Planning System Reform in the ACT

Submission to the Standing Committee on Planning and Environment of the ACT Legislative Assembly : *Planning and Development Bill 2006*

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Introduction

The Environmental Defenders Office welcomes the opportunity to comment further on the proposed reform of the *Land (Planning and Environment) Act 1991* by the Planning and Development Bill 2006. However, we are concerned that the objective or outcome of environmental protection has been lost in the focus on speed of development approvals.

A proper law reform process must look at the how the existing Act is performing terms of environmental outcomes. In other words, is the Act achieving its purpose of planning for sustainability, now and for the future?

Our submission makes four main suggestions:
1. Improving the objects clause of the legislation;
2. Improving community consultation and appeal rights;
3. Strengthening the Environmental Impact Statement process; and
4. Addressing the proposed reduction of the role of the Planning and Environment Committee in review of variations to the Territory Plan.

Inadequacy of Objects clause

The EDO has concerns in relation to the present drafting of the objects clause.

Briefly our concerns are:

- failure to include reference to "ecologically sustainable development" as opposed to "sustainable development":
- failure to draft the objects clause in such a way so that there is an obligation on decision-makers acting under the authority of the legislation to either apply or have greater regard to the objects of the act.
- An excessive emphasis on economic considerations in the drafting of the objects clause, in what amounts to effectively a double counting, as economic and financial considerations are referred to in both paragraph (a) and paragraph (b) of the objects clause.

We recommend that deletion of subparagraph 6(b) from the Bill, as this drafting is likely to entrench the primacy of economic considerations in decision-making under the Act.

In relation to the second dot point above re implementation of the objects clause, we draw your attention to the provisions of the NSW *Water Management Act 2000*, which states in section 3 that the objects of that Act are:

> (a) to apply the principles of ecologically sustainable development.

Importantly, the drafting of that act goes further by requiring that the Act be administered in accordance with water management principles and State Water Management Outcomes Plan. It states:

> "It is the duty of all persons exercising functions under this Act to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles of this Act". (s9(a))

It is our point that the sustainability objectives of the planning and development Bill could be drafted in such a way so that the objects clause becomes more than mere decoration or statement of exhortation, and instead acting in accordance with the objectives becomes a statutory obligation. For example, the objects clause could be drafted to include the following paragraph:

> "It is the duty of all persons involved in the administration of this Act to exercise their functions under this Act in a manner that gives effect to the sustainability objectives of this Act."

This example provision is drafted from s.9(b.) NSW Water Management Act 2000.

Third-party appeal rights

In summary our concerns about the appeal rights provisions of the proposed legislation are:

(a) there is no requirement for major public notification on merit assessable development in all circumstances. There is no detail in the present public consultation material released by ACTPLA about a list of merit track development that will require such notification. These restrictions on notification will flow on to effectively restrict third-party appeal rights.

(b) the restrictive definition of the standing provisions, " materially affected", will mean that much legitimate community concern about major and controversial development may be blocked on the basis of a technicality, many that the substance of community concerns is never addressed, leading to the risk that there could be an increase in applications for judicial review of planning controversies. These restrictions on appeal rights are at variance with interstate practice in Victoria and New South Wales, where broader appeal rights appear to have had little effect on economic development.

(c) a further source of community input into planning matters in the ACT is to be closed off by the Bill, by means of the reduction in the role of the planning and environment standing committee in the consideration of draft variations of the Territory plan. This will occur because reference to the committee will be at the discretion of the Minister.

Proposals to restrict appeal rights

The EDO ACT is concerned at the overwhelming emphasis of the draft Bill on the removal of appeal rights and public notification rights. The fundamental importance of these issues was described by EDO South Australia solicitor Mark Parnell in a paper written in 2000:

> "Inevitably, there will continue to be tensions between the desire for a genuinely participatory and inclusive planning system and the attempts of the more powerful groups in society to promote their interests. How we deal with these tensions will determine the sort of democracy… that we become." [1]

In 2005 the EDO ACT expressed concerned at the overwhelming emphasis of ACTPLA's public discussion documents on removal of appeal rights and public notification rights. A key preoccupation of the Development Assessment Forum (DAF) documents produced by the Department of Transport and Regional Affairs upon which the ACTPLA proposals are apparently based is upon trimming of appeal

[1] Mark Parnell (2000), "Fast-Tracking Development Approval - Methods & Justification", Environmental Defenders Office Inc. (South Australia), internet publication at http://www.edo.org.au/edosa/index.htm.

rights.[2] The DAF approach reflects Coalition government policy objectives of reduction of red tape and delays for the development industry. For the ACT government to be overly concerned with responding to these preoccupations may not be in the broader public interest.

However, calls for faster approvals and greater certainty coming from the property development industry paradoxically present ACTPLA with an opportunity to create some win-win outcomes. The EDO ACT recommends that the application of exemptions to be guided by principles of encouraging improved environmental performance in development proposals. In this way the granting of an exemption in appropriate circumstances could become an incentive for developments to incorporate the highest possible environmental performance.

EDO Recommendation
The EDO ACT recommends that the application of exemptions to be guided by principles of encouraging improved environmental performance in development proposals. However these exemptions must not involve restrictions on appeal rights to raise *bona fide* matters in the public interest.

ACTPLA could consider options where developments that present best environmental standards according to pre-set criteria being fast-tracked in relation to certain aspects of the development assessment and approval process. This has the potential to generate major incentives for improved environmental performance by encouraging a wider range of developers to investigate more environmentally aware design options. This involves a targeted – rather than an open slather - approach to the granting of exemptions.

Nevertheless, the EDO has severe reservations about the emphasis on fast-tracking of development without any off-setting or balancing emphasis on granting exemptions to those developments that will lead to clearly certified improvements in environmental outcomes.

Appeal Rights in the ACT

At present the *Land Act* applies a fairly broad test of whether a person may be affected by development in order to give rise to a right to object to that development. Section 237 (1) of the *Land Act* refers to "Any person who may be affected by the approval of an application". Appeal rights then flow from the fact that an objection has been made within the statutory time limit.

The reference to "interests" in s.282A(2) to the obligation of decision-makers to give notice of decisions to approve development, "to people whose interests the person believes are affected by the decision". This relates to the obligation to notify members of the public, not to the rights of the public to object or to lodge an application for review with the AAT.

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2 Department of Transport and Regional Affairs & Development Assessment Forum (2005), *A Leading Practice Model for Development Assessment in Australia*, unpublished draft, Commonwealth Government, Canberra.

The current legislation, the Land *(Planning and Environment) Act 1991*, provides a test along the lines of "a person whose interests are affected by a decision may apply to the AAT for review of the decision" (s.275). The proposed Bill uses new terminology, "materially affected" in clause 387.

However it is important to note s.275 must be interpreted in conjunction with section **276 of the Land Act. That section,** which sets out the rights of third parties to apply for merits review in the AAT **does not restrict standing on the basis of "interests".** Section 276(2) merely requires that an objection was made or if not there was a reasonable excuse for not doing so within the timeframe contemplated by the Act. **If either of these tests is satisfied a person is "qualified" to make an application for review. The tests do not include reference to the term "interests" with its associated connotations of economic or property interests, as opposed to aesthetic or environmental concerns.**

Strike outs and denials of standing in the AAT

The EDO has observed on a day-to-day basis that in the ACT's Administrative Appeals Tribunal, procedural motions are frequently put forward by the legal representatives for government and developer interests in order to prevent the substance of matters being raised by resident objectors from being heard. In many instances these arguments, with some exceptions, have been accepted by the Tribunal.[3]

For example, in the *Kippax Task Force* case (2004 decision No. AT 04/10), Dr Chris Watson, Convenor of the Kippax Task Force, an action group of the Belconnen Community Council Inc. was denied standing to appeal against a decision to grant development approval to a residential development. That development was on a site that was previously community use (a gym) and was needed, in the view of local residents, for a variety of community uses including a library, swimming pool, clubs etc. KTF was part of the Community Planning Forums and its input had been sought by the Planning Minister on several occasions. It was a legitimate organisation with legitimate concerns which had represented resident's views over a ten year period. This was evident from a Statement of Raymond George Brown (a planning staff member of ACTPLA) tendered by the ACT Government Solicitor in the above proceedings. EDO was not able to represent the Kippax Task Force due to a lack of funding and resources, partly arising from a Federal government restriction on use of grant funds for litigation, which in practice has required litigation fundraising from clients and other sources. The decision denying standing was given orally and therefore the decision is not reported on the internet.[4]

[3] *Moore & Ors and ACT Planning & Land Authority and Anor* [2004] ACTAAT 22 (28 May 2004); Save The Ridge Inc. and ACT Planning and Land Authority & Anor [2004] ACTAAT 16 (7 May 2004); *Kippax Task Force and ACT Planning & Land Authority & Ors* [2004] ACTAAT 11 (23 March 2004); *McCullough and ACT Planning & Land Authority & Anor* [2004] ACTAAT 9 (17 March 2004); *Brewer and Commissioner for Land and Planning & Anor* [2002] ACTAAT 46 (31 October 2002).

[4] *Kippax Task Force and ACT Planning & Land Authority & Ors* [2004] ACTAAT 11 (23 March 2004) refers to the related decision that denied standing.

This is only one example where the recent decisions of the AAT have presented a restrictive interpretation of the law of standing to prevent public interest questions from being heard.

Comments on ACTPLA Recommendations to Limit Third Party Appeals

It appears that ACTPLA has taken little notice of EDO comments made in 2005, other than to note them and disagree.

> **EDO Comment on ACTPLA Recommendation**
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> *"The Land Act should provide that third party appeals are open to persons who (a) are likely to be "materially" affected by a development application decision and (b) made a representation at the assessment stage."*
>
> **The EDO disagrees with this proposition.**

A controversial aspect of appeal rights is whether such rights should be limited to "persons affected" by a decision or whether "open standing" should enable any person to challenge the merits of a decision. With very few exceptions, the Environmental Defenders Office supports open standing, for the reasons set out earlier (i.e. general public interest in decisions affecting the environment.)

Limiting third party appeals to persons 'materially affected' promotes an 'out of sight out of mind' approach. Whilst it may be conceded that those living very close to a proposed development or polluting activity may have a stronger motivation to challenge a decision, such a fact is not a sufficient reason to limit appeals to that class of person.

Restriction of notification to adjoining lessees in the case of "merit track" applications is objectionable. There might be reasons why other nearby neighbours would wish to make representations, like reduction of neighbourhood amenity. This is a well established planning principle in all jurisdictions. The idea that comments by anyone but next door neighbours are irrelevant and unduly restrict economic development, is extremely short sighted.

The EDO is of the view that provisions of the *Land Act* must be amended to enable "any person" to object and to prevent semantic discussions of who is a proper objector and whose interests are affected.

In particular we suggest that is not good public policy to limit appeal rights by means of resort to a geographical proximity test. It is entirely plausible that more significant and relevant arguments about detrimental impacts of a particular development may be raised by a person or organization who is not a neighbour than by the owners and occupiers of adjoining properties. Further, a geographical proximity test is not appropriate for situations involving development on public lands, as there may be no immediate neighbours who would meet the proximity test.

Comment on "materially affected"

The restrictive definition of the standing provisions, " materially affected", will mean that much legitimate community concern about major and controversial development may be blocked on the basis of a technicality, many that the substance of community concerns is never addressed, leading to the risk that there could be an increase in applications for judicial review of planning controversies. These restrictions on appeal rights are at variance with interstate practice in Victoria and New South Wales, where broader appeal rights appear to have had little effect on economic development.

The intent of the exposure draft of the Bill remains a little elusive due to the lack of an explanatory memorandum. However if comments attributed to the Planning Minister, Simon Corbell MLA, in the *Canberra Times* of 15 July 2006 are accurate, there is cause for concern. Mr. Corbell is said to have said the new " materially affected" standing test "was aimed at stopping people for suburbs away from a proposed development unnecessarily objecting it."[5]

The current legislation, the Land *(Planning and Environment) Act 1991*, provides a test along the lines of "a person whose interests are affected by a decision may apply to the AAT for review of the decision" (s.275). The proposed Bill uses new terminology, "materially affected" in clause 387.

This phrase, "materially affected" appears to be derived from a provision of the Victorian *Planning and Environment Act 1987* (s.52) which sets out requirements for notification of neighbours in relation to developments

It is important therefore to note that the term "materially affected" is applied in a different context in the proposed ACT legislation to that which applies in Victoria.

ACTPLA's document entitled "Government response to community comments", November 2005 states:

> "The legislation will retain the right of community councils and other community associations to initiate a third party merit appeal where the appeal is consistent with the written objects of the association (applicable to incorporated and unincorporated associations);" (p.14)

In many instances, community concerns and concerns of residents arise in situations in which there is no incorporated association in existence. Our review of the legislation as proposed indicates that it fails to clearly state that an association may be an unincorporated association for the purposes of the standing test. The Bill merely states that standing is potentially available where the objects of the association "the decision relates to a matter included in the entity's objects or purposes." Many unincorporated associations i.e. groups will not have written

[5] Thistleton, J. " industry gives thumbs up to planning changes", Canberra Times, 15 July 2006.

objectives and may be required to lead affidavit evidence regarding their purposes in order to establish standing.

The main point is that a restrictive rule in relation to standing will mean that a large amount of Tribunal time will be spent in determining questions of standing rather than turning its collective mind to the substantial question of whether there is a need in a particular instance for improved planning decisions.

Professor Murray Raff, Head of the Law School at the University of Canberra, and an expert on Victorian planning law states that the definition of "material affected" is not often used to restrict standing in Victoria:

> "This is rarely put to the test in Victoria because no responsible authority I know of has been prepared to implement the Kennett amendments against their citizens and ratepayers with the full stringency that their drafting might otherwise justify. One pragmatic reason for this is that the Planning & Environment Act 1987 (Vic) also provides for citizen applications for cancellation of a planning permit and one ground is that no notice was received when entitled to it. Disputes at this end of the process have indicated a broad interpretation of entitlement to notice by VCAT. It is of course worse for a developer to start a project and then suffer the permit being cancelled than to have negotiated the contentious issues at the start. Generally, if one has lodged an objection one is entitled to appeal to VCAT. However, even if one has not objected one can seek leave to appeal and VCAT has been reasonably flexible on that. One of the tests is the desirability of disposing of the concrete issues in dispute."[6]

"Material detriment" does not address other adverse impacts on the wider community, including creating an unacceptable development precedent or impacts beyond immediate neighbours. It would seem that the only people who would have any legal basis for protest would be those on immediate boundaries, or whose view might be directly affected i.e. not a wider community. With such a narrow definition, there is little (or no) real prospect of a broad community (beyond the immediate neighbours) having any say on such developments.

The EDO has concerns that the Bill as drafted will not achieve any objectives of access for environmental groups due to ambiguity in drafting. Partly a large amount of the confusion will flow from the phrase "in relation to land" which qualifies the definition in s.387.

A number of specific questions remain:

1. In proposed clause 387 (1)(b), is the provision sufficient to grant standing to an environmental organisation that had within its objects of incorporation " "the preservation of the environment of the ACT" or something similar?

2. Given that the definition of material detriment provided in (b) follows the opening phrase "in relation to land", what is the implication of the inclusion of this phrase? Does it mean that the objector (even if they fall under (b) as an Association) must have interests in land in order to be entitled to object, and therefore to be entitled to lodge an application in the AAT?

[6] Email to EDO, 28 August 2006.

Does it mean that the interest in land must be some form of property interest i.e. fee simple, leasehold, or licence? Would it be possible to have an "interest" in an area of public land, and still meet the standing test in this proposed legislation ? Does the use of the phrase "in relation to land" necessarily imply the importation of accepted notions of "interests" from property law, indicating the power to take certain actions in relation to that parcel of land, rather than a mere professional, aesthetic, or emotional or intellectual interest in that land (e.g. it is a nice place to take the family for a walk, or even it is an area of public land where a hypothetical scientist seeking standing in relation to an area of public land where s/he regularly undertakes scientific research).

In other words does the use of the phrase necessarily imply the importation of accepted notions of "interests" from Anglo Australian property law, or all it does it imply something much broader for example would native title interests or interests in environmental protection be included?

Most environmental organisations – if incorporated - are likely would have standing recognised if their incorporation documents contained an object related to preservation of the environment. Naturally, this will not help individuals, such as an individual scientist wishing to protect threatened species on private land.

It might be better from the point of view of the ACT government for the objection provisions to match up with the *EPBC Act* (Cth) standing provisions (s.487) so that in the uncertainty surrounding planning objection and referral to the Commonwealth Minister there is sufficient flexibility for the ACT planning inquiry to serve as a one-off accredited procedure for Commonwealth purposes (in the absence of a bilateral between the ACT and the Cth), thus requiring matching flexibility in standing.

There is ambiguity in use of "in relation to land". Most probably it is meant to signify "not in relation to something else" like fund raising opportunities, or recruitment of qualified staff, or commercial activities. Possibly it means "in relation to land use planning, development of land and conservation of land, etc." However, the ambiguity of the expression remains problematic.

It is artificial to cast the question as the conservation organisation suffering detriment, because it is the integrity of the relevant eco-system that is suffering the detriment and the organisation is reporting it and advocating around it.

The government cannot however afford to cut voluntary organisations out of the process as "busy-bodies" unless it is prepared to boost massively the resources of ACT wildlife/environmental officers who can assess and monitor every project in relevant respects. The ethos of the era of lean government is that laws should be self-enforcing. Resort to tighter standing provisions prevents this with respect to environmental and planning laws and the standards that they implement. If other stakeholders are to be shut out, the government must put greater resources into its own enforcement and compliance activities. It cannot prevent objection to inappropriate development altogether because this is not desirable economic development, either in the conventional sense or encompassing sustainable development (it is now 14 years since Australia subscribed to Agenda 21 and its ideas of sustainable human settlement through planning).

Further comment is warranted in relation to 387(a)

> (a) the decision has, or is likely to have, an adverse impact on the entity's use or enjoyment of the land; …

In the opinion of the EDO, there would be a risk of the provision being interpreted to require more than a conservation, heritage or scientific interest in the land because of the restriction to "use or enjoyment" of the land. Enjoyment of land is often related to a possessory interest, such as a lease, as in the phrase "quiet enjoyment" which denotes the tenant's freedom from interference by the landlord and others claiming a title to the land that is superior to the landlord's – in other words it is the part of the lease that guarantees exclusive possession, which is one of the two essential touchstones of a lease (in addition to certainty [calculability] of the term of the lease).

A conservation, heritage or scientific interest in land is unlikely, on the other hand, to amount to a "use of land". For these reasons the first limb is likely to exclude entities that are conservation groups. The expression "entity" appears to include individuals as well, so long as they satisfy the Schedule 1 requirements. This however remains ambiguous.

Provisions of the Bill Relevant to Appeal Rights

Provision	What	Comment	Provisions in current Act
s.374	Meaning of "material detriment"		s.275 Land Act " a person whose interests are affected... may apply to the AAT for review of the decision."
Item 4, Schedule 1	Decision under s.148 to approve development application in the merit track		
Item 6, Schedule 1	Decision under s.148 to approve development application in the impact merit track	Linked to explicit statement in s.121 that there are third party appeal rights in relation to this category of development application.	

s.371	Challenge to validity of Ministerial decisions on development applications (judicial review) must be lodged within 28 days of the decision.	By comparison, NSW legislation provides for a much more generous three month period for lodgment of judicial review applications.	Bill is consistent with the current Act s.279A

Under the merit track there are third party appeal rights only if the development application is required to have major public notification).

Comment on the pursuit of DAF objectives

The current system in many respects is obviously not working very strategically. Environmental assessment requirements and compliance appear tougher for dwelling extensions than those major infrastructure proposals. The level of assessment required is not proportional to potential impact.

In relation to the role of the public, the big issue appears to be Development Assessments Tracks which determines what provisions are apply. The implications of what category the development falls into are considerable. For public notification would apply to Merit applications and above. The example given is a multi-unit development in an established residential area or a new office block in a town centre that do not fully comply with relevant codes. Can we take it below this there would be no public notification or third party rights to appeal?

Setting such a high trigger point for community involved virtually ensures the public locked out of the development assessment process but all but less than probably 5% of applications. **To exclude the community from participating is a stated intention of the DAF system.**

The DAF process is a Commonwealth Government sponsored initiative run by DOTARS. This approach has a clear direction that the community has little involvement involved in the decision making environment assessment. Interesting this would also apply to political decision makers. In states with local government there has been considerable angst among local government. The Australian Local Government Association (ALGA) President, Councilor Mike Montgomery, said the model sought to remove the power of Councils to make decisions on planning applications and stop third party appeals. "It is an assault on the democratic right of communities to control the planning process," The Commonwealth Government advocating because as they state on Coalition policy platform it has key objective the reduction of red tape, costs and delays for the development industry.

The ACTPLA interpretation does not seem to be taking on board that *there is a need for an Independent and Expert Assessment Panels be established at local or regional Level to assess projects not determined by professional staff, and to review staff decisions. It is proposed that each state and territory establish an independent expert commission to* *assess projects called in by the relevant Minister and to review appealed local panel decisions.* (Source: DAF Roadmap to Model DA process).

In the ACT case it would appear even more essential that these be established or we keep in existence bodies such as Planning and Development Council. Unlike the other state and territory jurisdictions there is less separation as ACT government fulfills both the local government and state agency role.

Also it is important because the ACT government maintains a strong economic dependence on the sale and development of greenfield land it making the decisions on. That conflict of interests leads to suboptimum decisions such as East O'Malley - where despite the weight of evidence that urban development was ecologically unsuitable, the developed still proceed because of the revenue issue. The then ACT Commissioner for Environment, Dr Joe Baker, raised this dependence as major barrier to the achievement of sustainable development decisions in the ACT in his *Annual Report*.

The Government has done a back flip of large proportions moving from a first term policy platform where "planning was to be for local people by local people" to advocating a system which unabashed goal is cutting red tape for the development industry.

Key policy documents such as A10 core guidelines and the incorporation of key elements of the neighborhood and masterplans plans into precinct plans should be in place before any such reform is implemented.

Comments on Reforms to Block Commercially Motivated Appeals

The EDO broadly supports the introduction of a provision which would enable the AAT to deny standing to appellants in the event that it is manifestly obvious that an appeal is motivated overwhelmingly by considerations of commercial competition.

Even though there exists strong anecdotal evidence of a problem of abuse of process by trade competitors, the potential implications for public participation are that genuine public interest litigants may be shut out of the AAT and Courts if appeal or judicial review rights are scrapped, or if restrictive standing requirements are introduced to stop trade competitor actions without associated protections for public interest based appeals.

One option for dealing with trade competitors whilst leaving the rights of other citizens intact is to provide statutory empowerment of ACTPLA and the AAT to investigate the motives behind a representation or appeal and dismiss those that appear to be solely commercially motivated.[7]

The EDO recognises that there should be some limits on third party rights in order to prevent commercial rivals from abusing their position. However sometimes they have a legitimate interest in defending their interest as neighbouring owners. In

[7] Mark Parnell (2004) *Fast-Tracking Development Approval - Methods & Justification*, EDO South Australia, www.edo.org.au/edosa

other cases, as Justice Stewart Morris has pointed out in his paper commercial rivals may have a legitimate interest in defending a consistent method of regulation, that avoids unfair discrimination in the imposition of regulatory costs.[8]

The Victorian Planning and Environment Act contains provisions enabling objections to be rejected on the ground of commercial competition (s.57(2A)) and for the tribunal to award both costs and damages against a person who has brought proceedings in the tribunal to secure or maintain a direct or indirect commercial advantage.(s.150(4)). The Victorian provision - s.57 *Planning and Environment Act* is included in an Appendix to this Submission.

EDO Comment on ACTPLA Recommendation

"The Land Act be amended to make it clear that increased commercial competition cannot constitute a valid ground for lodging a third party appeal."

The EDO agrees generally with this proposition as commercially motivated appeals do not normally constitute appeals which raise questions of the broader public interest in such matters as impacts on biodiversity, energy efficiency, visual amenity, and noise standards.

Further broad comments on the need for open standing

Attempts to restrict standing reflect a "deeper philosophical view that environmental disputes should only be recognised when they exist between the regulator and the regulated, (with no role for 'meddlesome' community groups or individuals). An alternative and more positive view of third party appeal rights is that such rights promote better decision-making by environmental authorities. If every decision was made in the knowledge that it could be reviewed by a higher Court or tribunal, then this would impose considerable discipline on the decision-maker to properly consider both the decision-making criteria and the best available evidence."[9]

Attempts to restrict standing are objectionable because they contravene principles of equality before the law. In a NSW decision in which a developer's association's efforts to propose a restrictive interpretation of broad standing provisions was rejected, the Court of Appeal held that there was no basis for reading down the words 'any person' contained in NSW planning law. Priestley JA observed:

> It is a convention that all people in NSW are subject to the same laws ... The convention is disturbed when individuals are observed by others to be breaking a law with impunity ... The observer who feels strongly enough about the particular breach may well ask, since all are subject to the same law, why should this person's breach of it be allowed, and if it should not be allowed, why should not it be dealt with at my instance.[10]

[8] Justice Stuart Morris (2005) Third Party Participation in the Planning Permit Process, by President, Victorian Civil and Administrative Tribunal, A paper presented at a conference on "Environmental Sustainability, the Community and Legal Advocacy" conducted by Victoria University, Melbourne on 4 March 2005.

[9] Mark Parnell (2000), *Public Participation in Environmental Decision Making*, paper presented to the Annual Conference of the Australian Institute of Administrative Law, Adelaide, June 2000, published on EDO South Australia website, www.edo.org.au/edosa.

[10] *Sydney City Council v Building Owners and Managers Association* (1985) 2 NSWLR 383 at 449.

Ensuring the enforcement of planning and environmental laws is a crucial purpose of open standing provisions. The decision in *BOMA* highlights this rationale for the introduction of open standing provisions. Their existence in other jurisdictions recognises the inevitable fact that there are often instances in which government agencies are either unaware of breaches of legislation or unwilling to address them. Therefore it amounts to good regulatory policy for the State to engage and recruit "regulatory surrogates" to assist it to enforce the laws of the land. The necessity for tripartite enforcement involving citizens is widely recognised in the academic literature on regulatory reform.[11]

Environmental legislation in New South Wales contains open standing provisions, allowing "any person" to apply to the Land and Environment Court to remedy or restrain a breach of the law (*Environmental Planning & Assessment Act 1979*, s. 123). Open standing provisions have been extended to all local government and planning and environmental statutes (in excess of 20) and have been adopted in Queensland, South Australia and Tasmania.[12]

Two decades of experience in NSW have underlined the positive success of open standing provisions. According to a former Justice of the Land and Environment Court "The floodgates of litigation have not been opened. There has been no 'shoal of officious busybodies agitatedly waiting, behind the flood-gates' (see Deane J in *Phelps v Western Mining Corp Ltd*). (1978) 20 ALR 183 at 189 – 190."[13] Elsewhere, in a 1999 conference paper the same judge, Justice Paul Stein AM observed that:

> "Court statistics reveal that the number of proceedings brought by individual citizens or NGO's under the various statutory open standing provisions have never exceeded 20% of registrations for civil enforcement and judicial review in any year. The balance of applications are by local councils and state agencies. It must also be kept in mind that of the 20%, an unknown percentage would, in any event, have had Common Law standing."[14]

The EDO urges the ACT to consider liberalising standing in environmental laws, not only to grant standing to mainstream environmental groups and NGOs, but to all citizens. This is especially important given the rights and responsibilities of and to citizens of the Territory flowing from the *Human Rights Act 2004* (ACT) and by international comparison from the *Aarhus Convention*.[15]

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[11] An important strand of the regulatory 're-invention' literature discusses means of encouraging 'regulatory surrogates' to engage in acts of indirect governance, thereby reducing the regulatory load on government: Gunningham and Grabosky (1998), Smart Regulation, Oxford University Press; Gunningham and Sinclair (2002) *Leaders and Laggards*, Greenleaf Press at 51.

[12] Open standing provisions have been available in the consumer protection area since 1974. The High Court of Australia recently affirmed the constitutionality of these provisions in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 169 ALR 616.

[13] Stein, P. (2000), *Down Under Perspective of the Environmental Court Project*, United Kingdom Environmental Law Association Seminar On The Final Report On The Environmental Court Project, 27 June 2000, London.

[14] Stein, P. (1999) "New directions in the prevention and resolution of environmental disputes - specialist environmental courts", Delivered Manila 6 March 1999 to "The South-East Asian Regional Symposium On The Judiciary And The Law Of Sustainable Development" at para 29.

[15] United Nations Economic Commission for Europe (UNECE) *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (1998), Aarhus, Denmark, 25 June 1998. (http://www.unece.org/env/pp/)

Three reasons in favour of broad public appeal rights were advanced by Justice Stuart Morris, President of the Victorian Civil and Administrative Tribunal in a Conference Paper delivered to Victoria University in March 2005[16]:

> "I think the case for third party appeal rights comes down to three basic propositions. First, the existence of third party appeal rights tends to improve the quality of governance. Good governance is not just about end results, it is also about the process of making decisions. Citizens derive satisfaction from having their say in decisions which affect them. Further, neighbouring landowners often have a very legitimate interest in whether development occurs and the form of that development. This interest might be based upon non-pecuniary impacts, but these can often be just as important as pecuniary concerns.
>
> Second, third party rights often lead to better planning decisions. It is true that it is comparatively rare for an objector to completely succeed in overturning a decision of a council in favour of development. But in more than half the matters brought before the tribunal objectors are at least partly successful, in the sense that the form of the development is changed or additional conditions are imposed. Third party appeals do enable development proposals to be evaluated in more detail and, although this comes at a cost, the most common outcome is a refinement of the development.
>
> Third, the existence of third party appeal rights discourages corrupt behaviour between developers and local government. When local government is charged with making a final decision on development issues there is a temptation for collusive behaviour; but this is pointless if objectors can exercise a right to appeal to an independent tribunal. I think it is worth comparing the experience of Victoria with New South Wales. In New South Wales third parties are only entitled to appeal to the Land and Environment Court in relation to "designated development", which is defined to embrace industrial type uses but does not extend to the majority of controversial developments, including apartments, town houses and the like. The New South Wales Independent Commission Against Corruption ("ICAC") has identified the fact that third parties generally cannot challenge decisions of councils in relation to development proposals as a factor which makes the New South Wales system highly susceptible to corrupt practice.[17]

Public Participation and Appeal Rights

Public participation is central to proper and effective environmental assessment and sound environmental outcomes. It is well-established that public participation has two fundamental benefits: (1) it ensures the "buy-in" of local communities; (2) it promotes better decision-making, with local communities best placed to provide accurate information on the proposal.

In response to the claim that "Public participation delays or discourages development", research conducted in South Australia, by Harvey (EIA) and Hodgson in relation to third party appeals support the contention of Leeson and others that problems with development are, in the main, unrelated to the use of third party or citizen rights.

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[16] Justice Stuart Morris (2005) Third Party Participation in the Planning Permit Process, by President, Victorian Civil and Administrative Tribunal, A paper presented at a conference on "Environmental Sustainability, the Community and Legal Advocacy" conducted by Victoria University, Melbourne on 4 March 2005.

The question has been raised as to whether perceptions about existing development approval problems really do exist in the minds of developers or whether they are simply "talked up" by those wishing to justify fast-tracking.[17] Even where there is concrete evidence showing that public participation is only a very minor factor in development delay or failure, politicians still justify responding to the "problem" as if it was real. In Victoria in 1993, for example, less than 2% of development applications resulted in appeals and less than a third of those involved third parties. Whilst the Victorian Planning Minister accepted this analysis, he could still justify the use of fast-track techniques on the grounds that the "reputation" of the planning system was at stake:

In South Australia, Parnell cites research showing that there is:
"conclusive statistical support for the proposition that third-party appeal rights do not represent a significant potential source of frustration or delay for developers."

In that State, the right to seek judicial review of major development decisions has been defended on the grounds that it has not been shown to cause developments to fail. Parnell observed: "The fact is that projects that have failed have not failed because of judicial review, and the Government simply will not be able to find a case where that has happened. The have failed for a host of other reasons - more often than not it has been for reasons of finance."

Despite the rhetoric of politicians, it is more likely that in the real world, locational choices are not typically influenced by the nature of the development assessment regime. Parnell cites a report of the Business Council of Australia:

> *"The decisions as to where the project will be established go to many other considerations than simply the environmental consideration. There'll be the access to the resource, there's the tax and other environments within which the financing of the project needs to be undertaken. The fact of an environmental impact procedure being different from one State to another will be relatively marginal to the locational choice."*

The critique regarding Delay

EDO NSW (2006) has made the following comments in relation to demands for reductions in delays in the planning process:

> "The EDO has already witnessed an increasing trend of winding back environmental regulation in NSW. Environmental regulation, including processes for public participation, review, and reporting requirements; has been developed over the last three decades. Recently however, industry, farming and business groups have been successful in lobbying for the streamlining of environmental regulation, and established principles have been eroded as a result. This is discussed below. It is disturbing to note that this trend seems to be gaining momentum."
>
> "Certain groups argued for the removal of "stop the clock" provisions on the basis that they cause delay and are thus a regulatory burden. However, the use of such

[17] Mark Parnell (2000), "Fast-Tracking Development Approval - Methods & Justification", Environmental Defenders Office Inc. (South Australia), internet publication at http://www.edo.org.au/edosa/index.htm.

provisions has often been essential for consent authorities to make decisions properly, in circumstances where inadequate information has been available. In this respect, it needs to be remembered that the provision of inadequate information by developers is one reason for the use of such provisions by decision-makers. Maladministration and under-resourcing are likely to be others. Removal of such requirements on the basis that they are simply "red-tape" or examples of inefficiencies in the system that hinder the rapid assessment and approval of development is simplistic in the extreme. Such an approach has the capacity to severely reduce the quality of assessment and is anathema to the public interest. Rather, close analysis should be given to the reasons for delay, and solutions developed accordingly. The EDO submits that the long-term public interest environmental impacts of a stream-lined approach have not been fully considered, and that comprehensive quality assessment must not be sacrificed in the name of short-term investment opportunities.[18]

Recommendations

1. The EDO is of the view that provisions of the *Land Act* must be amended to enable "any person" to object in line with NSW law to prevent semantic discussions of who is a proper objector and whose interests are affected.

2. The EDO broadly supports the introduction of a provision which would enable the AAT to deny standing to appellants in the event that it is manifestly obvious that an appeal is motivated overwhelmingly by considerations of commercial competition.

[18] EDO NSW (2006) "Investigation into the burden of regulation in NSW and improving regulatory efficiency", Submission to Regulation Review conducted by the NSW Independent Pricing and Regulatory Tribunal, p.5.

Comment on the EIA Provisions of the Bill

The EDO wishes to make a number of comments in relation to the proposed incremental impact assessment provisions of the Bill.

- The proposed abolition of Preliminary Assessments as a form of environmental impact assessment is potentially problematic as it may restrict options to require assessment of "minor" developments - for example in national parks such as Namadgi.

- There is a welcome list of developments for which production of an Environmental Impact Statement (EIS) is mandatory, a vast improvement on the present situation of excessive ministerial discretion to avoid requiring an EIS (s.121, Land Act).

- The failure of the Bill to adequately set out requirements for a valid EIS, and to address the questions of the role of EIA consultants and their integrity.

Provisions relating to EIA Consultants

The nexus between the developer and consultants is an issue that needs to be considered. One solution would be to mirror the Commonwealth EPBC provisions which require statutory declarations from consultants confirming that the content of an EIS is correct; and making it an offence to supply false or misleading information to obtain an approval (Appendix C).

Unlike other professionals, environmental consultants are not accountable to a professional body that requires the same stringent standards of conduct as those which regulate architects, lawyers and doctors.

Recommendation:

- Require a statutory declaration or certification from consultants confirming the correctness of the information provided.
- Make it an offence for a person to provide false or misleading information to obtain a development approval (model: provisions in the *EPBC Act 1999* (Cth))

Quality of environmental impact statement documents

For many years now one of the most common complaints about the EIS process is that the proponent of a project is the person or body who organises the preparation of an EIS. Consequently it has often been argued that an EIS is compromised at the outset. Certainly this concern was raised as early as 1973 by Mr Justice Douglas of the US Supreme Court (*Life of the Land v Brinegar* (1973) 414 US 1052).

The Courts have implied minimum standards that must be met (*Environmental Defence Society v South Pacific Aluminum Ltd* (No 4) [1981] 1 NZLR 530) and therefore EIA are usually prepared by professionally qualified persons.

Criteria by which a document will be considered to be an "adequate" EIS
Cripps J in set out a number of guidelines in *Prineas v Forestry Commission*[19] (approved on appeal):

- An EIS is not required to be perfect. It need not cover every topic nor explore every avenue;
- It must not be superficial, subjective or non-informative;
- It should be comprehensive in its treatment of subject matter, and objective in its approach;
- It should be sufficiently specific to direct a reasonably intelligent and informed mind to the possible or potential environmental consequences of the carrying out or not carrying out the particular activity; and
- It should be written in understandable language.

However what can be seen from these points is that the common law on the quality of environmental impact statements does not set a very high threshold for meeting the test of "an adequate EIS".

The issue of the adequacy of an EIS was authoritatively dealt with by Cripps J in *Prineas v Forestry Commission of New South Wales* (1983) 49 LGRA 402 at 417 as follows:

> "I do not think the obligation in s. 111, that is to take into account 'to the fullest extent possible all matters affecting or likely to affect the environment' imposes on a determining authority when preparing an environmental impact statement a standard of absolute perfection or a standard of compliance measured by no consideration other than whether it is possible in fact to carry out the investigation. I do not think the legislature directed determining authorities to ignore such matters as money, time, manpower etc. In my opinion there must be imported into the statutory obligation a concept of reasonableness. Clearly enough, the legislature wished to eliminate the possibility of a superficial, subjective or non-informative environmental impact statement and any statement meeting that description would not comply with the provisions of the Act, with the result that the final decision would be a nullity. But, in my opinion, provided an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision-maker and members of the public and the Department of Environment and Planning to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity, it meets the standard required by the regulations. The fact that the environmental impact statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations. In matters of scientific assessment it must be doubtful whether an environmental impact statement, as a matter of practical reality, would ever address every aspect of the problem. There will always be some expert prepared to deny adequacy of treatment to it and point to its shortcomings or deficiencies."

The EDO recommends instead of a "bare-minimum approach" that the Bill should present a best practice model of environmental impact assessment. In order to arrive that what amounts to best practice, ACTPLA should have regard to the European Union requirements, and also to Professor Murray Raff's key article in the *Environmental and Planning Law Journal* entitled "Ten Principles of Quality in Environmental Impact Assessment."[20] A final revision of the

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[19] *Prineas v Forestry Commission* (1983) 49 LGRA 402 and on appeal (1984) 53 LGRA 160;
[20] Raff, M. (1997). Ten principles of quality in environmental impact assessment. Environmental and Planning Law Journal. 14 (3): 207-221.

Planning and Development Bill would do well to take this article into account. In particular there are a number of provisions missing:

- "the inquiry must examine alternative courses of action and their environmental significance, even if the proponent does not have the power to implement these alternatives."

- "alternative courses of action include the option of doing nothing. "

- " environmental effects are not to be disregarded merely because they are difficult to identify or quantify. "

- "projects must not be segmented in ways which disguise the scale of environmental impact and detract from the viability of alternatives to the total project." (this refers to the need to introduce provisions to address the sham where a developer segments a large project into small parts in order to escape assessment thresholds.)"

Call in powers

The EDO notes the failure of the Bill to adequately constrain the Minister's capacity to "call-in" developments - a power which has been used over fifteen times in the past four years to block the possibility of the public exercising their appeal rights in the Administrative Appeals Tribunal - for example in the case of EDO clients opposed to the high rise Goodwin aged care facility in Ainslie, originally proposed as a six storey development.

The EDO endorses the comments made by the Conservation Council in 2005, on the subject of the call-in power as follows: "Decisions made using the call-in powers are not subject to third party appeals, as they are not included in Schedule 4 of the Land Act which sets out reviewable decisions. In addition Regulations 23 and 24, and accompanying Schedules six and seven specifically excludes decisions made by the Minister using the call-in powers. The Land Act also clearly states that call-in decisions are not challengeable via the AAT. [s279A(2)] Other legal proceedings – such as seeking an injunction in the Supreme Court can only occur within 28 days after the date of the decision.

The call-in power in the ACT is quite unique. While most others states also have a comparable call-in power a key rationale for the power is to allow the State government to 'call-in' local government planning decisions. The ACT being both effectively a local and State Government negates the need for such a provision.

The call-in power is unnecessary for three key reasons:

- the call-in power does not provide adequate checks and balances;
- the use of the call-in power reduces the authority of our planning processes; and
- it leaves open capacity for undue influence by sectional interests."

The EDO does not support the use of call-in powers and advocates the removal of these provisions from the proposed Bill.

In February of this year the Planning Minister Simon Corbell summarized the use of the ministerial call-in power over the four-year period so far of the Stanhope government in the Assembly:

"The power has been exercised 15 times in that period. The majority of these have been in relation to development proposals in the city" The developments concerned included:

- Metropolitan building on section 6 City;
- new commonwealth offices on section 88 City;
- the QIC development on section 84 City;
- new student accommodation for the Australian National University at section 30 City;
- another QIC development,

- more Commonwealth offices, on section 89 City
- the Acton Hotel redevelopment on section 24 City.
- part of the Kingston Foreshore development was called in to enable this major first stage of the Kingston Foreshore project to proceed.
- two separate developments for the Space residential developments in Turner
- fast tracking of new ACT Housing properties in Duffy destroyed in bushfires.
- Big W and Coles developments in Gungahlin,
- two aged care developments in Bruce and Ainslie. [21]

One justification cited by the Minister was the reference to the Planning and Land Council. However in the future, given recent abolition of the Planning and Land Council, there can therefore be no independent comment or review on the use of call in powers.

At the PLC meeting of 7 June 2006, the Minister advised the Council by letter that the Council would be abolished with effect from 1 July 2006. Some of the necessary legislative changes to bring this into effect were enacted in the form of the *Administrative (Miscellaneous Amendments) Act 2006*. This legislation assisted in the implementation of the government's new approach by removing the requirement for the Minister for Planning to consider the comments of the independent Planning and Land Council prior to making a decision to approve a development that had been "called-in" for special consideration by the Minister rather than the planning authority, (with the associated implication that planning appeal rights were removed).

[21] Legislative Assembly for the ACT Hansard, 16 February 2006, p.242.

APPENDICES

Appendix A: Objects clause from NSW legislation for comparison purposes: section 5A, *Environmental Planning and Assessment Act 1979*

5 Objects

The objects of this Act are:

(a) to encourage:
(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,
(ii) the promotion and co-ordination of the orderly and economic use and development of land,
(iii) the protection, provision and co-ordination of communication and utility services,
(iv) the provision of land for public purposes,
(v) the provision and co-ordination of community services and facilities, and
(vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and
(vii) ecologically sustainable development, and
(viii) the provision and maintenance of affordable housing, and
(b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and
(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment.

Appendix B. Third Party Notice Provisions in the Victorian Planning and Environment Act 1987

s. 51

52.Notice of application

(1) Unless the responsible authority requires the applicant to give notice, the responsible authority must give notice of an application in a prescribed form—

S. 52(1)(a) amended by Nos 53/1988 s. 45(Sch. 3 item 57) (as amended by No. 47/1989 s. 23(2)), 86/1989 s. 4(2)(a), 128/1993 s. 13(1).

(a) to the owners (except persons entitled to be registered under the **Transfer of Land Act 1958** as proprietor of an estate in fee simple) and occupiers of allotments or lots adjoining the land to which the application applies unless the responsible authority is satisfied that the grant of the permit would not cause material detriment to any person; and

57.Objections to applications for permits

(1) Any person who may be affected by the grant of the permit may object to the grant of a permit.

(1A) If the permit would allow the removal or variation of a registered restrictive covenant or if anything authorised by the permit would result in a breach of a registered restrictive covenant, an owner or occupier of any land benefited by the covenant is deemed to be a person affected by the grant of the permit.

S. 57(1A) inserted by No. 100/2000 s. 8.

(2) An objection must be made to the responsible authority in writing stating the reasons for the objection and stating how the objector would be affected by the grant of the permit.

S. 57(2) amended by No. 128/1993 s. 14(1).

(2A) **The responsible authority may reject an objection which it considers has been made primarily to secure or maintain a direct or indirect commercial advantage for the objector.**

S. 57(2A) inserted by No. 128/1993 s. 14(2).

(2B)If an objection has been rejected under sub-section (2A) this Act applies as if the objection had not been made.

150. Tribunal orders in relation to proceedings

* * * * *

S. 150(1)–(3) repealed by No. 86/1989 s. 20(2).

(4) If any proceedings are brought before the Tribunal under this Act and the Tribunal is satisfied that—

S. 150(4) amended by No. 52/1998 s. 191(1).

(a) the proceedings have been brought vexatiously or frivolously or primarily to secure or maintain a direct or indirect commercial advantage for the person who brought the proceedings; and

S. 150(4)(a) amended by No. 128/1993 s. 26(1).

(b) any other person has suffered loss or damage as a result of the proceedings—

the Tribunal may order the person who brought the proceedings to pay to that other person an amount assessed by the Tribunal as compensation for the loss or damage and an amount for costs.

82. Appeals where objectors

(1) An objector may apply to the Tribunal for review of a decision of the responsible authority to grant a permit.

S. 82(1) amended by No. 52/1998 s. 191(4)(b).

(2) A planning scheme may set out classes of applications for permits the decisions on which are exempted from sub-section (1).

S. 82(2) substituted by No. 128/1993 s. 19, amended by No. 52/1998 s. 191(4)(c).

S. 82(3) inserted by No. 128/1993 s. 19, substituted by No. 52/1998 s. 191(5).

(3) If a planning scheme exempts a decision of an application for a permit from sub-section (1), an application for review cannot be made under that sub-section in respect of that decision.

S. 82AA

82B. Affected person may seek leave to apply for review

S. 82B(1) amended by No. 52/1998 s. 191(4)(e)(i).

(1) Any person who is affected may apply to the Tribunal for leave to apply for review of a decision of the responsible authority to grant the permit in any case in which a written objection to the grant of the permit was received by the responsible authority.

S. 82B(2) amended by No. 52/1998 s. 191(4)(e)(ii).

(2) Subject to sub-section (3), the Tribunal must give the applicant for the permit, the responsible authority and the affected person an opportunity to be heard before making a decision.

S. 82B(3) substituted by No. 52/1998 s. 191(6).

(3) The Tribunal is not required to hold a hearing under sub-section (2) if the applicant for the permit consents to the request for leave to apply for review.

Appendix C: Selected provisions of the Commonwealth *EPBC Act* 1999

489 Providing false or misleading information to obtain approval or permit

(1) A person is guilty of an offence if:
- (a) the person provides information in response to a requirement or request under Part 7, 8, 9, 13 or 13A; and
- (b) the person is reckless as to whether the information is false or misleading in a material particular.

Note: The fault element in paragraph (1)(b) can be demonstrated by proof of knowledge. See subsection 5.4(4) of the *Criminal Code*.

(2) An offence against subsection (1) is punishable on conviction by:
- (a) imprisonment for a term not more than 2 years, a fine not more than 120 penalty units, or both, if it is proved the person knew the information was false or misleading; or
- (b) imprisonment for a term not more than 1 year, a fine not more than 60 penalty units, or both, if it is proved the person was reckless as to whether the information was false or misleading.

Note: Subsection 4B(3) of the *Crimes Act 1914* lets a court fine a body corporate up to 5 times the maximum amount the court could fine a person under this subsection.

(2A) A person is guilty of an offence if:
- (a) the person provides information in response to a requirement or request under Part 7, 8, 9, 13 or 13A; and
- (b) the person is negligent as to whether the information is false or misleading in a material particular.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(2B) An offence against subsection (2A) is punishable on conviction by a fine not more than 30 penalty units.

Note: Subsection 4B(3) of the *Crimes Act 1914* lets a court fine a body corporate up to 5 times the maximum amount the court could fine a person under this subsection.

(3) Subsections (1) and (2A) do not apply to a requirement to provide information that is imposed by a condition attached to an environmental authority.

Note: The defendant bears an evidential burden in relation to the matter in subsection (3). See subsection 13.3(3) of the *Criminal Code*.

490 Providing false or misleading information in response to a condition on an approval or permit

(1) A person is guilty of an offence if:
- (a) the person is the holder of an environmental authority; and
- (b) a condition attached to the environmental authority requires the person to provide information; and
- (c) the person provides information in response (or purportedly in response) to the requirement; and
- (d) the person is reckless as to whether the information is false or misleading in a material particular.

Note: The fault element in paragraph (1)(d) can be demonstrated by proof of knowledge. See subsection 5.4(4) of the *Criminal Code*.

(2) The offence is punishable on conviction by:

(a) imprisonment for a term not more than 2 years, a fine not more than 120 penalty units, or both, if it is proved the person knew the information was false or misleading; or

(b) imprisonment for a term not more than 1 year, a fine not more than 60 penalty units, or both, if it is proved the person was reckless as to whether the information was false or misleading.

Note: Subsection 4B(3) of the *Crimes Act 1914* lets a court fine a body corporate up to 5 times the maximum amount the court could fine a person under this subsection.