given that the estimated cost of running an IHAP is around \$100,000-\$120,000 per year this additional cost needs to be factored into the cost of assessing a DA.
- Almost every metropolitan council has invested in expensive electronic systems to manage:
 - i) data collection and retrieval;
 - ii) the fast delivery of planning certificates; and
 - iii) increasingly sophisticated on-line DA tracking systems that require on-going resources to update and administer.

Issues	Proposal/question	LGNSW comment
DA fees Part 15	Do the DAs fees need to be changed?	<p>Yes. Many councils have indicated to LGNSW that the current fee schedule does not cover the cost of assessing the application.</p> <p>While fees are based on 'cost of work' these costs can be substantially under-estimated. Fees need to be significantly increased to acknowledge the level of work involved and the expertise required to assess a DA in an increasingly complex and litigious planning context.</p> <p>Councils are increasingly required to negotiate outcomes with applicants and communities on highly controversial and technical issues, where issues of design and density may be hotly debated.</p>
DAs determined by mandatory IHAPs Part 15	Do the DA fees determined by planning panels need to be increased?	<p>We welcome the Government's commitment⁷ to review the cost of establishing and operating mandatory IHAPs.</p> <p>LGNSW does not agree that possible legal action arising from a DA should be a matter of consideration when determining the assessment fees of a DA. This is because it is impossible to predict which decisions are appealed against.</p>

⁷ Scot MacDonald MLC stated in the Legislative Council on 15 November that:

"I also assure stakeholders that the department will closely monitor the implementation of these reforms. We have had informal advice from councils that IHAPs can save them money by reducing legal challenges to planning decisions. We will monitor the costs and savings to councils and, if necessary, allow adjustment to development application fees to ensure that the cost of IHAPs is not borne by ratepayers generally. We can do this through changes to regulation" Hansard p. 41.

Issues	Proposal/question	LGNSW comment
Planning Reform Fund (PRF) and the cost of DAs Clauses 256A and 256L	Should the planning reform fund cover the cost of administering the planning panels?	LGNSW recommends that the PRF support administrative changes arising from the reform agenda, including the cost of administering an IHAP ⁸ .
Planning Reform Fund (PRF) - Transparency and accountability		The Regulation should include a requirement that the revenue and expenditure of the PRF is subject to full public disclosure in an annual report.
Planning certificates Clause 279	Should the cost of planning certificates be changed?	<p>Planning certificates have been set at \$53 since 2000. Some councils charge an additional 24 hour service fee but this practice is declining as council IT services are delivering a speedy service to users.</p> <p>Almost every council has invested substantially in delivering certificates digitally. However, while these services are technically well advanced most certificates are manually checked before issue because of:</p> <ul style="list-style-type: none"> • the legal status of these certificates, • the reliance that applicants place on the accuracy of the information provided; and • ongoing discrepancies between local based and state based maps. <p>The current fee does not account for the legal ramifications of providing inaccurate information.</p>
Review of a DA	Should the cost of a review of a DA be increased?	The fees need to be reviewed to take into account the importance of this process as most of these DAs are likely to proceed to court, where the DA is refused. The fees need to factor in this process that may require council seeking legal advice.
Planning Proposal (PP)	Should the fees of a PP be prescribed under the regulations?	<p>No. Currently councils negotiate with the applicant to determine a suitable fee based on the scope of planning studies required. Assessment requirements vary widely for PPs depending on the type and scale of development proposed. This can range from a land release on the urban fringe, a subdivision for housing in an established area, a new shopping centre or a multi- storey flat development.</p> <p>LGNSW opposes prescribing fees in the regulations and supports councils continuing to apply their own fee structure based on the common types of PPs that are assessed locally and the planning studies required.</p>
Compliance levy for CDAs?	What should be an appropriate levy to enforce a CDA?	The Planning Bill 2017 has introduced a compliance levy for CDAs. This needs to be considered by the proposed Expert Steering Committee and sub-committees.

⁸ Clause 256A- applies for development applications (other than for State significant development). 256A specifies payment to the Secretary. Clause 256L applies to fees for State significant development and State significant infrastructure.

D. Conclusion and Recommendation

LGNSW welcomes the review of the *Environmental Planning and Assessment Regulation 2000*. The Issues Paper launches the much needed review of the planning regulations, and is the first step of many in the review process.

LGNSW appreciates that many councils have been progressively introducing more technologically advanced processes to modernise the assessment system since the introduction of the Regulations in 2000. Further changes are welcomed but all improvements must:

- continue to enable communities to be fully engaged in the planning system; and
- balance the right of the council to deliver a community benefit with the individual's right to develop a property.

The purpose of planning is to ensure that land use and infrastructure decisions are made for the long term benefit of the whole community. The role of industry to instigate innovation and new development is appreciated. However, all development ranging from new housing estates to medium density/or high rise development, must be considered by council within the local strategic context, and the timing of the delivery of supporting infrastructure.

Not only should the development approval process be streamlined, but all users need to also be better educated. The average DA would be more readily approved, if it was better prepared and supported by adequate information.

Expedience must not override the need for quality development.

The task of the regulatory review is very large task and needs to be inclusive. LGNSW strongly recommends that the DP&E set up an Expert Steering Committee to manage the review of the regulation, supported by a number of working groups dealing with different sections of the regulation. The Expert Steering Committee should comprise senior representatives of the DP&E, LGNSW and other stakeholder groups. The sub-committees should be similarly structured at officer level and cover:

- Local Strategic Planning Statements and Community Participation Plans;
- Development assessment procedures;
- Fees for development services;
- Development Control Plans; and
- Development levies and Voluntary Planning Agreements.

Thank you for seeking feedback from LGNSW in the early stages of the review process. We look forward to partnering with the NSW Government on improving planning outcomes in NSW.