

# **PLANNING FOR ECOLOGICALLY SUSTAINABLE DEVELOPMENT**

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OPPORTUNITIES FOR IMPROVED ENVIRONMENTAL OUTCOMES AND  
ENHANCED COMMUNITY INVOLVEMENT IN THE PLANNING SYSTEM



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**Key terms:**

*ESD* – refers to ecologically sustainable development\*

*EP&A Act* – refers to the Environmental Planning and Assessment Act 1979 (NSW)

*EPBC Act* – refers to the Environment Protection and Biodiversity Conservation Act (Cth)

LEC – Land and Environment Court

*LEP* – Local Environment Plan

JRPP – Joint regional planning panel

Minister – unless otherwise noted, refers to the Minister for Planning and Infrastructure

PAC – Planning Assessment Commission

*SEPP* – State environmental planning policy

State – refers to the State of New South Wales (NSW)

\* As expounded in the Rio Declaration on Environment and Development 1992 (UN)

## PART 1 – INTRODUCTION

Our organisations welcome the opportunity to respond to the NSW Planning System Review Issues Paper – *The way ahead for planning in NSW?*

The current review of the planning system provides an opportunity to:

- create a more efficient, transparent and user-friendly planning system,
- address the perceptions of corruption that have plagued the planning system, by limiting discretion and providing greater accountability and public engagement,
- adopt a whole-of-Government approach to planning for our State’s future by making better use of interagency expertise, data and resources,
- ensure the protection of the natural environment,
- ensure that the planning framework is consistent with natural resource management and transport and infrastructure goals,
- bring planning legislation in line with international and national best practice for environment and sustainability,
- incorporate advances in science and improved technologies, and drive innovation, and
- ensure the State of New South Wales is climate change ready.

The efficacy of the planning system should not be judged solely on its ability to achieve assessment processing timeframes or development approval rates. More fundamental to the planning system’s effectiveness is its ability to produce ecologically sustainable outcomes. This requires strategic planning, comprehensive environmental impact assessment and genuine public consultation. Fast approvals that deliver poor quality, high risk or unsustainable development are not in the public interest. As the Productivity Commission noted in its benchmarking report on Australian Planning Systems:

*...a combination of several benchmarks is often needed to reflect system performance. For example, while longer development approval times may seem to be less efficient, if they reflect more effective community engagement or integrated referrals, the end result may be greater community support and preferred overall outcome.<sup>1</sup>*

When it was introduced in 1979, the EP&A Act was celebrated as being one of the most progressive in the world. It was described as a:

*“system of environmental planning under which decisions on land use and resource management are made within the physical capacity of the environment in order to promote the economic and social welfare of the people of NSW”.*<sup>2</sup>

The EP&A Act recognised the value of genuine public participation as not only a component of good governance and democracy, but in leading to better decisions. It also introduced a robust system of environmental impact assessment that provided a mechanism for identifying and assessing all potential impacts of a development in determining development applications.

Since then, the Act has suffered a series of major reforms intended to ‘streamline’ the planning system.<sup>3</sup> In actual fact, these reforms have eroded the key features of the original 1979 Act and created a planning system that is more complicated, inaccessible and uncertain.<sup>4</sup>

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<sup>1</sup> Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (April 2011), Vol. 1, p xxviii.

<sup>2</sup> NSW *Parliamentary Debates*, Legislative Assembly, 17 April 1979, Hansard p 4278, Hon Mr Haig, Minister for Corrective Services

In the past three decades our population has grown by over 40%; our demand for housing and infrastructure has increased and our reliance on our limited natural resources has never been greater.<sup>5</sup> We are facing new tests of managing climate change and biodiversity loss. At the same time, advances in science, technology and social and economic fields present new opportunities for reimagining planning and development for a sustainable future.

The challenge for the planning system in 2012 is to resolve some of the tensions between competing economic, social and environmental needs of our society, while recognising the declining state of our natural environment and ensuring that it is afforded the protection required to sustain future generations.

We submit that there is a clear need for the new planning system to draw on the original intentions of the 1979 legislation and recognise the physical capacity of the environment and the need to serve the public interest. This will require genuine public participation, emphasis on environmental sustainability and comprehensive environmental assessment. At the core should be the overarching object of ecologically sustainable development. This will ensure that economic considerations are underpinned by environmental sustainability and that environmental and social equity considerations are integrated into all decision making processes. In turn, this will help ensure that the planning framework promotes a resilient environment and society that secures the future of our State.

**About our organisations:**

- *The **Nature Conservation Council of NSW (NCC)** is the peak environment group for New South Wales. NCC represents more than 100 member societies from across the state. Many of NCC's members have a strong interest in planning and development issues, and are strongly committed to securing positive environmental outcomes in their local area.*
- *The **Environmental Defender's Office NSW (EDO)** is a community legal centre specialising in public interest environmental law. The office was specifically created to perform this function after the passage of the Environmental Planning and Assessment Act 1979 and Land and Environment Court Act 1979.*
- *The **Total Environment Centre (TEC)** has been campaigning for environment protection in the city and country, changing government policy, advising the community and challenging business for over 30 years. TEC has been working to protect this country's natural and urban environment, flagging the issues, driving debate, supporting community activism and pushing for better environmental policy and practice.*

<sup>3</sup> For example, the introduction of the major projects framework under Part 3A by the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005* (now repealed) and the introduction of the Planning Assessment Commission and Joint Regional Planning Panels by the *Environmental Planning and Assessment Amendment Act 2008* No 36

<sup>4</sup> For example, as a result of recent amendments, the Minister now has wide ranging discretion when it comes to making environmental planning instruments. Public consultation with respect to State environmental planning policies is at the discretion of the Minister (s 38, EP&A Act). With respect to LEPs, there is no longer a requirement to prepare a local environment study for the preparation of LEPs. Instead the level of environmental assessment is at the discretion of the Minister (s54, EP&A Act). Public consultation occurs at the 'gate-way' stage but is not required on the draft LEP. There are now several approval bodies (JRPPs and PACs) and a wide range of different type of development (exempt and complying, advertised, designated, integrated, State significant development, State significant infrastructure).

**WE SUBMIT THAT THE FOLLOWING ARE ESSENTIAL KEY ELEMENTS FOR A NEW PLANNING SYSTEM:**

- 1) A commitment to ***Ecological Sustainable Development***.  
ESD should be the overarching objective of the new planning legislation. All decisions, powers and functions, with respect to both strategic planning and development assessment, must be exercised to achieve ESD. The following elements will further assist in implementing this objective.
- 2) Legislative mechanisms for achieving ***environmental outcomes***.  
This is important, not just for implementing a commitment to ecological sustainable development, but also for achieving the State's natural resource management goals and urban sustainability goals, in a practical and mainstream approach.
- 3) Mandatory requirements for genuine and meaningful ***public participation*** in decision making throughout the system, including for both strategic planning and development assessment.
- 4) A framework for ***effective strategic planning*** across State, regional and local levels that includes:
  - i. ***strategic environmental assessment***, and
  - ii. ***assessment of cumulative impacts***.
- 5) Mechanisms for ensuring the integrity of ***environmental impact assessment*** including:
  - i. ***independent appointment of environmental consultants***,
  - ii. ***robust offences for providing false and misleading information (recklessly or intentionally) and for deceptive conduct, and***
  - iii. ***comprehensive assessment and scrutiny that reflects the scale of impacts***.
- 6) Mechanisms for managing ***climate change*** by building in mitigation and adaptation requirements throughout the system.
- 7) Mechanisms for ensuring ***accountability***, including third party appeal rights and open standing for breaches of the legislation, and better ***enforcement*** by way of robust tools, penalties, resources and monitoring.

**The importance of these elements as fundamental components of a new planning system is outlined below.**

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<sup>5</sup> The Australian Bureau of Statistics reports the population of NSW has grown from 5.07 million in June 1979 to 7.30 million in June 2011 (www.abs.gov.au). The Sydney metropolitan strategy (*City of Cities: A plan for Sydney's Future*) estimates that Sydney's population will increase by 1.7 million from 2006 to reach 6 million by 2036.

## 1) ECOLOGICALLY SUSTAINABLE DEVELOPMENT AS THE OVERARCHING OBJECTIVE OF A NEW PLANNING SYSTEM

### ***Ecologically sustainable development***

Ecologically sustainable development (ESD) should be the overarching objective of the new planning system. In brief, ESD aims to provide for the needs of present generations without compromising the ability of future generations to meet their own needs. At the national level it has been defined as ‘using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased’.<sup>6</sup>

ESD seeks to integrate environmental, economic and social considerations in decision making. ESD is “not a factor to be balanced against other considerations; ESD is the balance between development and environmental imperatives”.<sup>7</sup> Historically, an imbalance has led to environmental considerations being set aside for economic outcomes, including under the EP&A Act, where encouraging ESD is one of ten equally-weighted objects.<sup>8</sup> Properly applied, ESD recognises that ecological integrity and environmental sustainability are fundamental to social and economic wellbeing, particularly when considering the needs of both present and future generations. Despite the challenges presented by the concept of ESD, experts have recognised that ‘there is no other credible candidate for an integrative policy framework’.<sup>9</sup>

While ESD has obvious environmental benefits<sup>10</sup>, the economic and social benefits are also significant. ESD provides long term social and economic sustainability by:

- putting the needs of people and our environment first, for present and future generations,
- engaging citizens in the decisions that shape our towns, cities and society,
- promoting healthy, liveable and long-lasting communities and development<sup>11</sup>,
- assisting decision makers by properly assessing the true costs and benefits of particular development through full-cost accounting<sup>12</sup>,

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<sup>6</sup> Australia's *National Strategy for Ecologically Sustainable Development* (1992). See <http://www.environment.gov.au/about/esd/index.html>.

<sup>7</sup> Bates, G. *Environmental Law in Australia* (5<sup>th</sup> ed. LexisNexis. 2002), para [5.19]-[5.20], cited by Farrier D, et. al. (2007) *Biodiversity offsets and native vegetation clearance in New South Wales; The rural/urban divide in the pursuit of ecological sustainable development* 24 EPLJ 427

<sup>8</sup> For example, the former Minister for Planning premised the introduction of the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform)* Bill 2005, which introduced the former Part 3A, with these words: *the wellbeing of our economy depends on business being able to work with certainty, a minimum of risk, low transaction costs, and appropriate levels of regulation. This bill demonstrates the Government's determination to take decisive action to achieve these objectives. By establishing greater certainty in the assessment of projects of State significance and major infrastructure projects, the bill further assists in the Government's desire to afford opportunities for the private sector to participate in the delivery of our infrastructure programs.* Part 3A has been criticised for weakening integration with natural resource legislation and restricting public participation and accountability through merits appeals.

<sup>9</sup> See Hawke, A. (2009), “Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999”, October 2009. See also Dovers, S. (2008) ‘Policy and Institutional Reforms’, in D. Linenmayer, S. Dovers, M. Harriss Olson & S. Morton (Eds.), *Ten Commitments: Reshaping the Lucky Country's Environment*, p 216.

<sup>10</sup> For example, ESD is important in protecting biological diversity and ecological integrity, managing environmental risk (by encouraging caution when an activity has a suspected risk of causing harm to the public or to the environment, including where impacts are uncertain), encouraging full accounting of environmental costs, and encouraging sustainable outcomes that reduce pollution and consumption.

- driving innovation and encouraging use of new technologies, which can improve efficiency and reduce production costs,
- encouraging cleaner production and less pollution, which reduces ‘polluter pays’ costs,
- encouraging use of sustainable building design, which can lead to reduced consumer costs (for example, reduction in spending on electricity and water), and
- lowering the incidence of disputes, and the associated legal and court costs.

### ***Need for clear objectives and implementation mechanisms with ESD at the apex***

Objectives are written for the purpose of setting overarching goals for legislation. However, there is often a risk that objectives will be passed over as aspirational statements unless further mechanisms are put in place to ensure the achievement of objectives.

For example, while ESD has been a component of the planning system for a number of years<sup>13</sup>, the planning system has failed to provide the necessary framework that would afford proper application of ESD and its guiding principles. Until now ESD has been merely ‘encouraged’<sup>14</sup> as one of ten equally weighted objectives of the EP&A Act and does not feature as a mandatory consideration in strategic planning or development assessment.<sup>15</sup> While the objectives of the EP&A Act are relevant considerations for decision makers, all that is required is a general consideration of ESD and further, failure to consider the objectives of the EP&A Act do not necessarily render a decision void.<sup>16</sup> Therefore, simply making ESD an objective of the new planning system is not enough. All decisions, powers and functions under the new planning system need to be exercised to achieve ESD.

ESD is not an abstract concept, and while perhaps difficult to implement for traditional planners, there are well established tools for achieving an effective balance of environmental, economic and social considerations in decision making. ESD is supported by a wide body of international and national policy and recognised principles that support decision makers to act in accordance with ESD.<sup>17</sup>

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<sup>11</sup> For example, the NSW Heart Foundation recognises that planning has a huge role to play in preventing our health from deteriorating. See *Putting the heart back into town planning*, ABC Radio, (<http://www.abc.net.au/local/stories/2012/01/31/3419739.htm?site=sydney>)

<sup>12</sup> See, eg, I. Curtis, “Valuing the Economic Loss of or Modification of the Ecosystem Services Provided by the Forest”, *Australian and New Zealand Property Journal* (June 2011).

<sup>13</sup> Ecologically sustainable development was added as an objective of the EP&A Act under section 5(c) by the *Environmental Planning and Assessment Amendment Act 1997*

<sup>14</sup> Section 5(c) Environmental Planning and Assessment Act 1979

<sup>15</sup> Ecological sustainable development is not listed, in its own right, as a head of consideration under section 79C of the EP&A Act. However the principles of ESD, including the precautionary principle, have been considered a relevant consideration under the guise of ‘public interest’. See, for example, *Carstens v Pittwater Council* (1999) 111 LGERA 1, *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237, *BT Goldsmith Planning Services Pty Limited v Blacktown City Council* [2005] NSWLEC 210

<sup>16</sup> See for example the comments of Hodgens JA in *Minister for Planning v Walker* [2008] NSWCA 224: [52] “In my opinion, one difficulty with the view that failure to consider ESD principles renders void a Minister’s decision, ... is that the encouragement of ESD is just one of many objects set out in s 5 of the *EPA Act*, some of which seemingly would have no relevance to many decisions.” And [56] “but that a failure by the Minister to consider whether (say) “provision and maintenance of affordable housing” was relevant to a particular decision, or an incorrect decision that this object was not relevant, would not without more make a decision void. If that view is correct in relation to this object of the *EPA Act*, then in my opinion it must also be correct in relation to other objects, including the principles of ESD.

<sup>17</sup> See above no. 6. See also Rio Declaration on Environment and Development 1992, available at <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>

The EP&A Act's current definition, which adopts the definition in section 6(2) of the *Protection of the Environment Administration Act 1991*, incorporates the key principles of ESD, namely:

- the precautionary principle (to manage environmental risk),
- inter-generational equity (considering the needs of current and future generations),
- conservation of biological diversity and ecological integrity, and
- improved valuation, pricing and incentive mechanisms (e.g. full accounting for environmental costs)

A body of case law has developed around the interpretation and application of these principles both in NSW and other jurisdictions and it would be appropriate for this definition of ESD to be retained.<sup>18</sup>

### **Implementing ESD in a new planning system**

ESD is recognised by various industry stakeholders in NSW as being a necessary component of a new planning system in NSW.<sup>19</sup> We submit that ESD should form the foundation of the new planning system. This would require ESD to be the overarching objective and legislative provisions that support a real commitment to ESD. This can be achieved through the recommendations outlined below and with the other key elements that are outlined in this submission. This is the way ahead for planning in NSW.

#### **RECOMMENDATIONS: ECOLOGICAL SUSTAINABLE DEVELOPMENT AS THE OVERARCHING OBJECTIVE OF A NEW PLANNING SYSTEM**

**Recommendation 1** - ESD should be the overarching objective of new planning legislation

**Recommendation 2** - All decisions, powers and functions under the new planning legislation must be exercised to achieve ESD

**Recommendation 3** – To achieve ESD the new planning system must contain legislative mechanisms for meeting environmental standards

**Recommendation 4** – The new planning system must guarantee genuine and meaningful public participation

**Recommendation 5** – The new planning system must provide mechanisms for ensuring accountability and improving enforcement

<sup>18</sup> See for example, *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270, *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 93 LGERA 249, *Carstens v Pittwater Council* (1999) 111 LGERA 1, *BGP Properties Pty Ltd v Lake Macquarie City Council*(2004) 138 LGERA 237, *Minister for Planning v Walker* [2008] NSWCA 224

<sup>19</sup> For example, the Urban Taskforce Australia submits that 'the planning system should promote ecological sustainable development' *Making it Work- Identifying the problems in and proposing solutions for the NSW planning system*", Submission to the Planning System Review by the Urban Taskforce, August 2011, p32; The NSW Minerals Council submits that "the principles of ESD should be included in those matters to be considered, where relevant, when evaluating an application for approval of State significant development under section 79C of the EP&A Act or its equivalent" Submission to the NSW Planning Review, NSW Minerals Council, November 2011, p6; The Local Government Association of NSW recommends the adoption of overarching principles including "to take account of the defined principles of ecologically sustainable development (ESD) in all undertakings" *Draft Submission Regarding Preliminary Comments on Review of NSW Planning System*, Local Government Association of NSW, November 2011 .

## 2) MECHANISMS FOR ACHIEVING ENVIRONMENTAL OUTCOMES

A genuine commitment to ESD requires that the new planning system contain legislative mechanisms for achieving environmental outcomes. As outlined above, it is not enough for the new planning system to make ESD the overarching objective (although this is essential). The new planning system must require that planning and development be carried out within the physical capacity of the environment.

The way to do this is to provide a clear and objective framework for strategic planning and decision making. The EP&A Act is heavy with discretionary decision making processes that have historically led to environmental considerations losing out to development and economic interests.<sup>20</sup> The new planning legislation must seek to redress this with objective decision making tools that ensure environmental standards are met at the approval stage, for example:

- requiring development to meet a threshold test (such as 'maintain or improve' for key environmental values),
- prescribing standards in codes or best practice guidelines that must be complied with (for example, BASIX, which requires certain development to meet standards for energy and water use<sup>21</sup>),
- prohibiting development in environmentally sensitive areas, and
- requiring compliance with natural resource management legislation and policy.

Once these standards are met, then our model anticipates a more subjective, values based set of criteria underpinning decisions.

Objective decision making has the benefit of reducing corruption risks, ensuring that decisions are transparent and that decision makers are accountable, thereby ensuring that the community's confidence in the planning system is restored.<sup>22</sup>

### ***Natural resource management goals***

The planning system is a key part of natural resource management. This is because all actions that may affect natural resources (including biodiversity, water, mineral resources and coastal resources) are regulated, either directly or indirectly, through the planning system. Further, the

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<sup>20</sup> See for example, *Minister for Planning v Walker* [2008] NSWCA 224. In that case the Court of Appeal, in allowing an appeal for approval of a joint concept plan application to subdivide the site into approximately 180 residential dwelling allotments, 3 super-lots for future apartment or townhouse development, up to 250 seniors living units and a residential aged care facility, held that although the planning minister must make decisions in the public interest, not having regard to ESD principles does not necessarily constitute a breach of that obligation. Hodgson J found that "(t)he 'mandatory' requirement that the Minister have regard to the public interest does not of itself make it mandatory ... that the minister have regard to any particular aspect of the public interest, such as one or more of the principles of ESD"

<sup>21</sup> While we generally support the BASIX system as a method for achieving energy and water reduction targets for house and units, we recognise the following shortcomings:

- It only requires a 50% reduction for energy and water use in new houses and small blocks of units, and a weaker 20% for multi-unit housing.
- It does not allow LEPs or DCPs to impose improved standards for energy or water consumption.
- Auditing and monitoring can be improved, to ensure that commitments made in a BASIX certificate continue to met.

<sup>22</sup> We note ICAC's recommendation that the NSW Government ensures that discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective *Anti-Corruption Safeguards And The NSW Planning System* Independent Commission Against Corruption February 2012

planning system is necessarily linked to natural resource management legislation<sup>23</sup>, which while not being the subject of this review, must be considered in the context of their interaction with the planning system. Natural resource management issues therefore need to be a key consideration of decision makers in making new plans and determining development applications.

The present system fails to adequately integrate planning outcomes with NRM goals. This contributes to confusion, dissatisfaction and perceptions that discretionary planning decisions trump a holistic, integrated view of State laws and government policy direction.

The NSW Government has, on advice from the Natural Resources Commission, adopted thirteen state wide targets for natural resource management.<sup>24</sup> In brief these relate to measuring quality and improvement across a range of environmental indicators by 2015, including:

1. native vegetation extent and condition
2. number of sustainable populations of a range of native fauna species
3. recovery of threatened species, populations and ecological communities
4. impact of invasive species
5. condition of riverine ecosystems
6. ability of groundwater systems to support groundwater dependent ecosystems and designated beneficial uses
7. condition of marine waters and ecosystems (no decline)
8. improvement in the condition of important wetlands, and the extent of those wetlands is maintained
9. condition of estuaries and coastal lake ecosystems
10. soil condition
11. increase in the area of land that is managed within its capability
12. natural resource decisions contribute to improving or maintaining economic sustainability and social well-being
13. capacity of natural resource managers.

There are a number of legislative schemes in place in NSW that seek to manage and protect our natural resources which in turn help to achieve these thirteen natural resource management goals. For example:

- the *Native Vegetation Act 2003* (NV Act) establishes a 'maintain and improve' test with respect to broadscale clearing of native vegetation on rural land. The NV Act adopts an *Environmental Outcomes Assessment Methodology* that underpins any approvals and property vegetation planning under the NV Act.<sup>25</sup> The tool requires an objective application of environmental assessment to determine if prescribed environmental indicators<sup>26</sup> are maintained or improved. The application of the assessment tool is mandatory and is based on objective scientific criteria. It has helped overcome many problems of subjective inconsistent decision making under the previous regime.

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<sup>23</sup> For example, *Threatened Species Conservation Act 1995*, *National Parks and Wildlife Act 1974*, *Native Vegetation Act 2003*, *Coastal Protection Act 1979*, *Mining Act 1992*, *Water Management Act 2000*, *Protection of the Environment Operations Act 1997*, *Heritage Act 1977*, and *Contaminated Lands Act 1997*

<sup>24</sup> Available at <http://www.nrc.nsw.gov.au/content/documents/Standard%20and%20targets%20-%20The%20Standard%20and%20targets.pdf>

<sup>25</sup> See the *Native Vegetation Regulation 2005* and the *Environment Outcome Assessment Methodology* available at <http://www.environment.nsw.gov.au/resources/vegetation/110157eoam.pdf>

<sup>26</sup> The *Environmental Outcome Assessment Methodology* applies the maintain and improve test with respect to water quality, salinity, biodiversity and land degradation (soil).

- the *Threatened Species Conservation Act 1995* (TSC Act) incorporates Biocertification and BioBanking schemes. Generally explained, Biocertification offers planning authorities the opportunity to obtain certification at the strategic planning phase following a biodiversity assessment for areas marked for development. This then removes the need for a Species Impact Assessment at the development assessment stage. The BioBanking scheme enables developers to 'offset' the impacts of their development by obtaining 'biodiversity credits' generated by landowners who commit to enhance and protect biodiversity values on their land through a biobanking agreement.<sup>27</sup> The Biobanking methodology adopts a 'maintain and improve' test, that requires offsetting outcomes to maintain or improve biodiversity. These are currently voluntary initiatives and are attracting limited developer interest. Consequently, there is a danger of those tools being progressively weakened in an effort to widen its adoption.<sup>28</sup>

While our organisations do have some reservations about the continued rigour and accountability of these schemes and their differing metrics, we see these sorts of objective, science-based tools as a valuable means to better integrate planning and natural resource management.<sup>29</sup> They can also assist in monitoring performance and the achievement of objectives and standards. At present though, such tools have limited application across the planning system.

### **Urban Sustainability Goals**

Urban sustainability is a critical part of achieving ESD as cities consume vast amounts of energy, water and materials. The recent UNEP report on the Green Economy states:

*"the environmental performance of cities is dependent on a combination of effective green strategies and physical structure – urban form, size, density and configuration. They can be designed, planned and managed to limit resource consumption and carbon emissions. Or, they can be allowed to become voracious, land-hungry, all-consuming systems that ultimately damage the delicate global energy equation".*<sup>30</sup>

With cities becoming even larger, and the growth of the services sector, sustainable cities become magnets for economic growth and new technology. NSW should have as a primary economic objective the accelerated development of Sydney, Newcastle and Wollongong as green cities so they have a smaller environmental footprint per capita than currently and reduce their total footprint while continuing to grow. This will also enhance their capacity to compete globally.

There is already considerable council activity in this area and the federal government has established a National Urban Policy which includes the goal:

*'Sustainability: to advance the sustainability of Australia's natural and built environment, including through better resource and risk management'.<sup>31</sup>*

<sup>27</sup> See further the Biodiversity Banking and Offset Scheme Overview, prepared by the former Department of Environment and Climate Change, NSW  
<http://www.environment.nsw.gov.au/resources/biobanking/biobankingoverview07528.pdf>

<sup>28</sup> See EDO, *State of Planning in NSW* (2010), Case study: Alternative assessment tools under NRM legislation", pp 45-46.

<sup>29</sup> See further EDO submissions on the native vegetation, biobanking and biocertification methodologies available <http://www.edo.org.au/edonsw/site/policy.php#2>

<sup>30</sup> UNEP *Green Economy Report*. (2012), p 463

<sup>31</sup> Available at <http://www.infrastructure.gov.au/infrastructure/mcu/urbanpolicy/index.aspx>

However the focus to date has been on showcases and the planning system needs to make urban sustainability the norm. One of the promises of Sydney's 2000 Green Olympics was that the sustainability lessons would become mainstream. This did not occur except for the development of BASIX.<sup>32</sup>

A new planning act should mandate urban sustainability goals at strategic and local planning levels for the use of energy, water, transport, waste reduction and protection of remaining bushland. It should also contain a quick timetable for the adoption of specific targets, monitoring, auditing and reporting processes that would apply to all types of built development from factories to commercial buildings to higher density residential. Similarly infrastructure should be required to meet sustainability targets.

### ***A new planning system***

There are various mechanisms that the new planning system can adopt in order to better integrate the planning system with natural resource management and urban sustainability goals. This includes at the **strategic planning** and **development assessment** stages.

With respect to **strategic planning**:

- The new planning system needs to ***better integrate Catchment Action Plans (CAPs)***.<sup>33</sup> CAPs are important natural resource management tools as they bring together government priorities, best available science and the values of catchment communities into a strategic plan for making improvements to natural resource management in NSW. CAPs are required to comply with State-wide natural resource management standards and promote the achievement of State-wide natural resource management targets.<sup>34</sup> Further, CAPs are subject to Cabinet approval and are therefore key Government documents aimed at managing NSW's natural resources. It is therefore imperative that CAPs are not undermined by inconsistent planning decisions and outcomes.

A 2008 report by the NSW Natural Resources Commission found that the NRM policy environment is not sufficiently integrated into the planning system for CMAs to implement Catchment Action Plans effectively.<sup>35</sup> LEPs and policies can often undermine initiatives in CAPs, as there is no legal requirement to consider CAPs when making LEPs or when assessing development applications.

In order to ensure better integration between the planning system and catchment action plans the new planning system should require CAPs to be integrated during strategic planning and development assessment.

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<sup>32</sup> See our concerns with BASIX, above n21

<sup>33</sup> These plans are made by Catchment Management Authorities (CMAs) in partnership with local communities. CAPs are intended to facilitate community action and government investment in natural resource management and to prescribe on-the-ground actions for preserving natural resources in partnership with local communities and private landholders.

<sup>34</sup> Section 23 of the *Catchment Management Authorities Act 2003*

<sup>35</sup> Natural Resources Commission, *Progress Report on Effective Implementation of Catchment Action Plans*, November 2008. Available at:  
<http://www.nrc.nsw.gov.au/content/documents/Progress%20report%20on%20effective%20implementation%20of%20CAPs.pdf>

- Regional Strategic Plans **should be developed in conjunction with Regional Conservation Plans.**<sup>36</sup> These should be produced in collaboration with the key state environmental agency and CMAs. Baseline environmental studies undertaken to inform conservation strategies can also be used to inform strategic land use plans. This would help integrate land use planning and natural resource management over the long term. Further, it provides the opportunity to utilise single data sources, providing a more efficient and streamlined system of strategic planning.
- The strategic planning process should identify future land uses including “**no-go zones**”. These are sensitive areas of NSW where certain kinds of development (such as mining) are prohibited, based on an assessment of environmental, water supply, social and agricultural-value criteria and risk and recognition that ‘management of impacts and monitoring’ is not a sufficient risk avoidance strategy. We note that the *NSW Liberals and Nationals Strategic Regional Land Use Policy* recognises that agricultural land and other sensitive areas exist in NSW where mining and coal seam gas extraction should not occur.<sup>37</sup>
- The new planning system needs to prescribe **appropriate mechanisms for assessing cumulative impacts** of development at the strategic planning phase, including for example, cumulative impacts on biodiversity, air and water quality, native vegetation and catchment health as well as the cumulative impacts of greenhouse gas emissions.<sup>38</sup>

With respect to **development assessment:**

- The new planning legislation needs to be based on objective decision making tools that are designed to meet **prescribed environmental standards.**<sup>39</sup> The meeting of environmental standards can be achieved by:
  - Requiring development to meet a threshold test (for example, the maintain and improve test used in the *Native Vegetation Act 2003* or the net environmental benefit test put forward in Western Australia and Victoria<sup>40</sup>) with respect to biodiversity, native vegetation and catchment health and water quality.<sup>41</sup>

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<sup>36</sup> Regional conservation plans have been prepared by the Office of Environment and Heritage (formerly Department of Environment, Climate Change and Water) to complement regional strategic plans prepared by the Department of Planning, by setting out regional conservation priorities for the same period.

<sup>37</sup> Available at

<http://www.nswnationals.org.au/images/stories/pdf/strategic%20regional%20land%20use%20policy.pdf>

<sup>38</sup> We note that the Namoi Catchment Management Authority has recently been involved with developing a methodology for assessing cumulative impacts from mining: see *Proposed Framework for Assessing the Cumulative Risk of Mining on Natural Resource Assets in the Namoi Catchment*, available at

[http://www.namoi.cma.nsw.gov.au/namoi\\_risk\\_assessment\\_final\\_v5\\_14sept11.pdf](http://www.namoi.cma.nsw.gov.au/namoi_risk_assessment_final_v5_14sept11.pdf). The work being done by the Namoi CMA could be continued and developed for application in the planning system.

<sup>39</sup> These could ultimately be part of a single methodology covering biodiversity, native vegetation, catchment health and water quality, energy and water use, climate change and pollution. In the meantime, suitably strengthened existing methodologies – such as BASIX, SEPP 65 and those applying to biobanking and native vegetation - could operate as proxies while the single methodology is developed.

<sup>40</sup> See for example Environment Protection Authority Victoria, *Discussion Paper: Environmental Offsets* (June 2008), available at

[http://epanote2.epa.vic.gov.au/EPA/publications.nsf/2f1c2625731746aa4a256ce90001cbb5/cfa2d441a0e31fb7ca2574670004b739/\\$FILE/1202.3.pdf](http://epanote2.epa.vic.gov.au/EPA/publications.nsf/2f1c2625731746aa4a256ce90001cbb5/cfa2d441a0e31fb7ca2574670004b739/$FILE/1202.3.pdf); see further Environment Protection Authority Western Australia (January 2006)

*Environmental Offsets, Position Statement No 9*

101 Environmental Protection Authority Western

<sup>41</sup> The assessment of cumulative impacts would also need to fall within the scope of this methodology.

- Requiring development to comply with certain standards put in place by policies or codes, backed by legislation. For example, the BASIX scheme currently does this in principle with respect to energy and water use for housing in NSW. The BASIX scheme should be improved and extended to other types of development. However to support objective decision making, these policies or codes must be given legislative weight by making it mandatory for development to be compliant. Examples of areas in which regulation by mandatory codes may be suitable include:
    - coastal development,
    - climate change adaptation,<sup>42</sup> and
    - building and operational standards.<sup>43</sup>
- Once these objective environmental standards are met, the planning system can, and should, allow a more values based assessment for planning criteria.
- The new planning system must facilitate an **inter-agency approach to development assessment**, including for State significant development and infrastructure. Decision makers must be required to consider all potential impacts of a proposed development and seek advice from other Government agencies where appropriate. Further, permits or approvals required under other legislation must be obtained (not overridden).<sup>44</sup> An inter-agency approach is important because:
  - it draws on expertise from other agencies and assists to identify developments that are inappropriate on environmental and technical grounds,
  - ensures that appropriate conditions are attached to any consent for development, and
  - streamlines the process for proponents who did not have to approach each agency individually.

Our organisations are continuing to develop policy that seeks to better integrate natural resource management and urban sustainability with land use planning, and we look forward to continuing to provide input on into the Planning System Review on these key matters.

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<sup>42</sup> See, for example, the draft Australian Standard for Climate Change Adaptation for Settlements and Infrastructure, available at [http://www.asbec.asn.au/files/DR\\_AS\\_5334\\_Draft\\_Adaptation\\_Standard\\_8Sept2011.pdf](http://www.asbec.asn.au/files/DR_AS_5334_Draft_Adaptation_Standard_8Sept2011.pdf)

<sup>43</sup> For example, most industries would have some type of Code or Best Practice Guidelines in place for development or operations. The planning system should facilitate integration with industry standards by requiring industry codes to be put in place and development to be compliant with such codes.

<sup>44</sup> See for example, section 91 of the EP&A Act, which sets out the permits and approvals that are required as part of the current integrated development process.

**RECOMMENDATIONS: MECHANISMS FOR ACHIEVING ENVIRONMENTAL OUTCOMES**

**Recommendation 6:** The new planning system must recognise the physical capacity of the environment, and provide appropriate legislative mechanisms to protect the environment.

**Recommendation 7:** The new planning system must seek to achieve better integration with natural resource management and urban sustainability goals.

**Recommendation 8:** The new planning system must reduce discretionary decision making and be based on objective decision-making tools.

**Recommendation 9:** Strategic land use planning needs to be integrated with regional conservation plans and Catchment Action Plans.

**Recommendation 10:** Strategic planning should identify “no-go zones” – environmentally sensitive areas that are not suitable for development.

**Recommendation 11:** An assessment of cumulative impacts must be required at both the strategic planning stage and the development assessment stage.

**Recommendation 12:** Approvals under the new planning legislation need to meet prescribed environmental standards for biodiversity, native vegetation, catchment health and water quality, energy and water use, climate change and pollution.

**Recommendation 13:** The new planning system must adopt an inter-agency approach to development assessment.

### 3) GENUINE AND MEANINGFUL PUBLIC PARTICIPATION

Putting the community back into planning was a promise of the Liberal and National Parties. They are ‘determined to again restore the community – and public interest – at the centre of government in New South Wales’<sup>45</sup> and:

- restore confidence and integrity in the planning system,
- restore trust in State and Local Government as a service provider,
- improve government transparency by increasing access to government information, and
- involve the community in decision making on government policy, services and projects.<sup>46</sup>

Genuine and meaningful public participation has the benefit of:

- empowering local communities
- improving decision making by assisting decision makers in identifying public interest concerns and utilising local knowledge
- ensuring community ‘buy-in’ of decisions which can reduce potential disputes<sup>47</sup>
- helping to ensure fairness, justice and accountability in decision making

A 2010 study by the Grattan Institute entitled *Cities: Who Decides?* drew comparisons with eight cities comparable to Australia and found “*that where hard decisions had been implemented, there was early, genuine, sophisticated and deep public engagement... [and that]... if we want to face our hard decisions in a way that makes our cities better places to live, including residents is not optional*”.<sup>48</sup>

The community must therefore be encouraged and able to participate in a genuine and meaningful manner in relation to all aspects of the planning system, from strategic planning, development assessment and post-approval monitoring. Impediments to public participation that have been introduced by reforms should be removed, and public participation should be reinstated as a prominent feature of the new planning system.<sup>49</sup> The public interest value and benefit of these processes must not be dispensed with the simple aim to increase the speed of development assessment.

In August 2010, the Environmental Defender’s Office and the Total Environment Centre undertook a project entitled “*Reconnecting the Community with the Planning System*”.<sup>50</sup> As part of this project the organisations prepared a Discussion Paper on what would be the community consultation features of a best practice planning system. The EDO and TEC ran six community workshops, and conducted an online survey, receiving feedback from 120 participants. The final

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<sup>45</sup> *Putting the Community Back Into Planning – The NSW Liberal and National Parties’ plan to reform the State’s planning system*, September 2009

<sup>46</sup> Goals 29-32 of *NSW 2021 – A plan to make NSW Number One*, Available at <http://2021.nsw.gov.au/>

<sup>47</sup> Gleeson notes that the 2008 reforms to the EP&A Act excluded the involvement of a substantial proportion of the community from the decision-making and decision review processes, and this led to a greater incentive for members of the excluded public to seek judicial review of planning decisions Grant Gleeson *Whose Neighbourhood is it anyway?* FIG Congress 2010, Facing the Challenges - Building the Capacity, Sydney 11-16 April 2010, available at [http://www.fig.net/pub/fig2010/papers/ts03e%5Cts03e\\_gleeson\\_4368.pdf](http://www.fig.net/pub/fig2010/papers/ts03e%5Cts03e_gleeson_4368.pdf)

<sup>48</sup> <http://www.grattan.edu.au/programs/cities.php>

<sup>49</sup> For example, under the current LEP process, the community is to be consulted on the original planning proposal but it is in the Minister’s discretion as to whether further community consultation is required if a planning proposal is varied (section 58(3), EP&A Act); we note also that for SEPPS, community consultation is at the discretion of the Minister (section 38, EP&A Act)

<sup>50</sup> Available at <http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=flsozHVCRQo%3D&tabid=490&language=en-US>

report makes 40 recommendations on how to improve community consultation in the planning system in the areas of quality of information, early provision of information, the range of consultation techniques used, targeted and broad community consultation, independence of experts preparing information for the community, realistic timeframes and adequate resourcing for community engagement, and guaranteed requirements for iterative consultation processes and feedback loops.

In summary, the project recommended that:

- the planning system establish minimum mandatory consultation requirements for both plan making and development assessment procedures.
- consultation be genuine and meaningful. There needs to be a distinction between providing information to the community (which can be done prior to consultation sessions) and consulting (which should provide sufficient opportunities for the community to ask questions and contribute responses).
- in order to overcome barriers to engagement public notification needs to occur through a range of mediums. For example, Sydney Morning Herald, local papers, local library displays, EDO bulletin, Council newsletters, community notice boards, TV advertisements, radio, other media (including the 'blogosphere'), letter drops, and brochures given to new residents.
- submission periods must be reasonable, and allow people sufficient time to receive and review information and prepare submissions. The planning system should adopt minimum timeframes, but not maximum timeframes, to ensure more equality between the time developers spend discussing proposals with planning officials and the time the community gets to discuss a proposal. The submission period for major projects should be extended beyond 30 days to ensure genuine consultation with community groups. Submission periods should not be set over the Christmas period, or should allow for further time over the Christmas period.

The findings of this project are highly relevant to the current planning system review and we submit a copy of that report as part of our submission (**Annexure 1**). We also note that more recently the TEC and EDO have agreed to an action plan with the Department of Planning and Infrastructure that seeks to implement a number of the recommendations of the project.

**RECOMMENDATIONS: GENUINE AND MEANINGFUL PUBLIC PARTICIPATION**

- **Recommendation 14:** The new planning system must establish minimum mandatory consultation requirements for both strategic planning and development assessment.
- **Recommendation 15:** Consultation must be genuine and meaningful, and distinguished from providing information to the community. Authorities and developers should be required to undertake early engagement and collaborate on what communities want.
- **Recommendation 16:** The new planning system must ensure more equitable rights of review against decisions.
- **Recommendation 17:** The planning system review should give full consideration to the 40 recommendations arising from the Reconnecting the Community with the Planning System project.

#### 4) A LEGISLATIVE FRAMEWORK FOR EFFECTIVE STRATEGIC PLANNING

In brief, strategic planning aims to set long term strategic goals and targets for a particular area or region based on comprehensive information and data. Strategic planning is an important component for achieving ESD.

The current planning system attempts to plan for future land use through State plans, metropolitan and regional strategies, Local Environmental Plans (including the Standard Instrument), State Environmental Planning Policies and other policies and strategies including coastal policies. However these planning strategies are often developed in isolation and, in the case of State environmental planning policies and regional strategic plans, are not prepared within a clear legislative framework that requires mandated environmental assessment or public participation. The system fails to provide a suitable basis for long term strategic planning including the proper consideration of vital long term issues such as ESD, biodiversity and connectivity, access to green space and infrastructure, climate change and population planning.

There are wide benefits in prescribing a clear legislative framework for strategic planning that includes environmental assessment and public participation. These benefits include:

- long-term sustainability of a region,
- acceptance and support of local communities ,
- early assessment of land use suitability and identification of areas for urban development, agricultural land and environmental conservation areas,
- improved assessment of cumulative impacts, and
- reducing costs in the long term by pre-empting intractable land-use conflicts and court challenges.

While good strategic planning has the benefit of filtering out land use conflicts at an early stage, it does not remove the need for individual site assessment at the development assessment phase, once the details of a proposal are known. Additionally, while it is important for the community to be engaged in the strategic assessment phase, communities are more likely to be engaged in the planning process when they have clear details about proposed development.

#### ***Strategic environmental assessment***

In order to ensure that strategic planning is based on the best information available, any framework for strategic planning must require concurrent strategic environmental assessment.

SEA aims to provide for a high level of protection of the environment and contributes to the integration of environmental considerations in the preparation and adoption of plans and programs with a view to promoting sustainable development.<sup>51</sup> This outcome is achieved through setting minimum requirements for environmental assessment processes alongside plan preparation, including:

- early and effective public participation and participation by bodies with environmental responsibilities,

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<sup>51</sup> See for example, Sadler, B. and R. Verheem, 1996, Strategic Environmental Assessment: Status, Challenges and Future Directions, Ministry of Housing, Spatial Planning and the Environment, The Netherlands. See also UNECE Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (commonly referred to as the SEA Protocol) (available at: [http://live.unece.org/env/eia/sea\\_protocol.html](http://live.unece.org/env/eia/sea_protocol.html))

- identification of the likely environmental effects of the development envisaged in a plan, and the reasonable alternatives considered in the preparation of the plan,
- consultation on an environmental report on the plan at the same time as community consultation is conducted on plan, and
- on-going monitoring of the significant effects of implementation of the plan.

The current planning system does not provide a clear and mandatory framework for strategic environmental assessment. In the past, draft LEPs were required to be accompanied by a local environmental study, however this varied in practice and was not required for amendments to LEPs. More recent changes to the Act have left the issue of environmental assessment almost entirely at the discretion of the Minister. There is no specific environmental assessment required for making a SEPP, although there are consultation (not concurrence) requirements with respect to threatened species.

Mandatory strategic environmental assessment is a feature of several other pieces of NSW legislation, for example:

- an impact statement is required for preparing a Protection of the Environment Policy (PEP) under the *Protection of the Environment Operations Act 1997*<sup>52</sup>, and
- an environmental impact assessment is required when preparing a Fishery Management Strategy under the *Fisheries Management Act 1994*.<sup>53</sup>

There is already a large body of information and data that can feed into strategic environmental assessment and the process should draw on the existing scientific and community information, and the existing expertise available within the Government. This would, in turn, encourage a whole-of-government approach to planning for the State of NSW. The type of existing information that could feed into strategic environmental assessment includes:

- information accumulated by catchment management authorities, particularly as part of their work in preparing regional catchment action plans.
- information held by the various divisions of the Office of Environment and Heritage, with respect to water, threatened species, endangered ecological communities
- statistics and projections held by transport and infrastructure agencies.
- state and Federal State of the Environment Reports
- statistics and projection from the Australian Bureau of Statistics

We note that the Hawke report, makes recommendations as to the framework for strategic assessment.<sup>54</sup> In summary, such a framework should:

- require an assessment of the extent to which a plan, policy or program:
  - protects the environment
  - promotes ESD
  - promotes the conservation of biodiversity
  - provides for the protection of heritage
- set minimum standards of acceptable environmental impacts, and
- set of higher level considerations, for example for any subsequent development approval

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<sup>52</sup> See section 16 of the *Protection of the Environment Operations Act 1997*, although we note that PEPs have not been used to date.

<sup>53</sup> See section 7D of the *Fisheries Management Act 1994* and Part 5, Division 5 of the *Environmental Planning and Assessment Act 1979*

<sup>54</sup> Hawke (2009) *The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999*, see in particular 3.43 – 3.50

### ***Assessment of cumulative impacts***

An assessment of cumulative impacts, with respect to climate change, air and water pollution, biodiversity and water must form part of the strategic planning process. This is important to head off impacts and land use conflicts that are likely to arise without proper strategic planning. This process is currently being attempted through the Strategic Regional Land Use Policy, but needs to be based on the best available science, legislative safeguards, and full cost accounting for environmental values and ecological services.

For example, with respect to biodiversity, a landscape-scale view of the cumulative impacts of new and pre-existing developments is essential in understanding how biodiversity can be maintained or improved (or potentially diminished). For example, habitat corridors in new developments are of limited value if they do not connect throughout the urban matrix and beyond it.

### ***A new planning system***

The new planning system must set out a framework for strategic planning at each level - State, regional and local. The system would need to be hierarchical, and could include, for example:

- a State Plan that operates as an overarching policy document setting out the goals of the State government in providing services to the people across all sectors,
- regional Conservation and Development Plans, that are informed by baseline environmental studies, provide a landscape assessment of environmental and cultural resources and identifies competing land uses and values (*for further information about regional strategic planning please see out responses to Questions A6, A7 and A8*), and
- local Plans, which prescribe land use and development standards at a local level and which must be consistent with regional conservation and development plans and the State plan.

The framework must provide for an inter-agency approach to strategic planning with participation from all relevant agencies including treasury, environment, local government, transport and infrastructure.<sup>55</sup> Strategic planning must also be based on the best information possible. In this respect there is an opportunity for the Government to review how it deals with information. Strategic Planning would benefit from a centralised system of information in order to collate, share and publish data across sectors in ways that promote accuracy, transparency and evidence-based decision making.

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<sup>55</sup> The inter-agency approach must ensure that agencies collaborate effectively to ensure best possible outcomes for the State. It may be appropriate for the strategic planning framework to incorporate Codes of Conduct for agencies to direct effective collaboration.

## **RECOMMENDATIONS: A LEGISLATIVE FRAMEWORK FOR STRATEGIC PLANNING**

**Recommendation 18:** The new planning system must provide legislative framework for strategic environmental assessment and long-term strategic planning

**Recommendation 19:** The framework for strategic planning must provide for the assessment of cumulative impacts

**Recommendation 20:** The framework for strategic planning must include mandatory community consultation.

**Recommendation 21:** The new planning system must give effective weight to strategic plans

**Recommendation 22:** The new planning system must ensure that decisions are consistent with approved plans

**Recommendation 23:** The new planning system must include provisions for the review of plans to keep plans up to date and to track cumulative impacts

**Recommendation 24:** The new planning system must retain the requirement for individual project assessment at the development assessment phase.

## **5) IMPROVEMENT IN THE INTEGRITY OF ENVIRONMENTAL IMPACT ASSESSMENT**

The Issues Paper identified concerns raised by both the community and other stakeholders about the reliability and validity of information contained in environmental impact statements and assessment reports provided by applicants for development.<sup>56</sup> Concerns were raised about both the accuracy of the data and the ability for consultants hired by the proponent to provide fearless and independent commentary.

We share these concerns and support a more systematic and impartial approach to environmental impact assessment. We note that the EDO has previously produced a range of submissions and reports noting the inadequacy of environmental assessment across a range of sectors.<sup>57</sup> We advocate for a system that would ensure that consultants responsible for preparing environmental impact assessments are independent and objective.

We note that there are additional benefits of ensuring that environmental impact assessments are reliable and accurate. For example, it may reduce the extent to which the consent authority would need to assess the adequacy of the information, saving both time and money. It may also provide

<sup>56</sup> Planning System Review Issues Paper – The way ahead for planning in NSW?, page 24

<sup>57</sup> See, for example, EDO *State of Planning in NSW Report* (2010); *Mining Law in NSW Discussion Paper* (2011); *Ticking the Box – Flaws in the Environmental Assessment of Coal Seam Gas Exploration* (2011) –Appendix 1 of the EDO’s Submission to NSW Legislative Council Inquiry into CSG; *Submission on the Review of the Threatened Species Conservation Act 1995* (2010), pp 17-21. All available at <http://www.edo.org.au/edonsw> under “Policy” or “Publications”

an opportunity for reliable information provided in environmental assessment reports to be captured in an integrated data system and reused in other processes (for example, assessing cumulative impacts of proposed neighbouring development).

### ***Breaking the nexus between the developer and the environmental consultant***

We believe the most effective way of ensuring the integrity of environmental impact assessments is to break the nexus between the developer and the environmental consultant. So long as developers continue to directly pay the consultants there is the risk of bias, undue influence and unethical practices. We believe that the same can be said about the private certification system.

We therefore submit that the new planning system must provide an improved system for engaging environmental consultants. Such a system could be implemented by the following steps:

- a central register of consultants is created (potentially managed by the Department of Planning, Office of Environment or Heritage or an independent body),
- proponents pay a fee (based on a percentage of the estimated construction investment value) into a designated fund,
- a consultant(s) is allocated to the proponent's project from the register of consultants,
- the consultant prepares a public environmental study of values and potential impacts, and
- the developer then finalises its proposal and preferred course of action.

We recognise that there may be potential issues with respect to liability and competition but we believe these issues could be appropriately managed; for example, registered consultants could be allocated through an open tender process, which would allow consultants to set their own fees.<sup>58</sup>

We also recognise that any such framework would need to be developed in consultation with industry and community.

### ***Other mechanisms for improving the integrity of environmental impact statements***

We also submit that there are further mechanisms and principles which could be implemented alongside any proposal for the independent appointment of consultants that would contribute to improving the integrity of environmental consultants. For example:

- **Accreditation of environmental and planning consultants**  
Professional accreditation is common among a wide range of professions either through mandatory accreditation schemes (for example, private certifiers, solicitors) or through voluntary industry schemes. Accreditation holds consultants accountable to an industry standard which discourages unethical behavior. Accreditation could require consultants to comply with a standard code of practice that requires consultants to prepare reports to assist the public interest.<sup>59</sup>

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<sup>58</sup> We also note that public interest exemptions can be sought from the ACCC regarding competition issues, if necessary. See, for example, *Competition and Consumer Act 2010* (Cth), Part VII (Authorisations, Notifications, and clearances in respect of restrictive trade practices).

<sup>59</sup> We note that such a proposal was recently before Parliament through the *Threatened Species Conservation Amendment (Ecological Consultants Accreditation Scheme) Bill 2011* but was defeated. We suggest that a scheme similar to that proposed by the *Threatened Species Conservation Amendment (Ecological Consultants Accreditation Scheme) Bill 2011* would help to address the concerns raised by both the community and stakeholders with respect to information contained environmental impact statements and assessment reports provided by applicants for development. However suggest that such a scheme should not limited to ecological assessments that relate to biodiversity values, but extend to all assessments required to be done as part of an environmental impact statement.

- **Ensuring assessment and scrutiny is commensurate with potential impacts**  
The new planning system needs to review and improve the level of assessment and scrutiny that is available for certain developments. For example, some environmental assessments prepared for development under Part 5 of the EP&A Act contain inadequate information and lack independent scrutiny.<sup>60</sup>
- **Rejection of inadequate documents**  
The new planning system should allow for the rejection of environmental impact assessments in circumstances where they are inadequate. We note that clause 51 of the EP&A Act Regulation allows a consent authority to reject a development application within 14 days if the application does not contain any information, or is not accompanied by any document, specified in Part 1 of Schedule 1 of the Regulation, or is not accompanied by an environmental impact statement (if required). This clause is unclear however, as to whether a consent authority can reject an application that, despite including the necessary documentation, contains inadequate or inaccurate information.<sup>61</sup>

We propose that consent authorities should be able to reject development applications that are accompanied by inadequate supporting documentation including inadequate environmental impact assessments.

- **External auditing through peer review panel**  
The new planning system could implement external auditing and quality assurance requirements through a peer review panel or a new government authority with the role of assessing the accuracy of environmental impact statements, species impact statements and assessments, as well as ensuring ongoing management conditions are complied with.
- **Annual reporting**  
The new planning system could introduce a requirement for the Minister for Planning and Infrastructure to table an annual report in parliament providing statistics and updates on environmental assessments and accuracy of predictions over time.

### ***Strengthened penalties for proponents providing false and misleading information***

We also recommend that the new planning legislation strengthens penalties for proponents providing false and misleading information in seeking an approval or permit under the EP&A Act or integrated legislation.

The current Act makes it an offence for a person to:

- knowingly include false or misleading information in a report of monitoring data or an audit report produced to the Minister in connection with an environmental audit<sup>62</sup>, and

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These would include reports on geotechnical issues, air, noise, water, visual impacts, traffic, heritage, and aboriginal heritage.

<sup>60</sup> The inadequacies of Part 5 assessments are discussed in the EDO report *Ticking the Box - Flaws in the Environmental Assessment of Coal Seam Gas Exploration Activities*, available at [http://www.edo.org.au/edonsw/site/pdf/pubs/ticking\\_the\\_box.pdf](http://www.edo.org.au/edonsw/site/pdf/pubs/ticking_the_box.pdf); see also

<sup>61</sup> We note that the *Local Development Performance Monitoring Report for 2010/2011* released by the Department of Planning and Infrastructure reports that only 0.9% of applications were rejected, while 37% of applications were referred back to applicants for further information, available at <http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=29mGD0zKm9c%3d&tabid=74&language=en-AU>

<sup>62</sup> Section 122E of the Environmental Planning and Assessment Act

- make any statement, knowing it to be false or misleading in an important respect, in or in connection with any document lodged with the Director-General or a consent authority or certifying authority for the purposes of EP&A Act or Regulation.<sup>63</sup>

We submit that the burden of proof in these offences is too onerous. To the best of our knowledge there have been no prosecutions under these sections. We would support strengthening penalties for inaccurate information beyond ‘knowingly false or misleading’. Offences should apply to negligent or reckless material inaccuracies.

There is precedent for this in the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.<sup>64</sup> Under section 489, 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,<sup>65</sup> and
- (b) the person is reckless as to whether the information is false or misleading in a material particular.

Independent environmental assessment and offences for misleading and deceptive information will address the concerns of the community and stakeholders. This is the way forward for planning in NSW.

**RECOMMENDATIONS: IMPROVEMENT IN THE INTEGRITY OF ENVIRONMENTAL IMPACT ASSESSMENT**

**Recommendation 25:** The new planning system must remove the nexus between developers and environmental consultants by introducing a framework for the independent appointment of environmental consultants.

**Recommendation 26:** The new planning system must introduce further measures to ensure the integrity of environmental impact statements including:

- accreditation of environmental and planning consultants,
- ensuring assessment and scrutiny is commensurate with potential impacts,
- requirements to reject reports that are unsatisfactory,
- external auditing of environmental assessment reports, and
- annual reporting requirements.

**Recommendation 27:** The new planning system must strengthen penalties for providing inaccurate information beyond false and misleading to include negligent or reckless inaccuracies .

<sup>63</sup> See clause 283 of the *Environmental Planning and Assessment Regulation 2000*

<sup>64</sup> See sections 489, 490 and 491.

<sup>65</sup> Part 7 of the EPBC Act relates to deciding whether approval of actions is needed; Part 8 of the EPBC act relates to assessing impacts of controlled actions; Part 9 of the EPBC Act relates to approval of actions; Part 13 of the EPBC Act relates to listing threatened species and communities; Part 13a relates to the international movement of wildlife specimens

## 6) MECHANISMS FOR MITIGATING AND ADAPTING TO CLIMATE CHANGE

Climate change is a real and present concern for the State of NSW. Climate change will have significant impacts on our natural environment and resources, with:

- rises in sea levels,
- increased bushfire activity,
- decreased rainfall,
- increased ocean temperatures and acidification,
- increased storm activity, and
- loss of biodiversity.<sup>66</sup>

A review of the State's greenhouse gas emissions shows that about a quarter of NSW emissions come from building and construction activities.<sup>67</sup> Energy use is also increasing, leading to discussions about the need to increase base load power and build more coal or gas fired power stations, which will in turn increase emissions.<sup>68</sup> Transport is also a major contributor to NSW emissions and is one of the strongest sources of emissions growth in Australia.<sup>69</sup>

These activities are regulated, in one way or another, by the State's planning system, but the current system fails to adequately incorporate the consideration of the potential effects of climate change and does not prescribe measures to mitigate emissions or adapt to climate change impacts. Current regulation is uncoordinated and inadequate, and a range of measures is needed at different stages. This includes at the stages of environmental impact assessment, development consent and other authorisations (e.g. mining titles), pollution control laws, and monitoring and enforcement. Such measures are needed in addition to a national carbon price.<sup>70</sup>

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<sup>66</sup> For example, the Federal Government's State of the Environment Report 2011 predicts that "Climate change is expected to lead to increases in sea level, with projection of a sea level rise of up to 1.1 metres by 2100. [...] Such a sea level rise, with an allowance included for a modelled high tide event, could potentially expose 157 000 - 247 600 existing residential buildings to inundation; the 2008 replacement value of these buildings is estimated at \$41-63 billion" available at <http://www.environment.gov.au/soe/2011/report/index.html>, p 825; see also p 322 "Weather conditions favouring more severe bushfires appear to be becoming more frequent. The past 30 years have seen an upward trend in the cumulative forest fire danger index [...] This reflects the effects of both progressively increasing temperatures and, in the latter period, the millennium drought. This trend is expected to continue under predicted climate change conditions; the average number of 'extreme' fire danger days in 2020 is predicted to increase"; see also p415 "The most important changes deriving from climate change that will affect marine ecosystems are gradually increasing water and air temperatures, sea level rises and acidification. Nearshore, the increased frequency of storms and associated run-off of fresh water, nutrients and suspended sediments will also be very important".

<sup>67</sup> Centre for International Economics, "Capitalising on the building sector's potential to lessen the costs of a broad based greenhouse gas emission cut" (Sept 2007), Australian Sustainable Built Environment Council, available at [www.asbec.com.au/research](http://www.asbec.com.au/research). But see also Australian Government Department of Infrastructure, *State of Australian Cities 2011*, at [www.infrastructure.gov.au](http://www.infrastructure.gov.au), which reports that since 2006, Australians have been consuming less energy and water while also cutting their household waste. From 2010 to 2011, energy consumption (mainly electricity) fell 1.2 %.

<sup>68</sup> Greenhouse gas emissions from NSW's electricity sector increased by 31% between 1990 and 2006. By 2009 the increase was 37.5%. See Australian Government, *Australia's National Greenhouse Accounts – State and Territory Greenhouse Gas Inventories 2004* (2006), pp 16-17; and 2009 accounts (2011), p 18.

<sup>69</sup> In 2009, transport contributed 83.6 Mt CO<sub>2</sub>-e or 15.3% of Australia's national greenhouse inventory emissions. See <http://www.climatechange.gov.au/publications/greenhouse-acctg/state-territory-inventory-2009.aspx>. For 2006-07, 62.7% of all energy used by NSW road transport was for passenger vehicles (Department of Environment, Climate Change and Water, *NSW State of the Environment 2009*, section 3.3).

<sup>70</sup> See e.g. S. Christensen, N. Durrant, P. O'Connor and A. Phillips, "Regulating greenhouse gas emissions from coal mining activities in the context of climate change", *Environmental and Planning Law Journal*, Vol 28/6 November 2011

A recent paper entitled “Are New South Wales’ planning laws climate-change ready?”<sup>71</sup> examines the current ability of NSW planning laws to effectively manage climate change issues and identified how the planning system can be improved to better manage climate change and achieve the goals set out in the former New South Wales State Plan. A copy of this paper is annexed to our submission (**Annexure 2**). In summary, this paper concludes that there is an urgent need for legislative amendment to the EP&A Act to ensure there is a robust and meaningful response to climate change. Amendments required include:

- incorporation of climate change into strategic planning
- establishment of a robust coastal adaption regime
- introduction of a comprehensive assessment framework of the climate change implications of all development
- strong energy efficient and water standards for building and construction.<sup>72</sup>

Further, the recent *Ulan* case highlights the Planning Department’s unwillingness to use the development assessment process to impose conditions relating to greenhouse emissions on coal mines generally.<sup>73</sup> As Justice Pain noted at [59]:

*“There is no formal document setting out the government’s position on the treatment of scope 1, 2 and 3 GHG emissions and the risk of climate change in the development assessment process under the EP[&]A Act.”*

The case has resulted in the first imposition of conditions to offset greenhouse emissions from an Australian coal mine.<sup>74</sup> It appears from this case that Department’s reluctance to use the development assessment process to impose conditions is based on maintaining ‘equity’ with conditions on more than 50 pre-existing NSW coal mines and the lack of specific requirements to consider climate change under the EP&A Act.<sup>75</sup>

We note that despite the failure of NSW Government to take the lead on climate change, a number of recent court cases demonstrate the importance of climate change as a planning and development consideration.<sup>76</sup> Additionally, a number of local councils have taken the initiative to incorporate climate change measures into their local planning management.<sup>77</sup>

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<sup>71</sup> Ghanem, R and Ruddock K, “Are New South Wales’ planning laws climate-change ready?” (2011) 28, *Environmental and Planning Law Journal* 17

<sup>72</sup> *Ibid*, p 35

<sup>73</sup> *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221. The case involved merits review of the former Planning Minister’s decision to consolidate various development consents, and approve an expansion that would effectively double the capacity of the Ulan coal mine, 40 km north of Mudgee. We note that de

<sup>74</sup> The final scope of the offset is still to be determined, and the mining company may appeal against the Land and Environment Court decision. We also note that the decision has been appealed.

<sup>75</sup> Amongst other reasons cited, *Ibid* paras 60-61.

<sup>76</sup> See for example, *Minister for Planning v Walker* (2008) NSWCA 224, *Ned Haughton v Minister for Planning and Macquarie Generation* (2011) NSWLEC 217,

<sup>77</sup> For example, Byron (<http://www.byron.nsw.gov.au/climate-change>) Ku-ring-gai (<http://www.kmc.nsw.gov.au/www/html/3857-climate-change.asp>) and Gosford ([http://www.gosford.nsw.gov.au/council/policies/environment\\_planning/Climate%20Change%20Adaptation%20and%20Mitigation%20Policy%20FINAL.pdf](http://www.gosford.nsw.gov.au/council/policies/environment_planning/Climate%20Change%20Adaptation%20and%20Mitigation%20Policy%20FINAL.pdf)) are examples of councils that have adopted climate change adaptation strategies. See also clause 22 of Botany Local Environment Plan which requires council to consider Greenhouse effect, global warming, air and water pollution and energy efficiency before granting consent to any development that the Council is satisfied is in excess of \$250,000 in value (excluding land costs), or is of a type likely to give rise to significant soil, air, or water pollution

Notwithstanding these developments, it is time for the NSW planning system to take the lead and provide appropriate mechanisms for ensuring a State wide approach to managing climate change impacts.

**RECOMMENDATIONS: MECHANISMS FOR MITIGATING AND ADAPTING TO CLIMATE CHANGE**

**Recommendation 28:** Make climate change a mandatory consideration in strategic planning.

**Recommendation 29:** The new planning system must introduce a State-wide approach to climate change adaptation, for example, through coastal policies and the adoption of recognised standards that are developed with adequate community consultation.

**Recommendation 30:** For projects that are likely to generate significant emissions there must be mandatory guidelines that codify a comprehensive assessment process. The guidelines should require new plants to use best practice technology and should prescribe mitigation measures and appropriate conditions. The guidelines should be given legislative force either in the new Act or in a State environmental planning policy.

**Recommendation 31:** The Standard Instrument LEP must include provisions (that would apply to coastal LGAs) that address buffer zones in local planning policies, restrictive zoning, setbacks and resilience building measures.

## **7) ACCOUNTABILITY AND ENFORCEMENT**

The new planning system will need to include robust checks and balances to ensure that planning decisions are lawful, impartial and based on best practice planning principles. There are well documented benefits of having court-based review rights in the planning system – including for participative democracy, executive accountability, institutional integrity, improved decision making and rational development of the law.<sup>78</sup>

NSW is fortunate to have a specialist court, the Land and Environment Court (LEC), to deal with land, planning and environmental law matters. A key theme to the reforms that created the Court and the EP&A Act was the general public's right to participate in environmental planning processes – particularly through appeal rights and 'open standing' to enforce the law.

The LEC has been an innovative model for environmental protection, and a model for other similar Courts in Queensland and South Australia. The Court has also been an important catalyst for Australian environmental jurisprudence, including on the precautionary principle and ecologically sustainable development.<sup>79</sup>

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<sup>78</sup> See, eg, The Hon Justice B. Preston, Chief Judge of the NSW Land and Environment Court, "The role of public interest environmental litigation" (2006) 23 Environmental and Planning Law Journal (EPLJ) 337; The Hon Justice Paul Stein AM, "The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest and Environmental Law" 13 EPLJ 179.

<sup>79</sup> For further information and references on these matters, see EDO NSW, Submission to the Review of the NSW Planning System (Stage 1), November 2011, pp 32-33 available at [http://www.edo.org.au/edonsw/site/pdf/subs/111104review\\_nsw\\_planning\\_stage\\_1.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/111104review_nsw_planning_stage_1.pdf).

Notwithstanding these advances, there is still room to improve accountability, access to justice and the quality of citizen participation in environmental decision-making, including through the LEC.

### **Appeal rights**

There are unfair imbalances in the present system which put the community at a disadvantage to developers in ensuring good planning decisions. As a result, approximately 99% of merits appeals are brought by developers, and only 1% by objectors.<sup>80</sup> Communities that live and grow alongside a development should have participatory rights to engage with development in a fulsome way. Fortunately there are a number of ways to redress these imbalances. The new planning system must retain and improve third party merits appeal rights for the community, on a more equitable footing with developers. In particular:

- allow merits appeals for third party objectors where an approved (non-‘designated’) development exceeds local development standards,
- where a development is refused that exceeds local development standards, remove developers’ automatic right to merits appeal,
- expand third party appeal rights in other areas to reduce corruption risks and improve decision making, as per ICAC’s 2007 and 2012 recommendations,
- reintroduce merit appeal rights for objectors in relation to State Significant projects without restriction,<sup>81</sup> as the greatest impacts deserve the greatest scrutiny,
- make merits appeal and judicial review rights available for critical/ State significant infrastructure projects, and remove ‘Ministerial consent’ requirements to appeal,
- ensure mandatory consultation on LEPs and rezoning rather than merits appeal rights,
- do not give developers new merits appeal rights in relation to rezoning refusals (if such rights were granted, equity would require corresponding merits appeal rights for objectors wherever zoning is changed), and
- provide more equitable time periods (3 months) for objectors to bring merits appeals – still half the time currently available to developers to lodge an appeal.

### **Open standing**

One of the LEC’s great strengths is its powers to grant civil remedies such as injunctions and declarations in response to breaches of environmental laws. This has enabled public interest litigants to protect the environment by bringing such matters before the Court.<sup>82</sup> Open standing also improves public confidence that laws will be adhered to and are able to be enforced; and ensures that limited resources are directed to resolution of substantive issues. Open standing has been a positive hallmark of the EP&A Act, notwithstanding the gradual degeneration of the planning regime more generally.<sup>83</sup> It is a widely supported feature in NSW to this day.<sup>84</sup>

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<sup>80</sup> Department of Planning, *Local Development Performance Monitoring 2010-11*, pp 80-81.

<sup>81</sup> For example, regardless of whether the development would otherwise be designated development, or whether a public hearing has been held by a Planning Assessment Commission.

<sup>82</sup> See for example- *Corkhill v Forestry Commission of NSW (No. 2)* (1991) 73 LGRA 126, and *Brown v Environmental Protection Authority* (1992-1993) 78 LGERA 119, and *Leatch v National Parks and Wildlife Service & Shoalhaven City Council* (1993) 81 LGERA 270, and *Timbarra Protection Coalition Inc v Ross Mining NL* [1998] NSWLEC 19, and *Coalcliff Community Association v Minister for Urban Affairs and Planning No. 40047 of 1996* [1997] NSWLEC 94, and *Gray v Minister for Planning & Ors* (2006) 152 LGERA 258.

<sup>83</sup> See EP&A Act 1979, s 123(1), ‘Restraint etc of breaches of this act’:

The new planning system must ensure that ‘open standing’ to bring action for breaches of the planning system is not eroded

### ***Review of decisions***

For any non-court based review process to work fairly and effectively, objectors need to be properly involved, both where an applicant initiates a review, and through new rights to initiate reviews in appropriate circumstances (for example, where development standards are exceeded). Noting their different role and non-judicial nature, review mechanisms should not replace the right to appeal to the Court.<sup>85</sup>

More generally, to resolve objections early, reduce costs and avoid the need for appeals, there should be broader mechanisms for community involvement in conciliation, mediation and neutral evaluation within the scope of the LEC framework.<sup>86</sup> This must include proper processes and legal safeguards to engage the public and improve accessibility.

### ***Other access to justice issues***

The new planning system must further improve access to justice by:

- reducing costs barriers for third party enforcement and public interest matters (for example: allow civil enforcement cases to be brought in an ‘own costs’ jurisdiction; amend the LEC rules to provide for a range of *mandatory* public interest costs orders where civil enforcement action is brought in the public interest),
- ensuring that administrative orders to enforce environmental laws<sup>87</sup> are available to both public authorities and third parties in relation to all State significant projects (including critical infrastructure), and
- allowing successful applicants for civil enforcement to have a say in how the penalty revenue is applied for environmental or community benefit.

### ***Compliance and enforcement***

Compliance with and enforcement of planning laws is a very significant issue identified by our members and clients. Identified problems with lack of enforcement include:

- where there is non-compliance with development consent conditions, including for large projects like mines and tips,
- no follow-up or leniency where development is carried out without consent,
- confusion as to the agency responsible for enforcement, and potential for buck-passing due to unclear relationships,<sup>88</sup> and

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*Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.*

<sup>84</sup> Planning System Review Issues Paper (2011), p 101.

<sup>85</sup> See Issues Paper, p 103.

<sup>86</sup> For example, see *Land and Environment Court Act 1979* (NSW), Part 4 Division 4 (Special provisions respecting Class 1, 2 or 3 proceedings)

<sup>87</sup> Such as stop work orders, interim protection orders and notices regarding threatened species, heritage and pollution (cf EP&A Act, s 115ZG, which removes these orders for critical state infrastructure). This perpetuates a failing of former Part 3A of the EP&A Act. See EDO NSW, Submission on corruption risks and the regulation of lobbying in NSW, (June 2010), at [www.edo.org.au/edonsw](http://www.edo.org.au/edonsw).

<sup>88</sup> For example, between local Councils and the Planning Department; and other agencies like Department of Primary Industries, Office of Environment and Heritage, Environment Protection Authority, and Office of Water.

- lack of resources for Councils to enforce compliance, versus a community perception that Councils aren't fulfilling their responsibilities (and public inability to 'require' Council enforcement).

There is no doubt a combination of reasons for these problems, including limited resources (money, staff, skills); problems of non-enforcement 'culture'; limited or ineffective powers; and limited or ineffective penalties. While a strong penalty system is necessary for deterrence, penalties themselves are insufficient without an effective system of monitoring and enforcement.

Our organisations make the following recommendations for improving on compliance and enforcement in the new planning system:

- With respect to **penalties**:
  - increase maximum penalties available for certain breaches of the planning regime, with more specific penalty ranges for different offences,
  - adopt a tiered penalty system in the Act, setting a range of penalty categories relative to seriousness, to inform the community and guide sentencing,
  - ensure greater equity between penalties (and powers) for local council enforcement and departmental enforcement, and
  - strengthen penalties for inaccurate information beyond 'knowingly false or misleading' to negligent or reckless material inaccuracies.
- With respect to **orders and offences**:
  - a new, flexible range of orders should be made available to enforcement authorities and courts, with corresponding remedies for non-compliance, and
  - further research on the use and adequacy of different existing offences would assist the design the enforcement system under the new planning Act.
- As noted under Part F, to increase transparency, public confidence and awareness, the new planning act should require enforcement authorities (councils and departments) to:
  - adopt and publish enforcement policies,
  - publish data on complaints received and investigated, and
  - report on the exercise of their enforcement powers (with appropriate support and resourcing)

Finally, the Issues Paper raises a number of **other specific matters** we have responded to:

- Councils should have rights to seek costs and other remedies against private certifiers in certain circumstances.
- Post-approval monitoring and reporting conditions should not be able to be weakened through review processes, although improving the utility and effectiveness of such conditions should be supported.
- Proponents and consent authorities should also be required to publish monitoring and reporting data online and accessibly to make public scrutiny easier.
- Consent authorities should be given wider powers to suspend or revoke development consents, including for significant breaches of consent conditions. Council compliance officers should be given appropriate rights of entry and inspection, and more pressingly, the resources and support to monitor, enforce and report on compliance.

**RECOMMENDATIONS: MECHANISMS FOR ENSURING ACCOUNTABILITY AND IMPROVED ENFORCEMENT**

**Recommendation 32:** The new planning system must ensure that the 'open standing' for breaches of the planning system is not eroded

**Recommendation 33:** The new planning system must retain and improve third party merits appeal rights for the community, on a more equitable footing with developers

**Recommendation 34:** The new planning system must improve access to justice by reducing costs barriers for third party enforcement and public interest matters, and broadening mechanisms for community involvement in conciliation, mediation and neutral evaluation within the LEC framework

**Recommendation 35:** The new planning system must improve mechanisms for compliance and enforcement, including by way of strengthened penalties, a tiered penalty framework, a broader range of innovative enforcement tools and orders, improved resourcing, and more transparent enforcement policies, monitoring and reporting obligations.

## PART 2 - RESPONSE TO FEEDBACK QUESTIONS

In Part 2 of our submission we endeavour to answer some of the key questions raised by the Planning System Review Issues Paper – *The way ahead for planning in NSW*?

### ***Our approach to the Issues Paper questions***

Responding to all 230+ questions raised by the Issues Paper would not be practicable for our organisations. As far as possible we have focused on the questions most relevant to our expertise and areas of interest. Acknowledging that there is some repetition amongst the questions, we refer back to the earlier questions or our main submission in Part 1 in order not to repeat our answers. We also observe that a large quantity of questions relate to the operation of the current EP&A Act. Some of our answers are qualified with the understanding that the new planning system may take on a completely different format. Finally, we note that while we have attempted to address what we see as the key questions, our efforts have been focused on our submissions in Part 1 – that is, the matters that we see as being essential for a new planning system. We anticipate that the key ideas from our submission will need to be explored in further detail once the Green Paper is released.

### **CHAPTER A- INTRODUCTION**

Please see below our responses to selected questions from Chapter A of the Planning System Review Issues Paper.

#### **A1 What should the objectives of new planning legislation be?**

- *Ecologically sustainable development*

In order to create a planning system that successfully balances the competing economic, environmental and social impacts facing NSW today and in the future, there needs to be a genuine commitment to ecologically sustainable development (ESD). The starting point is to make ESD the overarching objective of the new planning system. *Please see further our comments on ecologically sustainable development in Part 1 of our submission.*

- *Public participation*

The EP&A Act currently contains an objective ‘to provide increased opportunity for public involvement and participation in environmental planning and assessment’.<sup>89</sup> The objective of ‘increased opportunity’ was appropriate at the time of its introduction, when public participation was a relatively new feature of environmental decision making. However, thirty years on, and with a series of amendments that have seen public participation opportunities weakened<sup>90</sup>, the new planning system must step up its commitment to genuine and meaningful public participation.

The current objective should be amended to “ensure guaranteed and meaningful public involvement and participation in environmental planning and assessment”. *Please see further our introductory comments on public participation and also our response to Question A9.*

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<sup>89</sup> Section 5(c), EP&A Act

<sup>90</sup> For example, the amendments introduced by the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005* including the introduction of Part 3A

▪ *Protection of biodiversity*

The new planning system should include an objective specifically relating to the protection of biodiversity.<sup>91</sup> Biodiversity contributes to providing the ecosystem services that form our natural capital: freshwater, clean air, soil fertility and biological pest control. It is fundamental to our physical, social, cultural and economic wellbeing as well as having its own intrinsic worth.<sup>92</sup>

One of the current objectives of the EP&A Act is to encourage the protection of the environment. This includes the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats.<sup>93</sup> We suggest that this objective should be amended to “ensure the protection of biodiversity and the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats”.

▪ *Operational objectives*

Question B5 of the Issues Paper asks whether the objectives should address the operation of the new planning legislation. We note that one of the purposes of *Local Government Act* 1993 is to provide the legal framework for an effective, efficient, environmentally responsible and open system of local government in New South Wales<sup>94</sup>.

Given that efficiency, openness and environmental responsibility have been expressed as key concerns for the planning system<sup>95</sup> it may be appropriate to include a similar objective in the new planning legislation.

**A2 Should any overarching objectives be given weight above all other considerations?**

Ecologically sustainable development (ESD) should be the overarching objective of the new planning legislation. ESD is “not a factor to be balanced against other considerations; ESD is the balance between development and environmental imperatives”.<sup>96</sup> *Please see further our comments on ESD in Part 1 of our submission as to how ESD should be given effect as an objective and applied throughout the new Act.*

<sup>91</sup> Australia’s Biodiversity Conservation Strategy 2010 - 2030<sup>91</sup> describes biodiversity as follows:

*Biodiversity occurs in all environments on Earth – on land, in rivers and lakes, and in the seas and oceans. There are three levels of biodiversity:*

- *genetic diversity—the variety of genetic information contained in individual plants, animals and micro-organisms*
- *species diversity—the variety of species*
- *ecosystem diversity—the variety of habitats, ecological communities and ecological processes.*

<sup>92</sup> Draft New South Wales Biodiversity Strategy 2010-2015

<http://www.environment.nsw.gov.au/resources/biodiversity/strategy/10821DraftBioStrat.pdf>

<sup>93</sup> Section 5(a)(vi) of the *Environmental Planning and Assessment Act* 1979 NSW

<sup>94</sup> Section 7(a) of the *Local Government Act* 1993 NSW

<sup>95</sup> See for example page 17 of the NSW Planning System Review Issues Paper

<sup>96</sup> Bates, G. *Environmental Law in Australia* (5<sup>th</sup> ed. LexisNexis. 2002), para [5.19]-[5.20], cited by Farrier D, et. al. (2007) *Biodiversity offsets and native vegetation clearance in New South Wales; The rural/urban divide in the pursuit of ecological sustainable development* 24 EPLJ 427

**A3 Should there be strict controls in plans?**

**A4 Should applications that depart from development controls be permitted?**

**A5 What should the test be for a proposed variation?**

Yes – there should be strict controls in plans. Strict controls provide a level of certainty in the system, which increases the public’s confidence in decision making processes.

Our organisations recognise that the planning system must be sufficiently flexible in order to accommodate the differences between coastal, urban, rural and regional areas. We suggest that those differences be addressed at the strategic planning phase, thereby providing a framework for the subsequent imposition of strict, local controls that accurately reflect the relevant characteristics of the land. While it would be appropriate for strict controls to be developed at a local level, these controls should be consistent with long term strategic planning at a broader regional or State level.

Applications that depart from controls have the potential to undermine strategic planning, and to give rise to disputes. Any test for a proposed variation to a control should be based on community or environmental grounds, for example to avoid social and environmental damage or to lead to better sustainability and design outcomes and must remain consistent with long term strategic objectives. Any decision allowing variation to development controls should be subject to objector merits appeal, however where development that exceeds local development standards is *refused*, developers should not have an automatic right to merits appeal.

**A6 Should new planning legislation provide a framework for regional strategic planning processes? If so, how should appropriate regions be determined for strategic planning?**

Yes – the new planning legislation should provide a framework for regional strategic planning. We note that strategic planning needs to take place at all levels - State, regional and local.

We submit that regional strategic planning would be best undertaken at a regional catchment level to support improved integration with natural resource management. Regional strategic plans should be prepared having regard to existing Catchment Management Plans and should be prepared in conjunction with regional conservation plans.

Strategic planning, at all levels, must:

- prescribe clear environmental assessment processes including the assessment of cumulative impacts,
- prescribe processes for mandatory community consultation,
- give appropriate weight to plans,
- ensure decision making is consistent with approved plans, and
- include provisions for the review of plans to keep plans up to date and to track cumulative impacts

More specifically, a framework for regional strategic planning must be designed to:

- **undertake independent baseline studies** of catchments’ environmental qualities, such as for resources like water, soil, vegetation, biodiversity, minerals and air quality (see further our comments on strategic environmental assessment below),

- **collate, share and publish data across sectors** in ways that promote accuracy, transparency and evidence-based decision making,
- **identify competing land uses and values** (including environmental and cultural values) across regions,
- **take account of potential cumulative impacts,**
- describe how the **goal of ESD** will be put in practice through regional and local planning decisions,
- **integrate natural resource management (NRM)** goals into the planning process,
- **establish “no-go zones”** – sensitive areas of NSW where certain kinds of development (such as mining) are prohibited, based on an assessment of environmental, water supply, social and agricultural-value criteria,
- provide for **comprehensive rights of public participation**, and support to engage,
- **promote resilience to climate change** for communities and their environments, addressing risks and opportunities via mitigation and adaptation,
- **devote sufficient resources to regional development**, to develop effective decentralisation strategies and divert population growth from Sydney,
- **consider and integrate infrastructure needs** (including all forms of public transport) *ahead of* new development, based on identified values, qualities and potential growth, and
- **prioritise the value of landscape and green infrastructure** (parks, waterways, wildlife corridors etc).

**A7 Should strategic plans be statutory instruments with greater weight?**

Strategic plans should be given greater weight so long as they are prepared in accordance with a legislative framework similar to that proposed in our response to Question A6. This framework must include consultation with government agencies, mandatory public participation and minimum environmental studies. Strategic plans could be given greater weight by:

- giving them the same status as environmental planning instruments, or
- making compliance with strategic plans a mandatory requirement for local environmental plans and State environmental planning policies.

**A8 How should implementation of strategic plans be facilitated?**

There needs to be a whole of Government approach to strategic planning with input from all relevant agencies including treasury, environment, local government, community, transport and infrastructure.

Strategic planning must be based on the best information available drawing on the large amounts of existing scientific and community information that is already available, and the existing expertise available within the Government.

*Please see further our response to Question A6 on a framework for strategic planning and our response to Question C9 on the information and data that should be used for making plans.*

**A9 In a new planning system, how can we improve community participation opportunities? How can we improve consultation processes for plan making and development assessment?**

In August 2010, the Environmental Defender's Office and the Total Environment Centre published a report entitled "*Reconnecting the Community with the Planning System*".<sup>97</sup> As part of this project the EDO prepared a Discussion Paper identifying a series of questions designed at invoking discussion on what would be the community consultation features of a best practice planning system. The EDO and TEC ran six community workshops, and conducted an online survey, receiving feedback from 120 participants. The final report makes 40 recommendations on how to improve community consultation in the planning system, with a focus on quality of information, early provision of information, the range of consultation techniques used, targeted and broad community consultation, independence of experts preparing information for the community, realistic timeframes and adequate resourcing for community engagement, and guaranteed requirements for iterative consultation processes and feedback loops. A copy of this report is annexed to our submission (**Annexure 1**).

More recently the Department of Planning and Infrastructure has agreed to an action plan that commits the Department to a number of actions intended to improve public engagement with the planning system.<sup>98</sup> The Department recognises that a number of recommendations relate to legislative reform which would best be considered in the context of a review of the EP&A Act. Accordingly we consider it appropriate to outline the 40 recommendations made by that report in response to this question:

1. Consultation as a legislative requirement

- *Recommendation # 1:* Establish minimum mandatory consultation requirements under the EP&A Act that guarantee genuine community involvement in plan making and development assessment procedures.

2. Information versus consultation

- *Recommendation # 2:* Develop protocols that clearly delineate and operationalise the distinction between information and consultation when engaging with the community (for example, providing information prior to consultation sessions and restricting the information component of consultation sessions).
- *Recommendation # 3:* Ensure that consultation is only undertaken by people who have the confidence of the community that their views will be accurately given to government.
- *Recommendation # 4:* Undertake further consultation with users on how the DoP website appears and ways of making it more user-friendly.
- *Recommendation # 5:* Consider engaging more "people who can translate the law" in consultation sessions.
- *Recommendation # 6:* Consider facilitating a legal inquiries process, similar to the ATO.
- *Recommendation # 7:* Establish a comprehensive community information program, using a variety of techniques to provide plain-English information, to provide updates on legal and policy developments and address confusion about the current system.
- *Recommendation # 8:* Complement the community information program with free annual or biannual consultation workshops around NSW on proposed changes by government.

<sup>97</sup> <http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=flozHVCRQo%3D&tabid=490&language=en-US>

<sup>98</sup> A copy of the action plan is available on the Department's website:

<http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=Z6wpTNgYUa0%3D&tabid=490&language=en-US>

### 3. How consultation is done

#### *For law reform*

- *Recommendation # 9:* Place public notices information about the relevant parliamentary timetable in the newspaper at the start of a Parliamentary session.
- *Recommendation # 10:* Undertake a targeted communications strategy to relevant state and local interest groups depending on the type of legislation proposed.
- *Recommendation # 11:* Identify priority groups with an interest in the law reform that could have a role in broader notification and information sharing about law reform, with the capacity to facilitate feedback to the relevant Departments or MPs.
- *Recommendation # 12:* Establish a register of interested people and groups who wish to be alerted of any relevant law reform.

#### *For proposals under existing law*

- *Recommendation # 13:* Consider adopting a range of notification methods including: Sydney Morning Herald, local papers, local library displays, EDO bulletin, Council newsletters, community notice boards, TV advertisements, radio, other media (including the ‘blogosphere’), letter drops, and brochures given to new residents.
- *Recommendation # 14:* Develop interactive websites where users can give their email address and be provided with further information.
- *Recommendation # 15:* Provide hard copy documents (or discs) on request.
- *Recommendation # 16:* Engage a small Secretariat (“someone on the end of the phone”) to respond to community inquiries and supply information.
- *Recommendation # 17:* Use emerging media and techniques such as social networking tools (e.g. updates via blogs, Twitter etc) and “dialogue circles” to engage more immediately and directly with the community
- *Recommendation # 18:* Adopt a range of consultation techniques to engage more effectively with different communities, including:
  - Workshops with agreed summaries in lieu of written submissions;
  - More visual plan information to address differing literacy skills and cater for people who process information more visually than in written form;
  - More oral hearings to allow marginalised people to participate without requiring long written submissions;

### 4. Who is consulted

- *Recommendation # 19:* Consider two-tiered consultation sessions – one for the experts (eg stakeholder groups) and another for the grass roots community – in appropriate circumstances.

### 5. What is consulted on

- *Recommendation # 20:* Amend that EP&A Act to ensure independent experts prepare environmental assessments for consultation.
- *Recommendation # 21:* Provide Councils with funds to commission environmental assessments from independent experts.
- *Recommendation # 22:* Limit the earnings a consultant can derive from one developer or government department per year.
- *Recommendation # 23:* Bar former Council planners from operating as consultants in their own areas for 5 years after they resign from Council.

### 6. Timeframes for consultation

#### *For law reform*

- *Recommendation # 24:* Adopt the consistent practice of providing adequate prior notice and time to consider law reform proposals.

#### *For proposals under existing law*

- *Recommendation # 25:* Enshrine community consultation rights under the EP&A Act to operate from the beginning of both plan-making and development assessment processes.
  - *Recommendation # 26:* Amend that EP&A Act to ensure that early engagement and consultation does not result in forfeiture of review rights at a later stage.
  - *Recommendation # 27:* Provide more detail to facilitate genuine consultation on concept plans and planning proposals.
  - *Recommendation # 28:* Undertake a review of existing timeframes with a view to adopting minimum timeframes, but not maximum timeframes, to ensure more equality between the time developers spend discussing proposals with planning officials and the time the community gets to discuss a proposal.
  - *Recommendation # 29:* Extend major project consultation timeframes beyond 30 days to ensure genuine consultation with community groups.
7. Resourcing for community participation
- *Recommendation # 30:* Provide funding for independent groups (such as NGOs, universities and local government), and general assistance, to facilitate consultation.
  - *Recommendation # 31:* Establish a fund (with, say, contributions from developers) to facilitate professional assistance for to the community in preparing submissions.
8. How community feedback is considered
- *Recommendation # 32:* Reinstate fixed minimum mandatory criteria for environmental assessment to assure the community that all relevant factors have been considered.
  - *Recommendation # 33:* Amend the EP&A Act to ensure that large infrastructure projects have more and clearer standard criteria around decision making and better consultation and review provisions than the current Part 3A, with comparable environmental assessment requirements to those under Part 4.
  - *Recommendation # 34:* Repeal the category of critical infrastructure under the EP&A Act.
  - *Recommendation # 35:* Provide clear and consistent information to Councils and the community about what instruments impose mandatory requirements and which documents are 'guidelines.'
  - *Recommendation # 36:* Create a specific planning ombudsman or an independent authority to assist the community to overcome inconsistencies in interpretation by Councils, perceptions of bias etc.
  - *Recommendation # 37:* Ensure decision making bodies are subject to ethical planning principles and transparency requirements to address potential bias and to properly hear and process community input.
9. Local considerations
- *Recommendation # 38:* Undertake more site visits, locally based seminars and more facilitated meetings in local communities.
10. Consultation feedback
- *Recommendation # 39:* Implement measures to ensure that community input is properly considered and mandatory feedback loops are embedded in the system to show how input has been considered with explanations to the community why their recommendations have been refused or amended.
  - *Recommendation # 40:* Ensure that there are mandatory public hearings for major projects

**A12 Who should decide regionally significant development and local development applications?**

The matter of who should determine development applications, for regionally significant development and local development, as well as State significant development, is multifaceted.

On one hand there is a desire to remove the politics from decision making and reduce potential corruption risks through independent decision making. On the other hand there is a need to make elected representatives, at both State and local government levels, accountable.

The challenge for the new planning system will be to balance these competing concerns in order to achieve the best outcomes overall. However, just as important, is the need to provide a clear, transparent and objective decision making framework for decision making at all levels – local, regional and State, to foster good decision making irrespective of who ultimately makes decisions.

Our organisations have received a range of feedback from our members and clients as to who should be making planning decisions. Opinions are based on individual experiences in a variety of locations throughout the State. The common concern of the environmental community is that decision making must be transparent and objective and decision makers must be accountable. *Please see further our response to Question B16.*

We therefore submit that a new planning system must foster better decision making by:

- removing discretionary decision making,
- incorporating objective decision making tools,
- requiring information to be made publicly available, prior to decisions being made,
- mandating genuine public participation,
- requiring decision makers to provide reasons for decisions, and
- ensure merit appeal right of decisions.

**A13 Should Joint Regional Planning Panels decide development applications? If so, which applications should the panels decide? Who should identify these?**

**D70 Should a new planning system include Joint Regional Planning Panels? (includes responses to D71 – D80)**

Under the current system regionally significant development is processed and assessed by councils who provide an assessment report to a joint regional planning panel (JRPP) for determination.

Some of our members and clients support the use of JRPPs and have seen positive outcomes in decisions made in their region. Others criticise JRPPs for not allowing sufficient time for community input and not having sufficient local representation and local knowledge. The common concerns about the operation of JRPPs are outlined in our responses to Questions D71 – D80 set out here.

***D71 What should be the composition of a Joint Regional Planning Panel?***

The current composition of a JRPP includes:

- Three (3) persons appointed by the Minister, each having expertise in at least 1 of planning, architecture, heritage, the environment, urban design, land economics, traffic and transport, law, engineering, tourism or government and public administration, and

- Two (2) council nominees of an applicable council, at least one of whom has expertise in planning, architecture, heritage, the environment, urban design, land economics, traffic and transport, law, engineering or tourism.

Under this current framework, there is potential for gaps in the expertise of the JRPP. While the panel members must have expertise in at least one of the prescribed areas, there is no regulation with respect to the balance of expertise.

We submit that the provisions regulating the composition of a JRPP (or equivalent) should address the balance in areas of expertise. In this respect we submit that:

- each JRPP (or equivalent) must include a person having experience in the environment, for example, an ecologist (that is, inclusion of this area of expertise is not optional), and
- for development proposals in coastal area, at least one panel member must have experience in the hydrology of coastal lakes, wetlands and estuaries.

Some NCC members also suggested that there should be local representation on each panel.

***D72 What should be the hearing processes for a Joint Regional Planning Panel?***

There should be a clear framework for public involvement in JRPP hearings. Some members of the environmental community have expressed concern with the limited amount of time to participate in JRPP hearings.

***D73 Should a council be able to refer a matter to a Joint Regional Planning Panel for determination even if the matter would not ordinarily fall within the jurisdiction of such a panel?***

The Issues Paper raises this question in the context of a suggestion that such additional referrals to JRPPs would help to depoliticise controversial development proposals and allow a decision to be made on planning merits.

A recurring theme throughout our submission is that the new planning system must be clear and certain, for the benefit of both developers and the community. In this respect we submit that councils should not be able to refer a matter to a JRPP (or equivalent) for determination if it does not ordinarily fall within the jurisdiction of such a panel. Once there are exceptions it opens the door to an abuse of the provisions. We would question whether it is appropriate for Councils to refer ‘hard decisions’ to JRPPs for determination to avoid public scrutiny of the decision.

***Use of IHAPs***

We also note that the EP&A Act contains provisions allowing councils to set up Independent Hearing and Assessment Panels (IHAPs) to assess any aspect of a development application or any planning matter referred to the panel by the council (other than a matter subject to a determination or review by a JRPP). These panels must be made up of members having expertise in at least one of planning, architecture, heritage, the environment, urban design, land economics, traffic and transport, law, engineering, tourism or government and public administration. For the purposes of an assessment, a panel may receive or hear submissions from interested persons and must submit a report to the council within the time required by the council. Such panels (if retained in the new planning system) would provide an appropriate mechanism for councils to seek advice with respect to controversial development proposals. We would again submit that a person of environmental expertise should be a mandatory criterion.

Alternatively, and particularly if IHAPs are not retained in the new planning system, it may be appropriate to consider extending the role of JRPPs to be able to provide advice to council's on planning matters.

***D74 Should State nominated members of a Joint Regional Planning Panel be precluded from taking part in any decision concerning the local government area in which they reside?***

We note that the current provisions allow two council nominees on JRPPs, and presumably these are likely to include local people. The main issue is whether there would be bias by allowing a State nominated member to take part in a decision concerning their own local government area. If this was to occur there would need to be appropriate measures to ensure that bias does not affect decision making.

***D75 If a proposed development is recommended for approval by council staff, has no public submission objecting to it and is not objected to by the Department, should it be determined by the council?***

Echoing our concerns in question D73 with respect to consistency within the new planning system and removing the opportunity to abuse exceptions to provisions, we suggest that all developments that fall within the prescribed jurisdiction of a JRPP (or equivalent) should be referred such a panel for determination.

***D76 Should it be possible to constitute a Joint Regional Planning Panel with a single representative of each of the affected councils to consider and determine a significant development proposal that extends across the boundary between two local government areas?***

Yes, this would be an appropriate way of dealing with proposals that have potential the impacts across council borders.

***D77 If located entirely within one local government area, should a significant development proposal that is likely to have a significant planning impact on an adjacent local government area be determined by such a two council panel?***

Yes, this would be an appropriate way of dealing with proposals that have potential the impacts across council borders.

***D78 Should a council be able to apply to the Minister to be exempt from a JRPP?***

Again, echoing our concerns above in our responses to questions D72 and D75, we suggest that councils should not be able to apply to the Minister to be exempt from a JRPP.

***D79 Should aggregation of multiple proposals to bring them within the jurisdiction of a Joint Regional Planning Panel be banned if, separately, they would not satisfy the jurisdictional threshold?***

The premise for this question, as explained the Issues Paper, suggests that there has been an abuse of the provisions in order to have matters referred to the JRPP. We submit that the framework in the new planning legislation be clear as to the jurisdiction of a JRPP (or its equivalent) and prevent the inappropriate aggregation of multiple proposals.

***D80 Should an elected council have the right to pass a resolution to supplement or contradict the assessment report to a Joint Regional Planning Panel?***

This question appears to have arisen from concerns that it is unclear whether or not a council could pass a resolution concerning the merits of the proposal being considered by the JRPP.

Under the current EP&A Act, the elected council may take part in a public hearing of a JRPP. It would therefore seem appropriate that in order to participate effectively in the process, a council

should be able to pass a resolution concerning the merits of the proposal to be considered. This would in turn be one factor to be considered by the JRPP as part of the decision making process.

**A15 Should any changes be made to complying development and the process of approving it?  
(also includes D4-D6)**

Yes. The current complying development provisions need to be changed as does the process for approving complying development.

The current complying development regime seeks to make a certain percentage of development exempt and complying development. The 50% goal, set by the previous Government, is arbitrary and has led to the complying development categories being inappropriately expanded in order to achieve these goals. Of particular concern is the fact that section 76A(6) of the EP&A Act was repealed to allow complying development in environmentally sensitive areas.

The current regime has the potential to considerably reduce the opportunities for members of the community to comment on proposed developments in their LGAs. It is inappropriate to remove community consultation processes for potentially a large percentage of development applications in neighbourhoods. This goes against the current Government's *NSW 2021 State Plan*, that seeks to increase opportunities for people to look after their own neighbourhoods and environments (Goal 23) and restore confidence and integrity in the planning system (Goal 29).<sup>99</sup>

The current *State Environmental Planning Policy (Exempt and Complying Development Codes)* 2008 establishes uniform exempt and complying development categories across the State. This can be problematic, as local government areas in NSW vary greatly in terms of their locality, diversity, social pressures and environmental sensitivity. It is therefore not always appropriate to define exempt and complying development in a uniform manner across NSW. For example, some developments which may be considered 'minor' in a highly developed urban area may have significant impacts in areas of environmental sensitivity such as waterways, lakes, coastal, forest, heath, woodlands and wetlands.

Additionally, the codes do not provide a mechanism for assessing the cumulative impacts of a myriad of 'minor' developments, which, when considered in isolation, have minimal environmental impacts, but when considered on the whole, lead to "death by a thousand cuts".

The EDO runs an Environmental Law Line, and receives numerous calls from the community who are concerned about complying development and in particular, enforcement of breaches. While councils and private certifiers have enforcement powers regarding breaches for complying development, there is inadequate enforcement in this area.

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<sup>99</sup> NSW Government (2011), see [www.nsw2021.nsw.gov.au](http://www.nsw2021.nsw.gov.au)

Examples of the impacts of the current exempt and complying development on local communities: (anonymous examples, sourced from the EDO)

- A house (Tilba) which was not heritage listed, but which was of significance to the local community, was demolished under the exempt and complying development codes. In this case, the locally significant house was demolished for a yet to be approved block of units, with no opportunity for the community to explain the significance of the house.
- Part 3 of the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 sets out the General Housing Code,
  - The Code provides that the erection of a new dwelling that complies with the development standards set out in the Code is complying development. The relevant development standards require a setback of 3 metres, although there is an exception for alterations to an existing dwelling house.
  - A property owner (Ku-ring-gai) was issued a complying development certificate for alterations and additions to an 'existing dwelling house' by a private certifier, however the existing dwelling consisted of just two single brick side walls and under floor foundations, which were set back less than one metre.
  - The property owner relied on the exception in the exempt and complying development code to overcome the 3 metre development setback, and propose the construction of a two storey dwelling with front and back extension.
  - Such a development had obvious impacts on the neighbours, who have been unable to get the local council or private certifier to take action, and is a potential abuse of the provisions of the Housing Code.

Given the potential impacts of development on the environment and on communities we consider that only very minor development should be 'complying development' under the new planning system.

In summary, we submit that:

- The *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* should be repealed,
- The question as to what should be complying development should be determined at a local scale, taking into account characteristics of the local government area,
- Only truly minor development should be permitted to be listed as complying development.
- Private developers should not be able to sign off on minor variations to the development standards set out in the code. Development should only be considered complying if it complies,
- The new planning should reinstate the prohibition to complying development in environmentally sensitive areas (similar to the former section 76A(6) of the EP&A Act).

*Please see further our responses to question D4 – D6 outlined here:*

***D4 What development should be exempt from approval and what development should be able to be certified as complying?***

- Only truly minor development should be exempt from approval or certified as complying development

- *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* should be repealed. Exempt and complying development should be determined at a local scale, taking into account characteristics of the local government area
- The State government's involvement should be limited to restricting the types of development that can be exempt and complying development
- Development in environmentally sensitive areas should not be complying development

***D5 How should councils be allowed local expansions to any list of exempt and complying development?***

Exempt and complying development should be determined at a local scale, taking into account characteristics of the local government area and should be identified in a local environment plan (or equivalent). The process for listing exempt and complying development in an LEP (or equivalent) would therefore be subject to community consultation (under the plan making process). Any proposals to add to the list of exempt and complying development would require an amendment to the LEP (or equivalent) and be subject to community consultation.

***D6 Should there be a public process for evaluating complying development applications?***

The idea behind complying development is to establish a category of development that is minor in nature, and compliant with a set of standards. So long as complying development is limited to those types of development that are truly minor in nature, and there are no variations from the controls, we do not consider that a public process for evaluating complying development applications is necessary.

**A16 What changes should be made to the private certification system?**

**A17 How can private certifiers be made more accountable?**

As noted above in our response to Question A15, the EDO receives numerous calls to its Environmental Law Line concerning complying developers and private certifiers. The Issues Paper notes "a widespread current of community and council dissatisfaction with the present process".<sup>100</sup>

The private certification system has some inherent problems with perceptions of bias and conflicts of interest in certifiers signing off certificates for those who pay directly for the service. There are also problems with lack of enforcement by both councils and private certifiers.

If the new planning system is to include a private certification system then improvements to the current system are necessary, for example:

- certifiers should not be able to sign off on 'minor variations' to complying development,
- mandatory training and reporting for accredited certifiers, and
- there needs to be more incentives for councils to take enforcement action against certifiers.

However, a better idea may be to require clients to apply for a certifier from an independent third party, who would then select a certifier for the client at random from a pool of registered

<sup>100</sup> See page 23 of the Issues Paper

certifiers. This would address conflicts of interest and sever the direct link between certifiers and developers.<sup>101</sup>

Further concerns with the private certification process are expressed in our responses to questions from Chapter D of the Issues Paper, set out here.

***D117 Should private certifiers have their role expanded and, if so, into what areas?***

No, given the inherent problems with the private certification system, private certifiers should not have their role expanded.

***D118 Should private certifiers be permitted, in effect, to delegate certification powers to other specialist service providers and be entitled to rely, in turn, on certificates to the certifier from such specialist professions?***

No, the private certification already has problems with respect to accountability and enforcement. Further delegation would only complicate matters.

***D119 Should certifiers be required to provide a copy of the construction plans that they have certified (as being generally consistent with the development approval) to the council to enable the council to compare the two sets of plans?***

Yes, this will assist in making certifiers more accountable.

***D123 Should developers be permitted to choose their own certifier?***

As set out in our response to Question A16, the private certification system has some inherent problems with perceptions of bias and conflicts of interest, due to direct payment for services. This could be resolved by requiring clients to apply for a certifier from an independent third party, who would then select a certifier for the client at random from a pool of registered certifiers. This would address conflicts of interest and sever the direct link between certifiers and developers.

**A18 Should there be a right of review or appeal against a council decision concerning the zoning of a property?**

The Issues Paper raised this question in two contexts:

- i) whether there should be a right of appeal if council proposes zoning changes to land as part of a preparation of a new LEP, and
- ii) whether there should be a right of appeal for applicants seeking a rezoning of their land.

With respect to this first context, we note that the EP&A Act currently allows appeals to the validity of the LEP only in judicial review proceedings concerning the legality of the process. Judicial review proceedings can be commenced by any person within three months of the new LEP being published on the NSW legislation website. There is no merits review available with respect to LEPs.

We would not consider it necessary to introduce merits appeals in this first context so long as the new planning system featured an improved framework for effective strategic planning and

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<sup>101</sup> See further the EDO's 2008 Submission on the Discussion paper: Improving the NSW Planning System, available at [http://www.edo.org.au/edonsw/site/policy/improving\\_the\\_system080208.php](http://www.edo.org.au/edonsw/site/policy/improving_the_system080208.php)

preparation of LEPs that provided for mandatory public engagement and accountability at the outset. This would help to ensure LEP and zoning decisions are appropriate and sustainable for the relevant community.

In the second context we do not consider it appropriate to give developers merits appeal rights in relation to rezoning refusals. We note that such appeal rights do not currently exist. Such appeals would have the potential to undermine strategic planning processes, and undermine a more participative upfront approach to zoning and development. Instead, we submit that public participation should be a mandatory feature in the LEP making process. However, if developers were given such rights, equity would require corresponding merits appeal rights for objectors wherever zoning is changed.

*Please see further our submission on Chapter E of the Issues Paper, in particular our responses to Questions E3 and E5.*

**A19 Should there be any distinction between a council decision to change a zoning and a council refusing an application to change the zoning?**

*Please refer to our response to Question A18*

**A21 What are appropriate measures that might be implemented in a new planning system to create public confidence in the integrity of environmental impact statements (and their supporting studies) for major development projects?**

The new planning system must endeavour to:

- Remove the nexus between developers and environmental consultants by introducing a framework for the independent appointment of environmental consultants.
- Introduce further measures to ensure the integrity of environmental impact statements including:
  - accreditation of environmental and planning consultants,
  - ensuring assessment and scrutiny is commensurate with potential impacts,
  - requirements to reject reports that are unsatisfactory,
  - external auditing of environmental assessment reports, and
  - annual reporting requirements.
- Strengthen penalties for providing inaccurate information beyond false and misleading to include negligent or reckless inaccuracies

*For our full submission on this issue please refer to our introductory comments in Part 1 of our submission.*

## CHAPTER B– KEY ELEMENTS, STRUCTURE AND OBJECTIVES OF A NEW PLANNING SYSTEM

Please see below our responses to selected questions from Chapter B of the Planning System Review Issues Paper.

### B1 What should be included in the objectives of new planning legislation?

Please refer to our response to Question A1.

### B2 Should ecologically sustainable development be the overarching objective of new planning legislation?

Yes. Ecologically sustainable development (ESD) should be the overarching objective of the new planning system. Please refer to our comments on *ecologically sustainable development in Part 1 of our submission and our response to Question A2*.

### B3 Should some objectives have greater weight than others?

Yes – in particular ESD should be given greater weight, and in fact should be the overarching objective of the legislation

The implications of having a number of equally weighted objectives were highlighted in *Minister for Planning v Walker* [2008] NSWCA 224. One point of appeal in that case was that the Minister had failed to take into account ecologically sustainable development in granting concept approval to subdivide the site at Sandon Point on the south coast.<sup>102</sup> The Applicant argued that the Minister had not taken into account the principles of ESD, in particular the precautionary principle, because he had not considered whether the flood risk on the site would be exacerbated by climate change, had not obtained up-to-date mapping of endangered ecological communities, and had not carried out further investigations into a possible “women’s area” on the site.

At first instance Justice Biscoe held that under cl 8B of the *Environmental Planning and Assessment Regulation*, the Director-General was obliged to include in his report those aspects of the public interest which he considered to be relevant. It has been established in previous cases that ESD is an aspect of the public interest, therefore the Director-General was obliged to consider ESD in deciding what matters needed to be addressed in his report. In this case the Director-General had apparently failed to consider whether the climate-change related flood risk was a matter which needed to be addressed in his report and subsequently the Minister failed to consider this in granting concept plan approval.

The decision was overturned on appeal, with the Court of Appeal finding that although the planning minister must make decisions in the public interest, not having regard to ESD principles does not necessarily constitute a breach of that obligation.

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<sup>102</sup> The proposal was for subdivision into approximately 180 residential dwelling allotments, 3 super-lots for future apartment or townhouse development, up to 250 seniors living units and a residential aged care facility.

In overturning the original decision Justice Hodgson found:

*In my opinion, one difficulty with the view that failure to consider ESD principles renders void a Minister's decision, ... is that the encouragement of ESD is just one of many objects set out in s 5 of the EPA Act, some of which seemingly would have no relevance to many decisions.*<sup>103</sup>

In order to ensure the new planning system protects our natural environment, and provides for a sustainable, healthy and liveable lifestyle in NSW, ESD should underpin every decision made under the planning system. One way of achieving this would be to give ESD greater weight, by making it the overarching objective of the new planning system.

**B4 Should there also be separate objectives for plan making and development assessment and determination?**

No, there should not be separate objectives for plan making and development assessment. The interrelation between these two processes is fundamental and should be supported by one set of objectives that support the entire planning system. *Please see further our response to Question B10*

**B5 Should the objectives address the operation of the new planning legislation?**

We believe that it would be appropriate for the objectives to address the operation of the new planning system. This could be done through a section dealing specifically with operational objectives or through a single objective similar to that in the Local Government Act 1993<sup>104</sup> (*see further our response to Question A1*).

However, we consider it more important for the new planning system to provide specific mechanisms for *achieving* the operational objectives discussed in the Issues Paper (p 28).

For example:

- *Clarity, simplicity and certainty* can be achieved by ensuring that the new planning system provides clear and prescriptive frameworks for all processes including strategic planning, strategic assessment, development applications, environmental impact assessment and development assessment and determination.
- *Transparency and due process* can be achieved by limiting discretion and prescribing objective decision making tools, providing opportunities for genuine and meaningful public participation, making information publicly available, and ensuring accountability through appeal rights, effective enforcement, monitoring and reporting.
- *The right to be heard, the right to have open and accessible determination processes and the right to be given reasons for decisions* can be achieved through provisions that guarantee genuine and meaningful public participation and publicly available information at *all stages* of the planning process, including the strategic assessment phase and the development assessment phase.

<sup>103</sup> Minister for Planning v Walker [2008] NSWCA 224, at 52

<sup>104</sup> Section 7(a) of the *Local Government Act* 1993 NSW outlines of one of the Act's purpose as providing 'the legal framework for an effective efficient, environmentally responsible and open system of local government in New South Wales'

**B6 Are the current definitions in the Act still relevant or do they need updating?**

**B7 Does the present definition of 'development' need to be rewritten? If so, in what respect?**

**B8 Should there be a definition of 'minor'? If so, what should it say?**

It is appropriate to review the current definitions as part of the planning review process. However, it is also important to consider definitions in the specific context of their operation. As the planning review represents an opportunity for a completely new planning system, it may result in structural and content changes that substantially affect the context of relevant terms. Accordingly we will further consider the definitions in context in later stages of the review.

**B9 Should 'public interest' be defined? If so, what should it say?**

We do not consider it necessary for the term 'public interest' to be defined because:

- a body of case law as to what constitutes the 'public interest' already exists,
- it could be said that the 'public interest' is dynamic and that what constitutes the public interest may change over time. Any attempt to define public interest could limit its future application, and
- certain elements that have been interpreted as being part of the public interest (such as consideration of ecological sustainable development and the impacts of climate change) should be addressed substantively and specifically by the planning system in other ways.

**B10 Should there be one act or separate acts for different elements of the planning system?**

There should be one act in respect of the entire planning system, to ensure clarity and cohesion between different stages of decision making. Planning legislation is not concerned solely with regulating development. Strategic planning, and the reflection of strategic planning outcomes in environmental planning instruments, is integral to prescribing when and how development should take place. The interrelationship between these processes is essential and should be supported by one act that supports the entire planning system.

**B11 What should be in regulations?**

The regulations should contain information that is ancillary to the operation of the planning system, for example administrative details. Any matters that are crucial to achieving the objects of the Act should be contained in the act and not in the regulations. For example:

- provisions relating to community consultation should be included in the Act, including requirements for notification and processes for consultation, and
- provisions relating to offences should be included in the Act

We also urge that the regulations be developed in conjunction with the new planning legislation. Many of the details that are contained in regulations and codes are crucial in understanding how legislation is to operate. In order for industry and community to provide useful feedback on a

proposed new planning system, it is important that draft regulations be available for review in conjunction with draft legislation.

**B12 Should there be a statutory requirement to review legislation periodically? If so, at what interval?**

There must be a clear process set out in the new planning system for an independent review to be undertaken every five years, (for example, as exists at the Commonwealth level under the EPBC Act). The legislation should specify that those reviews must be:

- independent of Government
- involve significant stakeholder and community consultation, and
- involve an independent assessment of the extent to which the new planning Act is effectively achieving its goals, in particular the overarching goal of ecologically sustainable development.

In addition, the Department should monitor and review the operation of the legislation on a yearly basis. We note that the planning act has been routinely amended almost every year in its 30 year history. The annual information could then be used as part of the five year review.

**B13 Should there be requirements to periodically review other planning instruments and maps?**

Regular review clauses should be required for planning instruments and related maps, to consider whether the relevant aims are being achieved. The EP&A Act requires authorities to ensure SEPPs, LEPs and DCPs are kept 'under regular and periodic review'. This is subject to an ability for the Minister to make orders for staged repeal and review of environmental planning instruments.<sup>105</sup> The new planning Act should mandate clear minimum review periods that are appropriate to the significance and intended period of application of the plan or instrument.<sup>106</sup>

**B16 What provisions should there be for independent decision making?**

In 2008, significant amendments were made to the EP&A Act with the introduction of Joint Regional Planning Panels (JRPPs) and the Planning Assessment Commission (PAC). The rationale behind the introduction of these bodies was to provide greater transparency and objectivity in the determination of developments of regional significance.<sup>107</sup>

The challenge for the new planning system will be to balance the desire to remove the politics from decision making and reduce potential corruption risks through independent decision making with the need to make elected representatives, at both State and local government levels, accountable. Just as important, is the need to provide a clear, transparent and objective decision making framework for decision making at all levels - local, regional and State - to foster good decision making irrespective of who ultimately makes decisions.

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<sup>105</sup> EP&A Act, s 73 and s 33B.

<sup>106</sup> Former cl 15 of the SEPP (Major Development) 2005 included a review after 12 months of operation and then at 5 yearly intervals. However, this clause was recently repealed by the SEPP (State and Regional Development) 2011, which does not contain a mandatory review clause.

<sup>107</sup> Minister Sartor, Second Reading Speech Environmental Planning and Assessment Amendment Bill 2008, page 3

Our respective organisations have received a range of feedback from the environmental community as to who should be making planning decisions. Opinions are based on individual experiences in a variety of locations throughout the States. Here we summarise feedback from members of the environmental community on their experiences with JRPPs and PACs:

- *“Strengths are the PAC are professional high level scientist, architects etc at arms length from process and political area. They are independent and impartial hopefully. Weaknesses, total agreement which involves further professional reporting and in the end the majority will rule. Time constraints. Lack of knowledge of local areas”*  
(Response to NCC planning system review online survey)
- *“(JRPPs...) generally wider perspective greater expertise greater independence occasionally seem unduly influenced by local lobbyists”*  
(Response to NCC planning system review online survey)
- *“I regard the JRPPs as a much better means of making decisions on merit than Councils, especially with regard to Regionally Significant Development, ie development that would cause major, complex adverse impacts on sites that are of National, State and Regional Conservation significance. ( I consider that impacts as well as costs should be taken into account.) JRPPs are a mix of expertise (Ministerially appointed I recognise) and Council representation. So the critical thing for me is ensuring that strict selection and accountability criteria apply to the selection of members”.*  
(Response from NCC member)
- *“(JRPP decisions) are hit and miss... they have to make a decision on the night”*  
(Response from NCC member)
- *“JRPPs... should include an ecologist... and a local rate payer”*  
(Response from NCC member)
- *“There are councils out there... that are making really good decisions. Minister has made bad decisions. PAC has made good and bad decisions. Shows that it is not the decision maker – we need good planning legislation to ensure good decisions – and for rogue councils we need good review rights”.*  
(Response from NCC member)

A common theme is that decision making must be transparent and objective, and decision makers must be accountable. We therefore submit that a new planning system must foster better decision making by:

- removing discretionary decision making,
- incorporating objective decision making tools,
- requiring information to be made publicly available, prior to decisions being made,
- mandating genuine public participation,
- requiring decision makers to provide reasons for decisions, and
- ensure merit appeal rights of decisions.

**B17 What should be the role of the Minister in a new planning system?**

Please refer to our responses to Questions A12 and B16.

## CHAPTER C – MAKING PLANS

Please see below our responses to selected questions from Chapter C of the Planning System Review Issues Paper

### C1 Should there be an independent State Planning Commission to undertake strategic planning? Or should there be an independent Planning Advisory Board?

An independent State Planning Commission or Independent Planning Advisory Board may assist in implementing a ‘whole-of-Government’ approach for strategic planning. There would be potential for such a body to coordinate the preparation of strategic plans and environmental planning agreements, manage collaboration between Government agencies and maintain a central system of information. We note that any proposal to introduce a State Planning Commission or Independent Advisory Panel would need to be developed in consultation with industry and the community.

We note that Western Australia has set up a Planning Commission to carry out functions with respect to strategic planning. The functions of that Commission include:<sup>108</sup>

- providing advice to the Minister on:
  - (i) the coordination and promotion of land use, transport planning and land development in the State in a sustainable manner,
  - (ii) the administration, revision and reform of legislation relating to land use, transport planning and land development, and
  - (iii) local planning schemes, and amendments to those schemes, made or proposed to be made for any part of the State.
- preparing and reviewing a planning strategy for the State and planning policies, as a basis for coordinating and promoting land use planning, transport planning and land development in a sustainable manner, and for the guidance of public authorities and local governments on those matters
- to plan for the coordinated provision of transport and infrastructure for land development
- to provide advice and assistance to any body or person on land use planning and land development and in particular to local governments in relation to local planning schemes and their planning and development functions
- to undertake research and develop planning methods and models relating to land use planning, land development and associated matters
- to keep under review the strategic planning for the metropolitan region and any other part of the State to which a region planning scheme applies and to make recommendations to the Minister on that strategic planning
- to prepare and amend State planning policies, region planning schemes and improvement plans and improvement schemes

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<sup>108</sup> See section 14 of the *Planning and Development Act 2005* (WA)

**C3 Should new legislation prescribe a process of community participation prior to the drafting of a plan?**

Yes, a new planning system must prescribe a process of community consultation prior to the drafting of plan. This is important in ensuring that the public are included in making decisions about communities in which they live and will assist in ensuring community 'buy-in'.

However engagement of the community at this phase does not remove the need to engage the community at the development assessment phase.

*Please see further our comments on public participation and strategic planning in Part 1 of our submission.*

**C4 Should there be required consideration of the 'public interest' in the plan making process?**

Yes, the public interest must be considered in the plan making process.

**C5 Should there be a definition of what constitutes the 'public interest'? And what should it say?**

*Please refer to our response to Question B9*

**C6 Should plans and associated maps have prescribed periodic reviews?**

**C7 At what suggested intervals should such reviews occur?**

*Please refer to our response to Question B13*

**C9 What information and data should be used when preparing plans?**

Plans should be based on the best information and data available.

Planning for the State's future requires a whole-of-Government approach. This review of the planning system provides the Government with the opportunity to develop a centralised system of information in order to collate, share and publish data across sectors in ways that promote accuracy, transparency and evidence-based decision making. We note that the Hawke report, amongst others, recommends a national environmental account system in order to centralise environmental information, with the idea that it should:

- provide measurable ways of comparing and assessing environmental assets over time,
- provide a practical base for investing in future actions for environmental assets,
- provide information to underpin evidence based decision making,
- better target private and public investment at the program and project level,
- provide for measurement and understanding of the impacts and effectiveness of policies and investments,
- allow for better identification and management of risks,
- provide greater community visibility on environmental outcomes;

- guide environmental and land-use planning, including through environmental impact assessments and regional planning, and
- identify and address gaps in reporting requirements and inform the SoE reporting process.<sup>109</sup>

There is already a substantial amount of information held in Government agencies that could feed directly in to a centralised information system, for example:

- information accumulated by catchment management authorities, particularly as part of their work in preparing regional catchment action plans,
- information held by the various divisions of the Office of Environment and Heritage, with respect to water, threatened species, endangered ecological communities,
- statistics and projections held by transport and infrastructure agencies,
- state and Federal State of the Environment Reports, and
- statistics and projection from the Australian Bureau of Statistics

Additionally, in Part 1 of our submission we advocate for independent environmental consultants to prepare reports as part of the development assessment process. Our argument is that this will improve the integrity of environmental impacts statements. Providing that the information in these reports is truly independent there is an opportunity for this information to also feed into a centralised data system.

**C10 Should there be a requirement to make it publicly available?**

Yes, information and data used for strategic planning should be made publicly available.

**C11 Should there be a requirement for plans to address climate change?**

Yes, there is a strong need for plans to address climate change. As noted in Part 1 of our submission, climate change is a real and present concern that will have significant impacts on our natural environment and resources. Current regulation of climate change is uncoordinated and inadequate. Strategic planning provides an opportunity to ensure that long-term adaption and mitigation measures are put in place at all levels. *Please see our comments on strategic planning and climate change in Part 1 of our submission.*

**C12 Should biodiversity and environmental studies be mandatory in the preparation of plans?**

Yes, it is imperative that biodiversity and environmental studies be mandatory in the preparation of plans. It is essential that strategic planning be based on independent baseline studies of catchments' environmental qualities, such as for resources like water, soil, vegetation, biodiversity, minerals and air quality. *Please see further our comments on strategic planning in Part 1 and our response to Question A6.*

<sup>109</sup> See Hawke, A. (2009), Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, Final Report, October 2009, Chapter 19; Wentworth Group of Concerned Scientists *Accounting for Nature: a Model for Building the National Environmental Accounts for Australia*, (2008).; and Australian Government, *National 2020 Summit Report*, p.58, [http://www.australia2020.gov.au/docs/final\\_report/2020\\_summit\\_report\\_full.pdf](http://www.australia2020.gov.au/docs/final_report/2020_summit_report_full.pdf).

**C13 How should landscapes of Aboriginal cultural heritage significance be identified and considered in plan making?**

It is crucial that Aboriginal cultural heritage be considered in plan making, and that this is done with appropriate community consultation. Consultation should be targeted to ensure that there is appropriate engagement of indigenous communities.

**C14 Should new planning legislation provide a statutory framework for strategic planning?**

**C15 Should strategic plans be statutory instruments that have legal status?**

**C16 How can the implementation of strategic plans be facilitated?**

**C17 To which geographical regions should strategic plans apply – catchments or local government**

*Please refer to our responses to Questions A6, A7 and A8.*

**C18 Should there be State environmental planning policies? If so, should they be in a single document? Or should they be provisions in a local environmental plan?**

**C19 - Should there be statutory public participation requirements when drafting SEPPs?**

**C20 Should a SEPP be subject to disallowance by Parliament?**

It is difficult to anticipate how SEPPs would operate in the new planning system. If SEPPs are to be part of the new planning system, then they must be prepared with full community consultation. It would also be appropriate for SEPPs to be subject to disallowance by Parliament.<sup>110</sup> These safeguards are particularly important in light of the controversies that have sometimes surrounded their use.

**C23 How should rezonings (planning proposals) be initiated?**

**C24 How can amendments to plans be processed more quickly?**

Rezonings (planning proposals) have the potential to undermine strategic planning. If strategic planning is done properly then there should be little need for rezoning to take place between the regular reviews of LEPs (or their equivalent). There is a lot of community concern over rezoning decisions and whether there is any public benefit associated with them. If rezonings are to be allowed:

- they should not be able to be initiated by developers,
- there should be a mandatory requirement for an environmental study with any rezoning, and
- there should be mandatory community consultation.

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<sup>110</sup> We note the decision of the Court of Appeal in *Minister for Planning and Infrastructure v Sweetwater Action Group Inc* [2011] NSWCA 378 finding that the Minister's decision to recommend the SEPP was the exercise of an executive power and therefore cannot be challenged in judicial review proceedings.

**C25 Should there be a right of appeal or review for decisions about planning proposals?**

*Please see our responses to Questions A18 and A19*

**C26 Should there be a right for a landholder to seek compensation for the consequences of a rezoning of their land?**

No, a landholder should not be entitled to seek compensation for the consequences of a rezoning of their land. Zoning of land does not automatically give rise to a right to develop, and therefore any rezoning of land should not give rise to compensation. It is important to distinguish the circumstance in which a land owner is entitled to receive compensation for the revocation of development consent.<sup>111</sup>

**C27 When local environmental plans are being made or amended, how can transparency and opportunities for negotiation be improved during consultation with government agencies?**

*We refer generally to our comments on strategic planning in Part 1 of our submission and our responses to Questions A6, A7 and A8.*

The preparation of local environment plans (LEPs) should take place within the more general strategic planning framework. This framework should facilitate an inter-agency approach to planning and promote consultation between Government agencies.

In the context of strategic planning, several suggestions have been made for improving transparency and opportunities for negotiation between agencies:

- Introduce a State Planning Commission that would be responsible for coordinating strategic planning in NSW including the preparation of LEPs. The Commission would be responsible for coordinating input from all Government agencies. *Please see further our response to Question C1.*
- Require Government agencies to provide input on the preparation of LEPs in the form of a public report, which is made available during the community consultation period.
- Introduce Codes of Conduct inter-agency negotiation.

**C29 What should be the processes prior to listing an item of local heritage in an LEP?**

Owners of property should not have the right to veto a proposal to list an item of local heritage. To do so would allow for private rights to trump public interests.

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<sup>111</sup> See section 96A of the EP&A Act

**C32 What should be the legal status of a DCP?**

DCPs must be given consideration in the assessment of all development applications. It is not appropriate for certain development to be exempt from the standards prescribed in DCPs.<sup>112</sup>

**C34 How should new planning legislation facilitate cooperative cross-border planning between councils?**

A proper framework for strategic planning should facilitate cross-border cooperation between councils.

**C35 Should a program be developed to integrate Aboriginal reserves properly into a new planning system and, if so, how should that program be developed and what timeframe could be targeted for its implementation?**

*Please see our response to Question C13. We suggest that the matter of Aboriginal reserves be dealt with in a similar way, with appropriate community consultation.*

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<sup>112</sup> We have particular concerns State significant development being exempt from the application of DCPs. See clause 11 of State Environmental Planning Policy (State and Regional Development) 2011

## CHAPTER D – DEVELOPMENT PROPOSALS AND ASSESSMENT

Please see below our responses to selected questions from Chapter D of the Planning System Review Issues Paper

**D1 How should development be categorised?**

**D2 What development should be designated as State significant and how should it be identified? Should either specific projects or types of development generally be identified as State significant?**

**D3 What type or category of development, if any, should be identified as regionally significant and be determined by a body other than the council?**

Our organisations recognise the need for the new planning system to provide a simplified approach to the categorisation of development. While there are various models that could be used, the fundamental approach should be that development is categorised:

- based on impact, and
- using objective criteria (for example, a list of development based on site or impact<sup>113</sup>).

Assessable development could generally be identified as State significant, regional significant or local. The identification of development as either State significant or regionally significant should be done in consultation with the community.

In order to reduce complexity in the system the categorisation of development as either designated development (under schedule 3 of the EP&A Regulation) or regionally significant (under schedule 4A of the EP&A Act) should be married.

*Please see our responses to Questions A15, A16 and A17 with respect to exempt and complying development and the private certification system.*

*Please refer to our responses to Questions A13 and B16 with respect to decision making and the role of independent decision making bodies.*

**D4 What development should be exempt from approval and what development should be able to be certified as complying?**

**D5 How should councils be allowed local expansions to any list of exempt and complying development?**

**D6 Should there be a public process for evaluating complying development applications?**

*These questions are answered in our response to Question A15.*

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<sup>113</sup> Similar, for example to the current categorisation of designated development under Schedule 3 of the Environmental Planning and Assessment Regulation

**D7 Should there be an absolute right to develop land for a purpose permitted in the zone subject only to assessment of the proposed form?**

No, there should not be an absolute right to develop land for a purpose permitted in the zone subject only to an assessment of the proposed form. While strategic planning will play a key role in determining appropriate land uses, it does not remove the need for individual site assessment.

**D8 Should there be an automatic approval of a proposal if all development standards and controls are satisfied?**

No, there should not be automatic approval of a proposal that satisfies all development standards and controls. Individual assessment would still be required, particularly to determine issues of design, character and landscaping and the suitability of the proposed development on the individual site.

The Land and Environment Court has recognised that it may not always be appropriate to develop a site to the maximum standards allowed. For example, in *Appwam Pty Ltd v Ashfield Council* Commissioner Morris was required to assess a development on the interface of industrial and residential sites.<sup>114</sup> The Commissioner found that:

*“The redevelopment of land, which is zoned for industrial purposes at the interface with a residential area, presents design challenges to ensure that the different uses can function without adverse impacts being caused to the amenity of residents of those areas whilst maintaining efficient operations for the industrial business. These constraints can mean that it is not always possible to optimise the development controls that apply to such an industrial site and not adversely affect the amenity of adjacent residents”.*<sup>115</sup>

**D9 Should conceptual approvals be available for large scale developments with separate components?**

No, conceptual approvals should not be available for large scale developments with separate components. It is not appropriate for approval to be given in circumstances where the full impacts of the proposal are not known. This is a particular concern in the case of large scale developments where impacts are likely to be the greatest.

One of the significant problems with former Part 3A was the concept plan process. It allowed projects to be approved as concept plans with only a ‘broad brush’ description of the development. Detailed information about the development was not needed.<sup>116</sup> A concept plan approval was taken to indicate ‘in principle’ approval of a proposed project, deferring further

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<sup>114</sup> [2011] NSWLEC 1001

<sup>115</sup> *Ibid*, at 37

<sup>116</sup> Section 75M, EP&A Act (now repealed)

detail to later.<sup>117</sup> Furthermore, it was possible for a single application to be made for approval of a concept plan and approval to carry out the project.<sup>118</sup> This meant that projects could be approved on the basis of concept plans without the need for further assessment. This made the effective assessment of these projects difficult, or even impossible, since the breadth of the impacts of the proposal remained unclear. Further, once concept approval was obtained, there was no opportunity for third party merits appeal for subsequent approvals.

If concept approvals are to be used in the new planning system then these key concerns would need to be resolved.

**D10 Should a new planning system reinstate the ability to convert one nonconforming use to another, different nonconforming use?**

**D11 Should existing nonconforming uses be permitted to intensify on the site where they are being conducted (subject to a merit assessment)?**

**D12 Should existing nonconforming uses be permitted to expand the boundaries of their present site (subject to a merit assessment)?**

**D13 Should properties with existing nonconforming uses have access to exempt and complying development processes?**

**D14 When there is a change in zoning of the land, should an application be able to be made to a council for a declaration of the nature and extent of an existing use?**

Existing non-conforming uses have always been a necessary but problematic part of the EP&A Act. There is a risk that broad existing use rights will undermine strategic planning, particularly at a local level. While it is appropriate for the new planning system to continue to recognise existing uses, changes to uses should be limited. In this respect we submit that:

- the new planning should not reinstate the ability to convert one non-conforming use to another different non-conforming use
- the intensification and expansion of existing use rights is problematic. On the one hand, there are concerns with putting blanket restrictions on land owners who rely on existing use rights, on the other hand, there are concerns with allowing the intensification and expansion of uses that contrary to surrounding land uses. Some of these issues could be dealt with at the strategic planning phase by requiring councils to conduct an audit of non-conforming uses and give consideration to the intensification and extension of non-conforming uses. If intensification or expansion is proposed it should be subject to assessment, even if minor.
- Given the concerns about existing use rights, there should be restrictions with respect to the use of exempt and complying development. For example, exempt and complying development should only be available if it is ancillary to the existing uses.

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<sup>117</sup> When determining whether to approve a concept plan, the Minister was required to decide what further assessment would be required before final approval was given. Final project applications for stages or elements of the concept plan could be determined by the Minister or by the local council

<sup>118</sup> Section 75M(3A) (now repealed)

**D17 Should it be possible to apply for approval for development that is prohibited in a zone?**

No, it should not be possible to apply for approval for development that is prohibited in a zone. This would undermine strategic planning.

**D19 Where a small scale proposal requires an environmental impact statement, should it be possible to seek a waiver?**

No, it should not be possible to seek a waiver for a small scale proposal that requires an environmental impact statement. Small proposals may still have significant impacts, which need to properly assessed in an environmental impact statement.

**D23 How can the application process be simplified?**

As recognised in the Issues Paper, delays in the development process are a concern from all points of view. Our organisations agree that the new planning system should seek to improve the development assessment process in order to reduce delays and increase certainty for developers and the community.

This does not mean, however, that the fundamental aspects of development assessment should be removed. Genuine public participation, robust environmental assessment and concurrence from integrated approval agencies are all essential components of the development assessment process that must remain. Fast approvals that deliver poor quality, high risk or unsustainable development are not in the public interest.

Improvements can however be made in other respects, for example:

- Consent authorities should be encouraged to reject inadequate development applications. Often, delays are caused because proponents have not provided all the necessary information or information provided is inadequate. This often leads to a 'back and forth' between the proponent and consent authority before all the necessary information is obtained. The new planning mechanism should contain a provision for the rejection of development applications.
- Consent authorities can be better resourced. If there is a genuine commitment to reducing assessment times, then resources should be directed to consent authorities to assist in achieving this.
- Decision making processes can incorporate more objective decision making tools. Clear assessment methodologies can assist the consent authority to assess a development proposal. For example, the BASIX methodology requires proponents to meet certain energy and water targets in order to obtain a BASIX certificate. The consent authority can then rely on the BASIX certificate for that aspect of the development.

**D24 Should there be standard development application forms that have to be used in all council areas?**

Yes, this would assist in improving efficiency in the system, particularly if it is intended for the development assessment process to become electronic.

**D25 What public notification requirements should there be for development applications?**

All development applications should be publicly notified.

Our organisations have received various feedback from the community as to how notification should occur. These include:

- Direct communication with those people directly impacted by the proposed development,
- Additional notification through a range of methods including Sydney Morning Herald, local newspapers, local library displays, newsletters of local organisations, EDO bulletin, Council newsletters, community notice boards, TV advertisements, and radio, and
- Use of emerging media and social media (e.g. blogs, twitter, Facebook)

*Please see further our response to Question A9 and the annexed report "Reconnecting the Community with the Planning System" (**Annexure 1**)*

**D26 How can the community consultation process be improved?**

Our organisation have received various feedback from the community as to how the community consultation project can be improved. In summary:

- Engage a Secretariat ("someone on the end of the phone") to respond to community inquiries and supply information
- Develop interactive websites where users can give their emails address and be provided with further information
- Hard copies of documents (or discs) should be made available on request
- A bus should be organised to take interested members of the community to the site so that they can understand the proposal in the context of the site
- Develop protocols that clearly delineate and operationalise the distinction between information and consultation when engaging the community (for example, providing information prior to consultation sessions and restricting the information component of consultation sessions)
- Adopt a range of consultation techniques to engage more effectively with different communities, including:
  - Workshops with agreed summaries in lieu of written submissions
  - More visual plan information to address differing literacy skills and cater for people who process information more visually than in written form
  - More oral hearings to allow marginalised people to participate without requiring long written submissions

*Please see further our response to Question A9 and the annexed report "Reconnecting the Community with the Planning System" (**Annexure 1**)*

**D27 Should deemed approvals take the place of deemed refusals for development applications?**

No, deemed approvals should not take the place of deemed refusals for development applications.

This suggestion arose in the context of considering how to speed up the assessment process. Delays may, of course, be due to a range of factors – insufficient or unclear information or the complexity of the proposal.

Moreover, as noted above in our submission, the efficacy of the planning system should not be judged solely on its ability to achieve assessment processing timeframes or development approval rates. ‘Deemed approvals’ that would permit development, not on an assessment of merit but because of a delay in assessment, are not in the public interest.

In this regard, it is well to remember that a key trigger for the planning reform process was a lack of community confidence in the planning system. A deemed approvals approach would threaten – in one foul swoop – to destroy the integrity and credibility of any new system.

The better approach would be to address the underlying issues in the assessment process, and to continue deemed refusals. Deemed refusals do wrest control from Councils after a period of time (and are consequently a significant incentive in most instances). *In this respect, please see our response to Question D23.*

**D28 Should councils be able to charge a higher development application fee in return for fast-tracking assessment of a development proposal?**

This suggestion has been put forward as a means of overcoming delays in the assessment process. Obviously, such an approach runs the risk that some developers (particularly ‘mums and dads’) will be left behind. However, there may be ways and means of structuring such a model whereby present standards are maintained and commitments made for normal developments while others are fast-tracked. The higher fee would obviously need to facilitate better resourcing to achieve this.

**D29 If an application partially satisfies the requirements for complying development, should it be assessed only on those matters that are non-complying?**

No, if a proposal does not meet the requirements for complying development in its entirety then it should not be considered to be complying development.

**D31 How should State significant proposals be assessed?**

As emphasised throughout our submission, all decision making, whether it be at local, regional or State level, must be undertaken within the scope of a clear and prescriptive legislative framework.

It may be appropriate for State significant proposals to be assessed under a different framework to regional or local development. In that respect, we submit that development that is likely to

have the most significant impacts on the environment and the community should be subject to the most rigorous assessment, accountability and oversight.

As noted in our response to Question A12, a new planning system must foster better decision making by:

- removing discretionary decision making,
- incorporating objective decision making tools,
- requiring information to be made publicly available, prior to decisions being made,
- mandating genuine public participation,
- requiring decision makers to provide reasons for decisions, and
- ensuring merit appeal rights of decisions.

Therefore, any framework for assessment of State significant development must include these key features.

- D32 Should the Crown undertake self-assessment?**  
**D33 Should the Crown undertake self-determination?**  
**D34 Should councils undertake self-assessment?**  
**D35 Should councils undertake self-determination?**

No, the new planning system should remove the ability for both the Crown and proponent councils to undertake self-assessment and self-determination.

Throughout our submission, we highlight a number of concerns with the current planning system, including, for example:

- the quality and accuracy of environmental impact assessments that are prepared by environmental consultants paid directly by developers,
- the risk of environmental considerations losing out to economic considerations in discretionary decision making,
- the risk of corruption and bias in planning decisions,
- reduced community consultation in environmental decision making, and
- limits on rights to appeal major planning decisions.

While the Issues Paper has focused generally on development assessment under Part 4 of the EP&A Act, these concerns are equally relevant for development under Part 5 of the EP&A Act. In fact, transparency and accountability are of utmost concern when the Crown or councils are both the proponent and the decision maker.

The EDO report *Ticking the Box, Flaws in the Environmental Assessment of Coal Seam Gas Exploration Activities* highlights problems with the assessment process under Part 5 of the EP&A Act.<sup>119</sup> While this report looks specifically at flaws in the environmental assessment of coal seam gas exploration activities, the report highlights concern with the review of environmental factors (REFs), namely:

- that REFs have been found to contain inadequate or inaccurate information<sup>120</sup>

<sup>119</sup> *Ticking the Box, Flaws in the Environmental Assessment of Coal Seam Gas Exploration Activities*, Environmental Defender's Office November 2011

<sup>120</sup> *Ibid.* The report contains a number of case studies highlighting inadequacies in REFs.

- there are no merits review on the adequacy of REFs.

Our concerns about the integrity of environmental impact assessments (*refer to our comments in Part 1 of this submission and our response to Question A21*) are equally relevant in the case of self-assessment by the Crown or council. In order to ensure the accuracy and adequacy of information contained in environmental assessments under Part 5 of the EP&A Act, the nexus between the person preparing the information and the person relying on the information must be broken. For this reason it is not appropriate for the Crown or a proponent council to undertake self-assessment of a proposal.

Further, it is not appropriate for the Crown or proponent council, to undertake self-determination. The risk for bias and corruption are too great. The new planning system must endeavour to overcome these risks by providing improved mechanisms for decision making, including for activities that currently fall under Part 5 of the EP&A Act.

The public interest in the activities carried out by the Crown and councils is recognised, however it should not outweigh the public interest of good decision making, undertaken with robust environmental assessment and community consultation.

**D36 How can the integrity of an environmental impact statement be guaranteed?**

*Please refer to our introductory comments in Part 1 and our response to Question A21*

**D38 What changes, expansions or additions should be made to the present assessment criteria in the Planning Act?**

Our organisations propose that the new planning system adopt a more objective decision-making framework that would afford better environmental protection, reduce the risk of corruption and substantially improve the legitimacy of the planning system. The proposed scheme, which would replace the existing framework under s 79C, is as follows.

First, the decision-making framework would set certain objective environmental standards that must be met before approval is possible. These could ultimately be part of a single methodology covering biodiversity, native vegetation, catchment health and water quality, energy and water use, climate change and pollution.<sup>121</sup> In the meantime, suitably strengthened existing methodologies – such as BASIX, SEPP 65<sup>122</sup> and those applying to biobanking and native vegetation – could operate as proxies while the single methodology is developed.<sup>123</sup>

Second, once it is established that approval is permissible, a more subjective, values-based approach would come into play. For example, for matters such as the suitability of the site, form and design, it is appropriate for the decision-maker to consider aesthetic and other planning considerations, such as overshadowing, bulk, and set-backs.

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<sup>121</sup> Compliance with these methodologies could be deemed to be consistent with ESD under this legislative model

<sup>122</sup> Relating to design quality for residential flat development.

<sup>123</sup> The development of this methodology is obviously an issue of some complexity and would need to be done in close consultation with the community, developers and agencies within Government.

This two-stage approach is consistent with an overarching objective of achieving ecologically sustainable development (outlined in Part 1), and reflects the original philosophy of the EP&A Act in 1979 that “decisions on land use and resource management are made within the physical capacity of the environment.”<sup>124</sup>

**D43 How can the planning system ensure that the impact of development that is remote from but directly affecting a community is taken into account in the assessment process?**

This question was raised in the context of a forum in Muswellbrook in which participants felt that new coal mines in another locality had had a direct impact on their community, particularly the increased frequency of freight trains through Muswellbrook.

Development often has the potential to create far-reaching impacts. It is common for relatively ‘close’ impacts’ to be assessed, for example truck movements, train movements, and offsite noise and air pollution. However it is somewhat unclear as to the extent to which more remote impacts are to be assessed. The new planning system should require that all adverse impacts of a development are taken into account when considering whether or not to approve a proposed development.

There is precedent for what constitutes ‘all adverse impacts’. For example:

In *Minister for the Environment and Heritage v Queensland Conservation Council Inc. and WWF Australia*<sup>125</sup> the Full Federal Court, in determining whether the impacts on the Great Barrier Reef from agriculture (and associated chemical application and run-off) facilitated by the building of the Nathan Dam should be considered an impact of the Dam itself, found that:

*“all adverse impacts” was not confined to direct physical impacts but included indirect impacts and effects “which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter”*

**D44 Should a consent authority be required to consider any cumulative impact of multiple developments of the same general type in a locality or region? Should this be a specific requirement in assessment criteria?**

Yes, a consent authority must be required to consider any cumulative impacts of multiple developments of the same general type in a locality or region. There should be a specific requirement to consider cumulative impacts such that the impacts from the project, when added to the impacts from all existing projects in the catchment, do not compromise environmental resilience or the system’s ability to sustain natural processes.

<sup>124</sup> NSW *Parliamentary Debates*, Legislative Assembly, 17 April 1979, Hansard p 4278, Hon Mr Haig, Minister for Corrective Services]

<sup>125</sup> [2004] FCAFC 190

**D45 As part of the assessment process for some classes of development projects, should there be a mandatory requirement in a new planning system for full carbon accounting to be considered?**

Yes, it should be a mandatory requirement under the new planning system for full carbon accounting to be considered for some classes of development. The new planning system should ensure that the true environmental costs of projects are taken into account in the assessment process.

**D46 Should the broader question of the public benefit of granting approval be balanced against the impacts of the proposal in deciding whether to grant consent?**

Our proposed model would require all developments to first meet identified environmental standards (*please refer to our response to Question D38*). Once these standards are met, then our model anticipates a more subjective, values based set of criteria underpinning decisions.

**D47 Should a consent authority be able to take into account past breaches of an earlier development consent by an applicant in considering whether or not it is reasonable to expect that conditions attached to any future development consent would be obeyed?**

No, a consent authority should not be able to take into account past breaches of an earlier development consent by an applicant in considering whether or not it is reasonable to expect that conditions attached to any future development consent would be obeyed. This is because development consent runs with the land and therefore the “fitness” or otherwise of a person can be irrelevant as the consent can be on sold. This stands in contrast to pollution law where the licence attaches to the person or company and therefore “fitness” is relevant.<sup>126</sup> Put another way, consent conditions need to be set at a level that will allow for the proper functioning of the planning system, not according to whether the developer is of exemplary standing or otherwise.

**D48 Should objections to complying with a development standard remain?**

*Please refer to our responses to Questions A3, A4 and A5.*

**D49 Should an ‘improve or maintain’ test be applied to some types of potential impacts of development proposals?**

Our proposed model would require all developments to first meet identified environmental standards (*please refer to our response to Question D38*). This would include an ‘improve or maintain’ methodology in relevant circumstances. *Please refer also to our discussion on mechanisms for achieving environmental outcomes in Part 1 of our submission.*

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<sup>126</sup> Protection of the Environment Operations Act 1997 s 83.

**D50 If so, what sorts of potential impacts should be subject to this higher test?**

*Please see our response to Questions D38 and our discussion on mechanisms for achieving environmental outcomes in Part 1 of our submission.*

**D51 Should there be a specific assessment criterion that requires risk of damage as a consequence of either short-term natural disasters or long term natural phenomenon changes to be included in development assessment?**

Yes, there should be a specific assessment criterion that requires risk of damage as a consequence of either short-term natural disasters or long term natural phenomenon changes to be included in development assessment. We note that there are already mechanisms in the planning system that allow for consideration of some short-term natural disasters, including flooding and bushfire.<sup>127</sup> These mechanisms require land to be identified as bush fire prone or flood prone and development is required to comply with specific development standards set for those areas. The new planning systems should maintain a similar mechanism for dealing with short-term natural disasters.<sup>128</sup> The new planning system should also include mechanisms for dealing with long term natural phenomenon, including, for example, climate change. The new planning system should require mapping of areas that are at risk from climate change impacts, including for example sea level inundation, and set specific development assessment criteria for these areas or prohibited areas.

**D52 What water issues should be required to be considered for urban development projects?**

Urban development projects should consider issues of water capture and water reuse.

**D55 When should an amended application be re-exhibited and when is a new application required?**

The EP&A Act currently provides for the amendment of development applications, however it is not clear about the circumstances in which an amended application should be re-exhibited or conversely, when a new application is required. While the new planning system should allow for some flexibility and the amendment of applications, it should also be clear as to what scale of amendments are appropriate and those which would require a new application.

In our response to Question D23, we suggest that the new planning system should encourage the rejection of applications that are inadequate. This was suggested as a way of improving the application process. It would also reduce the need for development applications to be amended.

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<sup>127</sup> For example, bush fire prone area maps identify areas that are at risk of bushfire and development on bush fire prone land must satisfy the aim and objectives of *Planning for Bush Fire Protection 2006*. Flood prone areas are identified in local environmental plans and development in these areas must be consistent with the Government's Flood Prone Land Policy and Floodplain Development Manual

<sup>128</sup> We note the current mechanisms support objective decision-making. Decision-makers are required to have reference to the relevant mapping, and development in identified risk areas must comply with the appropriate standards.

We do recognise however that some amendments may arise during the consultation process, in response to feedback or suggestions from the consent authority. The system should allow for such amendments, particularly if it is going to improve a proposal. If such amendments are to be allowed, then there may be a need to re-exhibit the proposal if they are more than minimal.

**D56 What are appropriate performance standards by which council efficiency can be measured in relation to development assessment?**

While it is important to monitor the performance of councils and facilitate efficiency, councils should not be judged solely on their ability to achieve assessment processing timeframes or development approval rates. Fast approvals that deliver poor quality, high risk or unsustainable development are not in the public interest. If there is a genuine commitment to ensuring council efficiency then resources should be directed to councils to help achieve this. *Please refer also to our response to Question D23.*

**D57 Should there be random performance audits of council development assessment?**

Yes, this will help promote transparency and accountability.

**D58 How should concurrences and other approvals be speeded up in the assessment process?**

Throughout our submission we recognise the need for an inter-agency approach to planning, for both strategic planning and development assessment. In particular, in Part 1 of our submission we highlight the importance of ensuring an inter-agency approach to development assessment so that all relevant considerations are considered in assessing and determining a development application. There is an important role for concurrences in the new planning system. Further, we emphasise that the planning system should facilitate and foster natural resource management. At present, it does not do this for State significant development as it exempts development from requiring approvals and permits under other legislation.

We would support measures to simplify the approval system, provided there is no loss in decision-making integrity and efficacy.

The adoption of a more objective based approach has the real potential to deliver a better approvals process. Also, the Department of Planning can obviously function as a 'one-stop-shop' that coordinates the assessment of concurrences and approvals that are required under other legislation. It is also important to direct resources to those agencies that are required to undertake concurrence and approval functions.

**D59 What approvals, consents or permits required by other legislation should be incorporated into a development consent?**

The current list of approvals, consents and permits listed under section 91 of the EP&A Act is an appropriate starting point for identifying what should be incorporated into a development

consent. Consistent with an inter-agency approach to planning, the planning review should consult with other Government agencies on this matter.

**D60 Should a council be able to delegate to a concurrence authority power to impose conditions on a development consent after the council approves the proposal?**

No, a council should not be able to delegate to a concurrence authority power to impose conditions on a development consent after the council approves the proposal. The decision maker must consider the full range of issues in determining a development application, including issues that may be raised by a concurrence authority. Second, a decision made by the decision maker should be final with the full scope and ambit of the consent settled. It is not appropriate for consideration of issues or imposition of further conditions to be deferred.

**D61 Should there be some penalty on a council if a referral to a concurrence authority has not been made in a timely fashion?**

No, penalties for delay are not necessarily a constructive way of dealing with the underlying issue, which is how to improve the assessment process. Our organisations believe it would be more appropriate to seek to improve the system as a whole rather than impose penalties on councils. *Please refer to our response to Question D23.*

**D62 Who should make decisions about State significant proposals?**

*Please refer to our responses to Questions A13 and B16.*

**D65 What decisions should the Planning Assessment Commission make? Should the Commission's processes be inquisitorial or adversarial?**

**D66 What should be the processes required for hearings of Planning Assessment Commission panels?**

**D67 Should a local member be on any Planning Assessment Commission panel considering a proposed development?**

**D68 If so, should this be mandatory for all commission panels?**

**D69 Should the development assessment criteria for the Planning Assessment Commission be the same as for any other development assessment process?**

*Please refer to our responses to Questions A13 and B16.* If the Planning Assessment Commission (PAC) is to be a feature of the new planning system, we suggest that:

- the PAC should be inquisitorial - it should be able to seek additional information, in particular information about potential alternatives,
- hearings should be public and inclusive (the framework for hearings should exclude barriers for entry),
- the reports of Government agencies provided to the PAC for the purpose of assessing an application should be made publicly available.

**D70 Should a new planning system include Joint Regional Planning Panels?**

**D71 What should be the composition of a Joint Regional Planning Panel?**

**D72 What should be the hearing processes for a Joint Regional Planning Panel?**

**D73 Should a council be able to refer a matter to a Joint Regional Planning Panel for determination even if the matter would not ordinarily fall within the jurisdiction of such a panel?**

**D74 Should State nominated members of a Joint Regional Planning Panel be precluded from taking part in any decision concerning the local government area in which they reside?**

**D75 If a proposed development is recommended for approval by council staff, has no public submission objecting to it and is not objected to by the Department, should it be determined by the council?**

**D76 Should it be possible to constitute a Joint Regional Planning Panel with a single representative of each of the affected councils to consider and determine a significant development proposal that extends across the boundary between two local government areas?**

**D77 If located entirely within one local government area, should a significant development proposal that is likely to have a significant planning impact on an adjacent local government area be determined by such a two council panel?**

**D78 Should a council should be able to apply to the Minister to be exempt from a JRPP?**

**D79 Should aggregation of multiple proposals to bring them within the jurisdiction of a Joint Regional Planning Panel be banned if, separately, they would not satisfy the jurisdictional threshold?**

**D80 Should an elected council have the right to pass a resolution to supplement or contradict the assessment report to a Joint Regional Planning Panel?**

*For our responses to Questions D70- D80 please refer to our response to A13*

**D82 Should elected councillors make any decisions about any development proposals?**

*Please refer to our response to Question B16.*

**D83 What should be the requirement for a decision making body to give reasons for decisions – in particular as to why objections to a proposal have not been accepted?**

A decision making body should be required to give reasons for decisions, in particular as to why objections to a proposal have not been accepted. This ensures sound administration and demonstrates meaningful consideration of consideration of submissions.

**D84 If a council resolves to approve a development proposal where the assessment report recommends rejection, should the council be obliged to provide reasons for approval of the development?**

Yes, a council should be obliged to provide reasons if it resolves to approve a development proposal where the assessment report recommends rejection. This ensures transparency and accountability.

**D86 Should there be a range of standard conditions of consent to be incorporated in development approvals?**

The new planning system could provide for a range of standard conditions to be incorporated in development approvals. This could assist with improving efficiency, and ensuring consistency and enforceability. We suggest that:

- there be a set of model conditions that can be subject to variation to allow for conditions to be tailored to individual sites, and
- the model conditions reflect the outcomes of the environmental methodologies underpinning objective decision making. For example, conditions should be included that require the proponent to maintain and improve biodiversity, native vegetation and catchment health and water quality and to comply with relevant codes and standards.

**D87 Should new planning legislation make it possible for public interest conditions to be imposed that go beyond the conditions that immediately relate to a particular development?**

Yes, the new planning system should make it possible for public interest conditions to be imposed that go beyond the conditions that immediately relate to a particular development.

**D89 Should it be possible to grant a long-term time-limited development consent for developments that are potentially subject to inundation by sea level rise caused by climate change?**

The planning system generally needs to develop an integrated set of mechanisms to properly deal with projected climate change impacts – for example, at both the planning, assessment and approval stages. Therefore, active consideration should be given to empowering councils to use time-limited consents.

**D94 If there is to be a more concept based development application process, should councils have the power to impose conditions on construction approvals?**

Our organisations do not support the use of concept based development approvals. *Please refer to our response to Question D9.*

**D107 What should be the permitted scope of modification applications?**

**D108 Should there be a limit to the number of modification applications permitted to be made?**

**D109 Should any modification be able to be approved retrospectively after the work has been done?**

**D110 If so, should retrospective approval be confined only to minor changes and not more substantial ones? Should this be the case even if major changes leave the development substantially the same development as the one originally approved?**

**D111 Should minor modification applications made to the Planning Assessment Commission or Joint Regional Planning Panel approvals be decided without a public hearing?**

**D112 Should councils be able to deal with minor modification applications to major projects?**

**D113 Development applications that propose breaches to (or increases in breaches to) numerical limits in local environmental plans are subject to special tests. Should modification applications be subject to these same special tests?**

Modification applications are problematic and the new planning system should define the scope of modification applications more clearly.

Under the current system developers can apply for a development consent to be modified with respect to a minor error, misdescription or miscalculation or provided that the modified proposal is of minimal environmental impact and is substantially the same development he consent as modified relates is substantially the same development as the development for which the consent was originally.<sup>129</sup> If the modification will result in a substantially different development, a new DA should be lodged.

One of the key concerns with respect to modification applications is the potential for incremental changes to be made to a development that have the potential to increase the size or intensity of a development and its subsequent impacts<sup>130</sup>. To overcome these problems:

- Modifications should always be linked back to the original application to avoid substantial changes through recurring incremental processes
- Modifications should only be available for minor impacts that do not increase the impacts of the development. If impacts are to be increased, then a full assessment would be required under a new development application.
- There may be benefits in limiting the number of modification applications permitted to be made.
- A modification should not be able to approved retrospectively as this would only encourage illegal development
- Modification applications that are not minor errors, misdescription or miscalculation, should be subject to the same community consultation requirements as the original development. The PAC or JRPP should not be able to approve minor modifications without a public hearing.
- Modification applications that propose breaches to (or increases in breaches to) numerical limits in local environmental plans should be subject to the same special tests as the original application.

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<sup>129</sup> Section 96 of the EP&A Act

<sup>130</sup> For example, mining approvals are often the subject of modification applications, to increase the scale of mining activities.

**D117 Should private certifiers have their role expanded and, if so, into what areas?**

**D118 Should private certifiers be permitted, in effect, to delegate certification powers to other specialist service providers and be entitled to rely, in turn, on certificates to the certifier from such specialist professions?**

**D119 Should certifiers be required to provide a copy of the construction plans that they have certified (as being generally consistent with the development approval) to the council to enable the council to compare the two sets of plans?**

**D120 Should there be a requirement for rectification works to remove unacceptably impacting non-compliances when these are actually built rather than leaving an assessment of such non-compliances to either a modification application assessment or to the Court on an appeal against any order to demolish?**

**D121 What statutory compensation rights, if any, should neighbours have against a certifier who approves unauthorised works that have a material adverse impact on a neighbouring property?**

**D122 Should construction plans be required to be completely the same as the development approval and not permitted to be varied by a private certifier for construction purposes?**

**D123 Should developers be permitted to choose their own certifier?**

**D124 What should the Department's compliance inspection role be?**

**D125 Should Interim Occupation Certificates have a maximum time specified and, if so, how much should this be?**

**D126 Should a certifier issuing a Final Occupation Certificate be required to certify that the completed development has been carried out in accordance with the development consent?**

*Please see our response to Questions A16 and A17*

**D127 What might be done to have power delegated by the Commonwealth to State authorities or councils to give approval under the Commonwealth Act?**

Our organisations oppose any proposal to delegate Commonwealth functions under the EP&A Act to the State. We do not believe there is any inappropriate duplication in approval processes between NSW and the Commonwealth EPBC Act.

It must be emphasised that the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* and the NSW planning framework play concurrent, but different roles. The NSW system is by nature focused on state and regional issues. On the other hand, the *EPBC Act* is directed in scope towards matters of national environmental significance. Separate approval processes must be maintained to ensure that there are two levels of scrutiny and accountability and that the Commonwealth plays a gatekeeper role. It is also arguably inappropriate – in a constitutional and probity sense – for State authorities to be exercising powers based on national significance.

**D131 Should there be specific statutory obligation to require the establishment of (and the procedures for) community consultation forums to be associated with major project developments?**

There has been a positive response to community consultation committees that have been set up voluntarily for a number of major projects. These forums facilitate continued interaction between a proponent and the community after development approval has been given. It allows communities to continue to receive information about the project and raise concerns about the ongoing operation of a major project directly with the proponent. This has the potential to reduce future disputes regarding the operation of the project, subsequent stages of the project, or future modifications. There would therefore be benefits with requiring the establishment of (and the procedures for) community consultation forums for major projects under the new planning system.

## CHAPTER E – APPEALS AND REVIEWS; ENFORCEMENT AND COMPLIANCE

Please see below our responses to selected questions from Chapter E of the Planning System Review Issues Paper.

### E1 What appeals should be available and for whom?

A central theme of the reforms that created the EP&A Act and the Land and Environment Court (LEC) was the general public's right to participate in the environmental planning process – including by way of appeal rights. We strongly emphasise the need to retain existing third party merits appeal rights for the community, and improve these rights to be on a more equitable footing with developers.

Appeal rights are a fundamental access to justice issue. Communities that live and grow alongside a development should have participatory rights to engage with development in a fulsome way. On the other hand, a lack of equitable rights causes further community disengagement from the planning system. While appeal rights on either side are exercised in very few cases,<sup>131</sup> it is appeals by developers, not objectors, that make up the vast majority of merit appeals to the LEC. In 2010-11, there were 378 developer appeals and only 4 objector appeals.<sup>132</sup> In other words, less than 1% of development determinations are appealed overall, and only 1% of *these appeals* are made by objectors. This in part reflects the additional resources available to developers, but also reflects the imbalance of when merit appeal rights are available.

We do not support merits appeal rights for objectors in every circumstance. Nevertheless, the planning review needs to carefully consider what types of decisions the community *should* have a right to challenge on their merits, in addition to existing rights. A recent EDO paper documents three case studies where third party merits appeal rights were not available to challenge large and controversial developments, despite significant community concern.<sup>133</sup> The extent of developers' appeal rights should also be considered.

To address imbalances in Court accessibility and appeal rights, the new planning system should:

- ensure more equitable appeal rights for certain ordinary (non-'designated') development, especially where development controls are exceeded
- expand third party merits appeal categories to reduce corruption risks and improve decision making
- expand appeal rights in relation to major projects, as the greatest impacts deserve the greatest scrutiny
- ensure mandatory consultation on LEPs and rezoning rather than merits appeal rights
- provide more equitable time periods for objectors to bring merits appeals
- substantially increase third party participation in conciliation and related processes.

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<sup>131</sup> 0.57% (indicative) as a proportion of development determinations. See Department of Planning, *Local Development Performance Monitoring 2010-11*, p 80, Table 6-1, at <http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=29mGD0zKm9c%3d&tabid=74&language=en-AU>.

<sup>132</sup> Department of Planning, *Local Development Performance Monitoring 2010-11*, pp 80-81.

<sup>133</sup> EDO NSW, *NSW Planning System's Sustainability Failures* (February 2012), at [http://www.edo.org.au/edonsw/site/pdf/misc/120209planning\\_law\\_reform\\_cases.pdf](http://www.edo.org.au/edonsw/site/pdf/misc/120209planning_law_reform_cases.pdf). The *Huntlee* (residential development) and *Bega Wood Pellet Mill* cases did not involve designated development, and so did not have merits appeal rights. The *Haughton* power stations case involved designated development, but as they were deemed 'critical infrastructure' no merits appeal rights existed.

Another focus of our response to Part E of the Issues Paper is open standing. This is addressed under E2 below. *Please refer further to our comments in Part 1 of our submission and our response to Question E3.*

**E2 Should anyone be able to apply to the Court to restrain a breach of the Act?**

One of the great strengths of the LEC is its powers to grant civil remedies such as injunctions and declarations in response to breaches of environmental laws. This has enabled public interest litigants to protect the environment by bringing such matters before the Court.<sup>134</sup> Since the advent of the EP&A Act in 1979, open standing has been a positive hallmark of the Act, notwithstanding the gradual degeneration of the planning regime more generally.<sup>135</sup>

Open standing also:

- improves public confidence that laws will be adhered to and are able to be enforced, and
- ensures that limited resources are directed to resolution of substantive issues.

This is particularly the case where enforcement activity by local councils and departments is constrained by limited enforcement budgets. In addition, as other areas of NSW environmental law have demonstrated, a *lack* of open standing for enforcement can contribute to rates of non-compliance.<sup>136</sup>

The Issues Paper notes that there was ‘widespread support’ in submissions for including open standing provisions in the new planning Act, similar to those under s 123 of the EP&A Act.<sup>137</sup> However, the Issues paper also noted that some submissions suggested additional limits. Objections to open standing have traditionally been based on a perception that it would lead to excessive or nuisance litigation rather than genuine claims. Three decades of experience with the EP&A Act, coupled with experience in other jurisdictions,<sup>138</sup> have proved these concerns are exaggerated and misplaced.<sup>139</sup>

Overall, we strongly support maintaining open standing to address breaches of the new planning laws. To remove some of the imposing cost barriers from this process, the new Act should also

<sup>134</sup> See for example- *Corkhill v Forestry Commission of NSW (No. 2)* (1991) 73 LGERA 126, and *Brown v Environmental Protection Authority* (1992-1993) 78 LGERA 119, and *Leatch v National Parks and Wildlife Service & Shoalhaven City Council* (1993) 81 LGERA 270, and *Timbarra Protection Coalition Inc v Ross Mining NL* [1998] NSWLEC 19, and *Coalcliff Community Association v Minister for Urban Affairs and Planning No. 40047 of 1996* [1997] NSWLEC 94, and *Gray v Minister for Planning & Ors* (2006) 152 LGERA 258.

<sup>135</sup> See EP&A Act 1979, s 123(1), ‘Restraint etc of breaches of this act’:

*Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.*

<sup>136</sup> See, for example, s 40 of the *Forestry and National Park Estate Act 1998* (NSW), which prohibits third party enforcement; and see Nature Conservation Council/Environmental Defender’s Office, *If a tree falls...* (2011), a report on forestry non-compliance.

<sup>137</sup> Issues Paper, p 101.

<sup>138</sup> Such as under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*).

<sup>139</sup> As noted by former Chief Justice of the LEC, Jerrold Cripps in “People v The Offenders”, Dispute Resolution Seminar, Brisbane 6 July 1990. For further sources see Australian Network of EDOs, “Submission on Senate Legal and Constitutional Affairs Committee Inquiry into Access to Justice” (2009), pp 3-4, at [http://www.edo.org.au/policy/090504access\\_justice.pdf](http://www.edo.org.au/policy/090504access_justice.pdf). See further: The Hon Justice Peter McClellan “Access To Justice In Environmental Law: An Australian Perspective” Commonwealth Law Conference 2005, London, 11-15 September 2005; Stein AM, The Hon Justice Paul “The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest and Environmental Law” 13 *Environmental Planning & Law Journal* 179;

allow civil enforcement cases to be brought in an ‘own costs’ jurisdiction, or protect third party enforcers through expanded use of public interest cost orders, as explained below.

### ***Reducing costs barriers to civil enforcement***

Despite the number of positive factors in favour of community access to the LEC, the threat of an adverse costs order is one of the greatest deterrents to litigants seeking to bring public interest proceedings. Civil enforcement action under the EP&A Act exposes community members to the LEC rule that, in general, ‘costs follow the event’.<sup>140</sup> That is, such action is brought in Class 4 of the LEC’s jurisdiction, in which the unsuccessful party is usually ordered to pay the other party’s costs. In other jurisdictions, such as Queensland, the public can take enforcement action under an ‘own costs’ jurisdiction (with limited ability for the court to award costs, similar to LEC Class 1).<sup>141</sup>

There is merit in allowing civil enforcement under the EP&A Act to occur on an ‘own costs’ basis, unless there are exceptional circumstances.<sup>142</sup> An alternative avenue would be to amend the LEC Rules to *require* the Court to make a public interest costs order (PICO) in all proceedings demonstrated to be in the *public interest*.<sup>143</sup> The low number of public interest cases brought in the LEC, coupled with solicitors’ professional obligations requiring reasonable prospects of success, should allay concerns of a flood of PICOs if the Court’s full and ‘infrequently’-used discretion was confined.<sup>144</sup>

Another concept that deserves serious consideration is the ability of a community group that reports a significant breach, or successfully brings enforcement proceedings, to have a say in the allocation of revenue from the penalty. We note the NSW *Fines Act* allows other laws that impose fines or penalties to specify how resulting revenue is to be applied.<sup>145</sup> This would allow, for example, fines to be applied to local community projects rather than consolidated State revenue. There are precedents for this in other jurisdictions, such as the New York Riverkeepers model.<sup>146</sup>

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<sup>140</sup> *Uniform Civil Procedure Rules 2005* (UCPR), Rule 42.1. See also *Land and Environment Court Rules 2007*, rule 4.2 (discretion in public interest proceedings).

<sup>141</sup> The *Sustainable Planning Act 2009* (Qld), s 456 allows any person to bring proceedings in the Planning and Environment Court for a declaration. Sections 597 (offences) and 601 (proceedings for orders) allow a person to bring other enforcement proceedings subject to listed exceptions. Under both the *Sustainable Planning Act 2009* (Qld) and the *Nature Conservation Act 1992* (Qld) (since 2003), each party pays its own costs in enforcement proceedings. On costs, see *Sustainable Planning Act 2009* (Qld), s 457; and former *Integrated Planning Act 1997* (Qld), s 4.1.23.

<sup>142</sup> Such as frivolous or vexatious proceedings.

<sup>143</sup> PICOs could include orders such as ‘no costs’ orders, capped costs orders, a one-way cost shifting order or an indemnity. See EDO NSW, “Submission to the NSW Law Reform Commission on Consultation Paper 13 Security for Costs and Associated Costs Orders” (2011), pp 6, 9-10; see also “Submission to the NSW Law Reform Commission on Security for costs and associated costs orders” (2010); both available at <http://www.edo.org.au/edonsw/site/policy.php#5>.

<sup>144</sup> See NSW Law Reform Commission Consultation Paper 13 (2011), para 4.24: “There are cases where courts depart from the general rule on costs in public interest proceedings. These cases occur infrequently.” See, eg, *Kennedy v Stockland Development Pty Ltd and Anor (No 2)* [2011] NSWLEC 10 (11/2/2011); and *Gray and Anor v Macquarie Generation (No 3)* [2011] NSWLEC 3 (1/2/2011).

<sup>145</sup> See *Fines Act 1996* (NSW), s 121; see also s 114 regarding State Debt Recovery Office agreements.

<sup>146</sup> Namely “...the Rivers and Harbors Act of 1888 and the Refuse Act of 1899. These statutes forbade pollution of American waters and provided a bounty reward for whoever reported the violation... The Fishermen used winnings from these cases to build and launch a Riverkeeper boat... Since those early days, Riverkeeper has brought hundreds of polluters to justice... The Hudson, condemned as an ‘open sewer’ in the 1960s, is today one of the richest water bodies on earth. The River’s miraculous recovery has inspired the creation of ‘waterkeepers’ on more than 180 waterways across the globe.” See <http://www.riverkeeper.org/about-us/our-story/a-brief-history/>.

To reduce cost barriers to enforcing the law, and to help the public protect their environment and create more liveable communities, we recommend:

- that civil enforcement proceedings under planning laws be available to the community on an 'own costs' basis, and/or
- amend the LEC rules to provide for a range of *mandatory* public interest costs orders where civil enforcement action is brought in the public interest; and
- that successful civil enforcement allow the successful applicant to determine or have a say in how the penalty revenue is applied for environmental or community benefit.

### **E3 In what circumstances should third party merit appeals be available?**

The rationale for third party appeal rights goes to the heart of planning objectives, enunciated both in 1979 and in 2011-12. The existence of third party appeal rights on an equitable basis contributes to aims of public accountability, community engagement, reduced corruption risks and sound decision-making.<sup>147</sup> The *State of Planning in NSW* report documents several case studies to demonstrate the practical value of merits appeals. While merits review might not overturn a decision, stricter environmental conditions can be imposed on the project, leading to better environmental outcomes. The *Beemery* cotton-farming case showed the potential for good decision-making, sustainable development and accountability to the community.<sup>148</sup> The *Hub Action Group* waste facility case showed the potential for major project provisions to subvert the merits review process.<sup>149</sup>

Conversely, as the ICAC has noted:

*The limited availability of third party appeal rights under the EP&A Act means that an important check on executive government is absent. [These] rights have the potential to deter corrupt approaches by minimising the change that any favouritism sought will succeed. The absence of third party appeals creates an opportunity for corrupt conduct to occur...*<sup>150</sup>

### **More equitable appeal rights for ordinary development, especially where development controls are exceeded**

There is a need to consider the equity of merits appeals to the LEC. At present there are systematic imbalances in the system which undermine community confidence and may create potential for a systemic bias towards unsustainable development approval decisions.

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<sup>147</sup> The Chief Judge of the Land and Environment Court has identified a number of benefits of environmental litigation including that it can: help to realise a truly democratic process; enforce legality in governance, maintain institutional integrity and ensure executive accountability; assist in the principled and progressive development of environmental law and policy; expose weaknesses in the law and suggest law reform; improve the quality of executive decision-making; explicate and give force to environmental values; promote environmental values by putting a price on them; ensure rational discourse on environmental issues and disputes; encourage society to debate public values, national identity and a sense of place; have positive social effects; foster environmentalism and environmental consciousness in society; and promote achievement in other areas of endeavour. See B. Preston, "The role of public interest environmental litigation" 23 *EPLJ* 337.

<sup>148</sup> See EDO, *State of Planning in NSW* (2010), pp 29-30.

<sup>149</sup> *Hub Action Group v the Minister for Planning and Orange City Council* [2008] NSWLEC 116; See EDO, *State of Planning in NSW* (2010), p 30.

<sup>150</sup> ICAC, *Anti-corruption safeguards and the NSW planning system* (2012), p 22.

The first imbalance relates to the availability of appeal rights for non-designated development, whereby:

- development proponents have *merits appeal* rights to the Court (LEC Class 1) if they are dissatisfied with a decision of a consent authority, usually the local council;<sup>151</sup> whereas
- the community has only *judicial review* rights (under LEC Class 4), which considers the legality of how the decision was made, rather than whether it was a good decision.

It is much more difficult to successfully challenge decisions on judicial review grounds because the community group needs to identify a legal error. The challenge also merely requires the decision maker to reconsider the decision should it be found unlawful, and therefore does not prevent the development proceeding in the longer term.

### *Comparative cost risks*

The second imbalance is that the costs risks flowing from the above are different. As a developer's merits appeals are heard in Class 1 of the LEC's jurisdiction – an 'own costs' jurisdiction – each party (eg developer and council) usually pays its own costs regardless of the outcome. By contrast, the LEC hears *judicial review* applications in its Class 4 jurisdiction.

As noted above (E2), Class 4 is a 'costs' jurisdiction, where the unsuccessful party will usually have to pay court costs of the successful party. This is a significant financial risk for community members who believe a development decision was improperly made. While the LEC rules give the Court discretion to waive costs for public interest proceedings, this is rarely exercised.<sup>152</sup> As a result, there are few community groups able to mount Class 4 judicial review proceedings, in contrast to developers who regularly appeal decisions when a council rejects their proposal. The limits on community merits appeal rights, coupled with cost risks, create issues of equity and access to justice. This is reflected in the statistics showing which parties bring merits appeals.<sup>153</sup>

### *Developer appeal rights and local development controls*

Proponents' automatic appeal rights mean an ambitious developer can conduct a 'war of attrition' against councils by repeatedly resubmitting development applications – even if they don't meet local development controls – and forcing councils to court if they are refused. This can result in large legal defence bills for councils, and the eventual approval of developments that continue to exceed local development controls and community expectations.

Further, it demonstrates a systematic bias towards developers. A City of Sydney report (2001) suggests developer appeal rights can also result in:

*Councils attempting to second-guess decisions of the Land & Environment Court – often resulting in the approval of projects that they do not support and which breach their own policies.*<sup>154</sup>

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<sup>151</sup> For example, where council refuses a development or modification application, or where approval conditions are disputed.

<sup>152</sup> See NSW Law Reform Commission on Consultation Paper 13 (May 2011) - Security for Costs and Associated Costs Orders, para 4.94; and corresponding EDO NSW Submission (Sept 2011), pp 6, 9-10.

<sup>153</sup> In 2010-11, there were 378 developer appeals and only 4 objector appeals, a ratio of 94 to 1. See Department of Planning, *Local Development Performance Monitoring 2010-11*, p 80, Table 6-1.

<sup>154</sup> City of Sydney, *Unwanted Legacies of the Land & Environment Court of NSW* (2001), Foreword by Councillor Frank Sartor, then Lord Mayor of Sydney.

Contrasted with objectors' limited appeal rights, the automatic appeal rights of developers can contribute to perceptions that the planning system is geared towards developers, at the expense of community preferences, local development controls and sound design.<sup>155</sup> To increase certainty and reduce such perceptions, we would support the removal of merits appeals for developers *where a development is refused that exceeds local development standards*. In the alternative, consideration could be given to limiting the number of times in a given period that a proponent can make an application for substantially the same development.

#### *Consider expert panels to hear merits reviews*

Merits appeals in the LEC are currently heard before a sole commissioner rather than a judge or a panel of experts. The decision on the merits therefore relies on the commissioner standing in the shoes of the original decision maker to determine what is the best decision.<sup>156</sup> Other jurisdictions, such as the VCAT system in Victoria, adopt a panel system to hear planning merits appeals in relevant circumstances.<sup>157</sup> Where developments may be controversial, this format provides greater opportunities for multiple views, experience and expertise in determining the outcome. For example, panels could include an independent architect, landscape architect, environment expert (for example, an ecologist) and planner along with an LEC commissioner.<sup>158</sup>

Overall, if inequitable appeal rights are carried over to the new planning Act, they may continue to fuel negative community perceptions and experience of the development regime. This may perpetuate a view that developers' rights override the community; or that those with sufficient resources can use repeated applications to overturn decisions, where council refuses a development on the basis of local standards.

To address imbalances in merits appeal rights for development generally, we support:

- additional merits appeals for third party objectors where a development is approved that exceeds local development standards<sup>159</sup> (see further recommendations below),
- where development that exceeds local development standards is *refused*, removing developers' automatic right to merits appeal, and
- use of an expert panel system for merits appeals regarding developments (rather than a

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<sup>155</sup> See, eg *Ashfield Mall development in Abacus Property Group v Ashfield Municipal Council [2009] NSWLEC 1097*, <http://www.lawlink.nsw.gov.au/lecjudgments/2009nswlec.nsf/00000000000000000000000000000000/5e8c1ed52438de7cca25758b0081e447?opendocument>; See also *Aviani Family (John & Carol Aviani) Altamira Holdings Pty Limited v Burwood Council [2008] NSWLEC 1410*, at <http://www.lawlink.nsw.gov.au/lecjudgments/2008nswlec.nsf/00000000000000000000000000000000/4d4de87ddd45cd4ca2574e700830732?opendocument>. Both cases involved SEPP 1 objections and resulted in developments that overrode local standards.

<sup>156</sup> Recent figures suggest an almost equal proportion between developer appeals against a council decision that are withdrawn or dismissed by the court (42%), and developer appeals approved by the court (43%) (though only 24% of developer appeals were upheld by the Court without any changes to the development).

<sup>157</sup> The President of VCAT is a Supreme Court Judge. Two County Court judges are Vice Presidents. The other members of the Planning and Environment List include experienced town planners, lawyers and other persons with special professional expertise, such as architects, scientists and engineers. One or more members sitting together hear applications depending on the nature of the application. See <http://www.vcat.vic.gov.au/>.

<sup>158</sup> Note: Our response to D71 (under A13) also refers to the need for mandatory appointments of JRPP members with environmental expertise.

<sup>159</sup> Previous amendments in 2008 were to provide for limited appeal rights to JRPPs where development exceeded existing standards by 25%. However, these changes have never been proclaimed for commencement, and in any case did not go far enough (in relation to the high threshold, geographical limits and non-judicial nature of the appeal rights). See further, EDO NSW, "Submission on corruption risks and the regulation of lobbying in NSW", at <http://www.edo.org.au/edonsw/site/pdf/subs/100625icac.pdf>.

sole Commissioner), to encourage best practice design, sustainability and community engagement.

### ***Expanding categories for merits appeal to reduce corruption risks and improve decision making***

In 2007, 2010 and again in 2012, the Independent Commission Against Corruption (ICAC) has made a series of recommendations to NSW Governments to extend third party merits appeal rights, in order to improve transparency and accountability of development approval processes at the local council and major project level.<sup>160</sup>

In 2007 and 2012, ICAC suggested that third party merits appeal rights should apply to certain additional categories of (non-designated) private sector development, including:

- Development that is significant and controversial (for example, large residential flat developments)
- Development that represents a significant departure from existing development standards (such as those relying on significant SEPP 1 objections, which allows flexible interpretation of development standards in LEPs<sup>161</sup>);
- Developments that are the subject of voluntary planning agreements.

ICAC's 2007 report further recommended third party appeal rights apply to developments where a local council is both the applicant and the consent authority, or where an application relates to land owned by a council.

We strongly support tenor of ICAC's recommendations, and the expansion of third party appeal rights (at a minimum) to equivalent categories in the new planning Act, for the reasons and benefits described above. The new planning laws need to redress the present imbalance and ensure that merits appeals are more widely available to the community, including where the proponent has not complied with the relevant development standards (explored further above).

### ***Major projects and appeal rights***

The transition from Part 3A to State Significant Development under the EP&A Act in 2011 is a step forward from the antithesis of public engagement and accountability for major projects,<sup>162</sup> to greater accountability and controls, and a restoration of local decision making. Elsewhere we note a number of changes that represent a positive direction for the new planning system. However, a number of negative aspects of the former Part 3A regime remain.

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<sup>160</sup> See Independent Commission Against Corruption, *Corruption Risks in NSW Development Processes* (2007); *The Exercise of Discretion under Part 3A of the Environmental Planning and Assessment Act 1979 and the State Environmental Planning Policy (Major Development) 2005* (2010); and *Anti-corruption safeguards and the NSW planning system* (2012). All at [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au).

<sup>161</sup> For example, if a developer's proposal meets the objectives of an LEP, but not some of the standards set by the LEP, such as the floor space ratio or height restrictions, they can apply for an exemption from those standards (SEPP 1 objection). The new Standard LEP Instrument now sets out the circumstances when a development standard in an LEP or SEPP can be varied, and once a council adopts the new standard LEP, SEPP 1 will cease to apply in that local government area. It is understood there is the intention to repeal SEPP 1 once all councils have adopted new LEPs using the Standard Instrument.

<sup>162</sup> See EDO NSW, *State of Planning in NSW* (December 2010), pp 25-30.

For the present context we refer to the significant limits on merit appeal rights for objectors in relation to State Significant Development (SSD) and (even more limited) for State Significant Infrastructure (SSI). In particular:

- third party merits appeal rights should be available for all SSD due to its significance, and not limited to SSD that would otherwise be ‘designated development’,
- while there has been a recent trend to delegate major project determination to the Planning Assessment Commission (PAC), a public hearing by the PAC is not a substitute for, and should not negate, merits appeal rights for objectors,<sup>163</sup>
- merits appeal rights should also be restored for SSI,<sup>164</sup>
- the suspension of penalty notices, directions and court orders, and the requirement to seek Ministerial consent to bring proceedings to remedy or restrain breaches in relation to SSI (including breaches of approval conditions), undermine public confidence and the sound administration of justice,<sup>165</sup> and
- objectors’ rights should not be curtailed where applicant appeal rights are available.

The Government was elected to office with the intent of bringing accountability and public participation to the fore. There are recent and ongoing examples of major projects where PAC and Ministerial decisions leave open the prospect of serious environmental and social impacts, without adequate recourse to the courts.<sup>166</sup> As a matter of sound public policy, the community expects that projects with the greatest impact should have the greatest public scrutiny. That requires a right to appeal on the merits for major projects (as well as enforce the law when such a project is in breach). In addition, the asymmetry of providing *developer* appeal rights where major projects are refused, but denying *objector* appeal rights where major projects are approved, may be in corporate interests – but it is not in the public interest.

Overall, in regard to appeal rights relating to SSD and SSI, we submit that:

- merit appeal rights for objectors in relation to State Significant projects should be available without restriction,
- merits appeal and judicial review rights should also be made available for critical/State significant infrastructure projects, and ‘Ministerial consent’ requirements for appeals should be removed, and
- administrative orders to enforce environmental laws (such as stop work orders, interim protection orders and notices regarding threatened species, heritage and pollution) should be available to both public authorities and third parties, in relation to all State significant projects (including critical infrastructure).

Such changes would significantly improve the accountability of decision makers in relation to major projects; improve the rigour of decisions themselves; and ensure that projects with the greatest potential impacts are accorded the greatest public scrutiny. This is most likely to secure the best outcome in accordance with ecologically sustainable development.

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<sup>163</sup> See EP&A Act, s 98(5), cf s 97(7).

<sup>164</sup> Cf judicial review rights under s 115ZJ(1).

<sup>165</sup> See, eg, EP&A Act, ss 115ZG and 115ZK.

<sup>166</sup> Eg, Gloucester Gas Project (involving concept plan approval and PAC consideration); *Haughton v Minister for Planning & Macquarie Generation & Ors* [2011] NSWLEC 217; *Huntlee Pty Ltd v Sweetwater Action Group Inc*; *Minister for Planning and Infrastructure v Sweetwater Action Group Inc* [2011] NSWCA 378. On *Haughton* and *Huntlee* see further EDO NSW, *NSW Planning System's Sustainability Failures...* (February 2012), via [www.edo.org.au/edonsw](http://www.edo.org.au/edonsw).

### ***Rezoning – mandatory consultation rather than merits appeal rights***

In 2008 the EP&A Act was amended in a way that fundamentally altered the process for making local environmental plans (LEPs) and ‘spot rezonings’.<sup>167</sup> The process for making LEPs is now controlled by the Planning Minister (or a delegate), including requirements for public consultation.<sup>168</sup>

The new planning Act should provide for mandatory community consultation with regard to making LEPs (including once draft LEPs have been amended) and rezonings. Legislated consultation processes need to be specific enough so that inadequate consultation could trigger judicial review. As noted in response to E5, we oppose giving developers new merits appeal rights in relation to rezoning refusals. However, if developers were given such rights, equity would require corresponding merits appeal rights for objectors wherever zoning is changed.

### ***More equitable time periods to bring merits appeals***

Proponents have six months to appeal if they are dissatisfied with a development or modification decision.<sup>169</sup> As noted above, objectors cannot currently seek merits appeal for non-designated development. However, they may bring *judicial review* proceedings within three months of notification of the decision.

Objectors do have merits appeal rights for designated development, and State Significant Development (SSD) that has not involved a public hearing by the PAC. However, objectors must bring a merits appeal within 28 days,<sup>170</sup> compared with the six months available to proponents. Twenty-eight days is often an inadequate period for an objector (such as a community group) to make a reasoned and well-informed decision on whether to appeal against a development consent. This is particularly the case for large or complex projects or sensitive environments. For example, an objecting community group may need to meet together and with their solicitors, analyse the consent authority’s decision, brief additional counsel, seek advice on prospects of success, seek out further expert assistance, and consider their financial position and other commitments. By comparison a proponent has an additional 152 days – a further five months – to consider its position.

A longer appeal period, such as three months, would assist the court and the parties by:

- improving the rigour and basis of objectors’ decisions on whether to appeal, without unnecessarily delaying development;
- help ensure the Court hears merits appeals on the basis of well-considered reasoning, rather than rushing decisions within 28 days;
- reduce community confusion by aligning with the period permitted to commence judicial review (along with our recommended period for appeals regarding LEPs).

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<sup>167</sup> A spot rezoning aims to increase the development potential of a site. Spot rezonings occur where an LEP is amended, usually in response to a particular development.

<sup>168</sup> See EDO factsheet 2.1.3 –LEPs and SEPPs, at [www.edo.org.au/edonsw/site/factsh/fs02\\_1\\_3.php](http://www.edo.org.au/edonsw/site/factsh/fs02_1_3.php).

<sup>169</sup> EP&A Act, ss 97-97AA. Prior to February 2011, the time limit was 12 months for development applications and 60 days for modification applications. (See L Taylor in D Farrier and P Stein (eds), *Environmental Law Handbook* (2011), Ch 5, p 233.)

<sup>170</sup> EP&A Act, s 98.

We therefore recommend objectors be given a period of three months (i.e. half the time available to proponents) to launch a merits appeal against a decision under the new planning Act.

Consideration should also be given to resolving the issue that, even while appeal proceedings are on foot, a developer may proceed to carry out their development under the consent that is in dispute. This may particularly be a problem where the level of commencement may influence the outcome of appeal proceedings.

### ***Third party participation and conciliation processes***

In addition to appeal rights, we believe there should be a role for greater use of Court conciliation and related processes<sup>171</sup> to resolve objections, provided there are proper procedures and safeguards for engaging third party community members.

Presently the LEC does not allow objectors to be joined to conciliation proceedings except in very limited circumstances. In some situations, the community can feel excluded by these processes, as Council and developers reach agreement with the Court while the community is given minimal opportunity for input. The new planning system should reduce Court discretion regarding objectors' role in conciliation, and provide legal rights for objectors to participate in a way that is both fair and practicable.

We would support broader mechanisms for community involvement in conciliation, mediation and neutral evaluation within the scope of the LEC framework. This would help to resolve objections early, reduce costs and avoid the need for appeals. This must include proper processes and legal safeguards to improve accessibility and public engagement.

### **E5 What should be the time limit for any appeal about LEP provisions?**

In the present system, the grounds to challenge an LEP are limited to the *validity* of the LEP in judicial review proceedings.<sup>172</sup> Judicial review proceedings can be commenced by any person, but must be commenced within three months of the new LEP being published on the NSW legislation website.

In our view, three months is an appropriate period to allow judicial review. This enables the rational assessment of often complex documents, and gives time to seek advice from relevant experts. A three-month period also aligns with our recommendation for *third party merits appeal and judicial review* discussed above.

Presently, a person cannot challenge the *merits* of an LEP. We oppose calls for development proponents to have new rights to bring merits appeals against zoning refusals. Rather than expanding merits appeals for zoning decisions, the new planning Act should build in a process for improved decision making, public engagement and accountability at the outset, to ensure LEP and zoning decisions are appropriate and sustainable for the relevant community. This requires innovative thinking and a willingness to embrace a deeper level of engagement on community

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<sup>171</sup> See Land and Environment Court Act 1979, Part 4 Division 4 (Special provisions respecting Class 1, 2 or 3 proceedings)

<sup>172</sup> This is where the Court looks to see whether the LEP has been validly made and particularly whether the correct process has been followed.

facilitated urban design.<sup>173</sup> These issues are further explored earlier in this submission in relation to strategic planning and environmental outcomes.

**E6 Should the Court have absolute discretion as to costs orders? Or should the Court's discretion be limited and, if so, in what respects?**

The context of this question is where a development applicant amends their plans during legal proceedings. The Issues Paper notes that currently the Court must make an order that the applicant pay the costs incurred as a result of the amendments (p 102). We believe that the prospect of paying costs is an important deterrent to litigation, by encouraging developers to amend development applications before launching legal proceedings. Nevertheless, we would support limited discretion being given to the Court to tailor costs orders to the circumstances – specifically, if the amendments substantively protect and improve the environment without new negative impacts.

For comments and recommendations on costs issues in relation to third parties see E2, under '*Reducing costs barriers to civil enforcement*'.

**E8. What sort of reviews should be available?  
E9. Who should conduct a review?  
E10. What rights should third parties have about reviews?  
And what provisions should apply regarding the costs of the review?**

Review rights and appeal rights, as outlined in the Issues Paper, provide separate but complementary functions. As the Productivity Commission notes:

*While appeal rights may extend approval times, they have an important role to play in a complex area subject to considerable discretion, competing policy objectives and vulnerable to special dealing. Rather than prohibit appeals, efforts would be better focused on ensuring good notification and engagement, clearly explaining trade-offs made and providing less formal conflict resolution and review mechanisms so that the resort to appeals is less likely.<sup>174</sup>*

As noted above (response to E3), we would support a broader range of cost-effective dispute resolution mechanisms in the planning system. The aim is to improve access to justice, encourage good decisions and reduce costs to parties – including Councils and the public – when there are disputes about development. Review rights form a part of this.

For any review process to work fairly and effectively, objectors need to be properly involved, both where an applicant initiates a review, and through new rights to initiate reviews in appropriate circumstances (eg where development standards are exceeded).

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<sup>173</sup> Over the past decade in Western Australia, the WA planning department "has been at the forefront of developing innovative ways in which to consult with the people who are affected by planning decisions and policies. It has taken a leading role in exploring innovations in community engagement, with 21st Century Town Meetings (Dialogues), Deliberative Surveys, Citizens' Juries, Multi Criteria Analysis Conferences and Consensus Forums." See <http://www.planning.org.au/documents/item/111>.

<sup>174</sup> Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (April 2011), Vol. 1, p L.

We note that some Councils have effective 'early intervention' processes such as on-site mediations to deal with objections. These can supplement options for review and appeal.

Noting their different role and non-judicial nature, review mechanisms should not replace the right to appeal to the Court.<sup>175</sup>

Costs should not be imposed as a barrier to third party participation, although mechanisms to rule on costs and avoid frivolous or vexatious reviews are appropriate.

Finally, as noted under E3, though relevant to question E10 and the role of third parties, we believe there should be a role for greater use of Court conciliation and related processes<sup>176</sup> to resolve objections, provided there are improved procedures and safeguards for engaging third party community members.

#### **E11 How might recommendations by the Planning Assessment Commission be reviewed?**

Decisions of the PAC should be subject to merits appeal rights in the Land and Environment Court, including where the PAC has held a public hearing (a step which currently removes appeal rights). Further responses on appeal rights can be found under E3 above.

#### **E12 Do some present penalties need to be increased?**

##### ***Increase maximum penalties***

Penalties are an important part of any effective regulatory framework, as a tool to punish undesirable behaviour and promote compliance. Enforcement authorities and courts may impose penalties for breaches of environmental and planning laws through administrative, civil or criminal procedures.

The new planning system provides an opportunity to update statutory penalties in a manner proportionate to the offences concerned. In recognition of their seriousness, the new Act should substantially increase certain penalties available for breaches of the planning regime, with more specific penalty ranges for different offences.

There are instances of inadequate penalties in the EP&A Act which limit the deterrence effect of the offence. This includes where maximum penalties are far smaller than those under other laws;<sup>177</sup> or are internally disproportionate (eg, penalties for obstructing council officers or related non-compliance are far smaller than equivalents relating to the Planning Department or ministerial directions).<sup>178</sup>

For example, the penalty for obstruction or providing false or misleading information is only 20 penalty units, or \$2,200 (EP&A Act, s 118N). This penalty is insufficient to deter persons from withholding evidence if that prevents the council from commencing proceedings in Court for non-

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<sup>175</sup> See Issues Paper, p 103.

<sup>176</sup> See Land and Environment Court Act 1979, Part 4 Division 4 (Special provisions respecting Class 1, 2 or 3 proceedings)

<sup>177</sup> For example, 20 penalty units compared with 100-500 penalty units. See further explanation in body.

<sup>178</sup> See, for example, EP&A Act, s 118N – up to \$2200; cf s122T(4) of EP&A Act – up to \$250,000 for corporations and \$120,000 for individuals, plus continuing offence penalties).

compliance. It is also significantly lower than comparative provisions in other NSW environmental laws, in other sectors, and interstate – where the maximum can range from \$11,000 to \$55,000.<sup>179</sup>

### ***Tiered penalty framework***

Under the EP&A Act it is a criminal offence not to comply with a development consent or attached conditions.<sup>180</sup> Generally the punishment for an offence against the EP&A Act is up to 10,000 penalty units, and a further daily penalty up to 1,000 penalty units. The penalty for an offence against the regulations is up to 1,000 penalty units.<sup>181</sup> (Different penalties apply where expressly stated in the Act or regulations.)

While a strong penalty system is necessary for deterrence, penalties themselves are insufficient without an effective system of enforcement (see E13-14 below). For example, *certainty of being apprehended* is likely to be a more significant factor in deterrence than the penalty itself.

Also important is *certainty in punishment*.<sup>182</sup> However, the current threshold for maximum penalties under the EP&A Act is so broad that there is little guidance for developers, enforcement authorities, courts or the public regarding the relative seriousness of different misconduct.<sup>183</sup>

Accordingly, the planning system should adopt a tiered penalty framework under the new Act. The framework should include categories of serious offences, mid-range (strict liability) offences and minor (absolute liability) offences.<sup>184</sup> These principles have been translated into legislation, including under the *Protection of the Environment Operations Act 1997* (NSW). Setting a range of

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<sup>179</sup> By comparison, the *Native Vegetation Act 2003* (NSW) provides a penalty of 100 penalty units for obstructing an officer. The *Nature Conservation Act 1992* (Qld) provides a penalty of 165 penalty units (\$16,500) for obstructing a conservation officer (s 155). Offences against officers undertaking their duties under the *Food Act 2003* (NSW) can incur a maximum penalty of 500 penalty units (\$55,000).

<sup>180</sup> EP&A Act, s 125 and s 76A.

<sup>181</sup> EP&A Act s 126. The penalty for an offence against the Act is the penalty expressly imposed by the Act and if no penalty is so imposed to a penalty not exceeding 10,000 penalty units and to a further daily penalty not exceeding 1,000 penalty units. The penalty for an offence against the regulations is the penalty (not exceeding 1,000 penalty units) expressly imposed by the regulations, or if no such penalty is imposed, to a penalty not exceeding 1,000 penalty units.

<sup>182</sup> Indeed, see eg Justice Jacobs in the High Court: ‘...Certainty of punishment is more important than increasingly heavy punishment.’ In Griffiths (1977) 137 CLR 293, 327.

<sup>183</sup> As the Chief Justice of the LEC has noted:

*This lack of discrimination in the maximum penalty introduces difficulty in ranking different offences. The result is that the maximum statutory penalty may not be an accurate or helpful basis for determining the relative seriousness of offences as against each other.*

The Hon Justice Brian Preston, “Principled Sentencing for Environmental Offences”, paper presented to the EDO Annual Conference, *Making Law Work: Improving environmental compliance and enforcement in Australia* (2006), Sydney.

<sup>184</sup> In *He Kaw Teh v R* (1985) 157 CLR 523, the High Court provided guidance on how to interpret criminal offence provisions in statutes. The court classified statutory offences into three tiers:

- Tier 1 (serious offences) – mens rea applies in full and therefore proof of a person’s intention is necessary in order to convict a person of a crime.
- Tier 2 (mid-range offences) - strict liability where only the actus reus (the guilty act causing a proscribed effect) needs to be proved to convict a person of a crime. The only defence to a strict liability offence is a pleading of ‘honest and reasonable mistake of fact’ (the defendant was not aware of the facts that led to the commission of the offence).
- Tier 3 (minor offences) - absolute liability where there is no defence that can be pleaded.

penalty categories relative to seriousness would better inform the community, guide sentencing and ensure breaches of planning law result in punishment that deters misconduct.

Consideration should also be given to the adoption of civil penalties in addition to offence provisions in order to improve the range of timely and cost-effective tools available to councils and departmental enforcement authorities.<sup>185</sup>

### ***Reviewing adequacy of offences***

Some offences would also benefit from an expansion of their terms to target poor performance and improve compliance. This is explored under question E14.

## **E13 What new orders should there be or what changes are needed to the present orders?**

### ***Innovative orders***

We support empowering enforcement authorities and courts with a specific range of innovative and flexible enforcement tools as in other environment and pollution laws.

Such orders would improve self-regulation by the development industry, deter breaches by targeting corporate behaviour, and assist enforcement authorities and courts by providing a variety of enforcement options that can be tailored to fit particular misconduct.

### ***Orders by consent authorities***

The Issues Paper states that 'Councils currently have the power to issue a wide range of orders to control, rectify or prevent the impact of illegal or unapproved development, to protect the community.' (p 105) We note that the Planning Minister, Councils and other consent authorities have power to issue orders in specified circumstances to persons to enforce compliance.<sup>186</sup>

Along with a tiered penalty framework (see E12), we would support increased availability of administrative orders and penalties for minor breaches under the new planning Act. A range of notices and on-the-spot fines are already used by local Councils under NSW pollution laws, for example.<sup>187</sup> Such orders and powers should be supported by clear rules and guidance on the appropriate use of different enforcement tools (administrative, civil and criminal). Councils and other authorities also need adequate resourcing to properly exercise such tools.

### ***Orders of the Court***

Currently, the Court's power to make orders under the EP&A Act is wide-ranging but general, which may discourage innovation. That is, where the Court is satisfied that a breach has been committed (or will be unless restrained), it may make such order as it thinks fit to remedy or restrain the breach.<sup>188</sup>

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<sup>185</sup> In this context it is noted that civil penalties are used less frequently in NSW than in Commonwealth legislation.

<sup>186</sup> EP&A Act, s121B

<sup>187</sup> See *Protection of the Environment Operations Act 1997*, Part 8.2, Division 3. . See further M. Murray, 'Pollution control and waste disposal' in Farrier and Stein, *The Environmental Law Handbook*, pp 353-6 and 372-3.

<sup>187</sup> EP&A Act, s 124

<sup>188</sup> *Ibid.*

To guide prosecutors and courts, the new planning Act should outline a specific range of additional orders available (without limiting them), beyond monetary penalties.

There are existing examples under the EP&A Act. At present, where a person is guilty of an offence involving the destruction of or damage to a tree or vegetation, in addition to a monetary penalty the Land and Environment Court may direct the offender to:

- (a) plant new trees and vegetation and maintain those trees and vegetation to a mature growth, and
- (b) provide security for the performance of any obligation imposed under paragraph (a).<sup>189</sup>

We would support the greater availability of such ‘remedial’ penalties in a variety of circumstances under the new planning system.

For example, available orders specified in the new planning Act should include:

- requiring contributions to environmental protection or improvement,
- requiring a convicted defendant to remedy a breach even in criminal proceedings,
- orders to pay investigation costs,
- undertake works for environmental benefit, including fund environmental organisations,
- complete audits, training and financial assurances,
- publicise offences or notify certain people, and
- orders to remove any monetary benefit of the crime.

#### *Precedent for a range of innovative orders*

By way of precedent in NSW, s 250 of the *Protection of the Environment Operations Act 1997* allows the Court to make a number of these specific, additional orders designed to target the nature of corporations and to best protect the environment.

At the federal level, a range of orders are available under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). This includes enforceable undertakings, remediation determinations, directed audits, and suspension or revocation of approvals.<sup>190</sup> The Australian Government also intends to amend the EPBC Act to include the power to issue warning notices.<sup>191</sup>

In addition, the Australian Government intends to allow a full range of administrative remedies or civil and criminal remedies or penalties to be applied to any breach of the amended EPBC Act as appropriate.<sup>192</sup>

Further afield, the US Environmental Protection Agency provides for ‘Supplement Environmental Projects’ involving voluntary undertakings for environmental benefit.<sup>193</sup>

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<sup>189</sup> EP&A Act, s 126(3) of

<sup>190</sup> See EPBC Act, sections 486DA, 480D, 458 and 144-145 respectively.

<sup>191</sup> Australian Govt’s Response to Recommendation 56(2) of the Report of the Independent Review of EPBC Act 2010: “The Australian Government’s capacity to deliver appropriate levels of compliance and enforcement will be improved by providing this low-level, formal compliance option as an alternative to court action in circumstances where prosecution is unwarranted.” Such warning notices could also be taken into account when considering a person’s environmental record, in deciding on subsequent approvals under the EPBC Act.

<sup>192</sup> The Australian Govt’s response to Recommendation 55 of the Independent Review of the EPBC Act 1999 in 2010: “This will provide for a more flexible and transparent approach to compliance and enforcement, and will ensure the most appropriate penalty can be applied in all instances.”

#### E14 How can enforcement be made easier and cheaper for consent authorities?

The Issues Paper notes that the cost of enforcement to councils was a frequently raised concern (p 106). From a community perspective, the EDO frequently receives calls about lack of enforcement of environmental problems by local councils and other authorities or departments.

A number of earlier recommendations under Part E of this submission will assist in making enforcement easier, cheaper and more effective for Councils. This includes:

- equipping Councils with a more flexible range of enforcement tools (see E13);
- stronger penalties (E12);
- retaining open standing for enforcement by members of the public;
- making civil enforcement proceedings available to the community on an 'own costs' basis (E2); and
- allow community groups that are successful in civil enforcement to determine how penalty revenue is applied (E2).

We would welcome further exploration and reduction of costs barriers to enforcement for consent authorities, particularly local Councils, in this planning review. For example, this may include consideration of costs incurred pursuing enforcement as well as defending appeals against enforcement orders and convictions.

The importance of transparent policies, monitoring and reporting in relation to planning and environmental enforcement is discussed below, under F8.

#### ***Reviewing adequacy of offences***

Some offences would also benefit from an expansion of their terms to target poor performance and improve compliance.

For example, data provided by proponents in reviews of environmental factors (REFs) has been known to contain misleading or sometimes incorrect information. However, in the context of REFs for coal seam gas, it is understood there has been no prosecution of any companies for these offences.<sup>194</sup> This is because clause 283 of the EP&A Regulation requires the company involved to know the information is misleading and false. Given the significance for local communities of the decisions that rely on this information, we believe a stricter standard should apply. In this instance we would support strengthening penalties for inaccurate information beyond 'knowingly false or misleading'. Offences should apply to negligent or reckless material inaccuracies.

At a broader level, further research on the use and adequacy of different existing offences would assist the design the enforcement system under the new planning Act.

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<sup>193</sup> This involves voluntary undertakings by an offender to carry out an environmentally beneficial project related to the violation in exchange for mitigation of the penalty to be paid. It does not include the activities an offender must take to return to compliance with the law. In addition the public can put forward project ideas for potential Supplement projects. United States Environmental Protection Agency, 'Supplement Environmental Projects' <http://www.epa.gov/Compliance/civil/seps/>.

<sup>194</sup> EDO NSW, *Ticking the Box: Flaws in the Environmental Assessment of Coal Seam Gas Exploration* (November 2011), p 17, available at [http://www.edo.org.au/edonsw/site/pdf/pubs/ticking\\_the\\_box.pdf](http://www.edo.org.au/edonsw/site/pdf/pubs/ticking_the_box.pdf)

**E15 Should councils have a costs or other remedy against private certifiers in certain circumstances  
E17 Should there be an appeal right for third parties in proceedings against private certifiers?**

The Issues Paper notes that in initial submissions, ‘by far the greatest concerns’ about building certification and private certifiers related to:

- a minority of ‘shonky’ private certifiers
- ‘inadequate compliance and enforcement provisions to address breaches, or provide effective disincentives for breaches.’ (p 23)

We agree that local councils should have rights to seek costs and other remedies against private certifiers in certain circumstances – including:

- where councils have incurred costs pursuing developers for non-compliance after a private certifier has certified the unauthorised work
- the ability to serve remedial orders on the certifier as well as the developer.<sup>195</sup>

In addition, we would support third party appeal rights against the decisions of the Building Professionals Board in disciplinary proceedings (see E17, Issues Paper p 107).

These should be part of a suite of measures to improve the accountability of private certifiers, and restore public trust in the industry by way of additional checks (see, eg, A16-17 and E17).

**E16 Should monitoring and reporting conditions be reviewable?**

In this context, the Issues Paper (p 106-7) notes concerns about the quality of data that proponents provide to fulfill monitoring and reporting conditions. We would support the ability to ‘review consents to impose more rigorous or more specific reporting requirements’, or ‘amend consents to reflect changes in scientific opinion’, provide the mechanisms to do so are clear and objective. While improving the utility and effectiveness of such conditions should be supported, monitoring and reporting conditions should not be able to be *weakened* through review processes. As part of the government’s commitment to greater transparency, proponents and consent authorities should also be required to publish monitoring and reporting data online and accessibly to make public scrutiny easier.

**E18 Should a consent authority have a wider right to revoke a development consent?**

The Issues Paper notes that currently, ‘a development consent can be revoked only on a limited number of grounds.’<sup>196</sup> As noted above, certainty of being apprehended and punished for misconduct provide a strong incentive to comply with regulation. The prospect of having a development consent suspended or revoked is likely to deter significant breaches – particularly if this power is seen to be used. We believe consent authorities should have and use the power to

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<sup>195</sup> See Issues Paper, p 106.

<sup>196</sup> Issues Paper, p 107. See for example, EP&A Act, s 96A (Revocation or modification of development consent).

suspend or revoke development consents more frequently, particularly for significant breaches of development conditions.<sup>197</sup>

Regulatory authorities have suspension and revocation powers in the pollution sphere under the *Protection of the Environment Operations Act 1997* (NSW). Relevant conditions and safeguards apply, including the need to give reasons, which may include where ‘a condition of the licence has been contravened’.<sup>198</sup> That Act also empowers the Environment Minister to suspend or revoke a pollution licence upon conviction for a major pollution offence.<sup>199</sup> The federal EPBC Act also provides for suspension or revocation of approvals in a range of circumstances relevant to environmental impacts or the proponent’s conduct.<sup>200</sup>

The new planning Act should provide consent authorities with wider powers to suspend or revoke development consents, including for significant breaches of consent conditions.

**E20 Should council compliance officers be given rights of entry and inspection and of access to official databases for compliance and enforcement inspections under planning legislation on the same basis as they have such rights under the Local Government Act?**

The Issues Paper states that ‘council compliance officers undertaking inspections to see if unapproved or illegal development has taken place do not have any right of entry to enter into and inspect a property or development for this purpose.’<sup>201</sup> We note that councils and principal certifying authorities have a range of investigation powers.<sup>202</sup> It is important that these powers are effective and efficient, to encourage developer compliance and remove barriers to proactive enforcement. We welcome the planning review’s consideration of whether these powers are adequate.

However our view, based on the experience of our organisations, clients and members, is that inadequate resourcing looms as a larger barrier to council enforcement than inadequate powers. We believe council compliance and enforcement activities need to be better resourced. In addition, barriers to the use of existing enforcement powers, including costs, should be identified and reduced. Finally, other agencies such as the Department of Planning and the EPA need to provide greater support to local councils to supplement local enforcement activities. In turn this may require greater resources channeled to these agencies themselves.

We support empowering council compliance officers with appropriate rights of entry and inspection, as well as access to official databases (with any appropriate and necessary privacy safeguards), for inspections and investigations. As noted above (E12), these powers should be supplemented by meaningful penalties for obstruction or non-compliance with directions.

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<sup>197</sup> See, for example, EDO NSW, *Mining Law in NSW* (June 2011), recommendation 18: “Provide the Planning Minister with powers to suspend or revoke mining approvals for breaches of conditions. In addition, establish a process for landowners to apply to revoke their consent to land access if mining operations breach conditions.”

<sup>198</sup> *Protection of the Environment Operations Act 1997* (NSW), s 79.

<sup>199</sup> *Protection of the Environment Operations Act 1997* (NSW), s 82.

<sup>200</sup> See *Environment Protection and Biodiversity Conservation Act 1999* (Cth), sections 144-145.

<sup>201</sup> See Issues Paper, p 108.

<sup>202</sup> See EP&A Act, Part 6 Division 1A. Eg, powers of entry (s 118A); power to inspect, conduct investigations, ask questions, take measurements, ask questions and require answers, take samples and photographs (s 118B); power to search premises for evidence (s 118K).

## CHAPTER F – IMPLEMENTATION OF THE NEW PLANNING SYSTEM

Please see below our responses to selected questions from Chapter F of the Planning System Review Issues Paper

**F1 What should be the role of the Department in implementing a new planning system? Should the role and resourcing of regional offices be embraced? And, if so, in what respects?**

We focus on the first of these questions. The Department of Planning and Infrastructure states that it ‘supports sustainable growth in NSW’. The Department describes its work as including:

- Long-term planning for the State’s regions,
- Driving well-located housing and employment land,
- Assessing State significant development proposals, and
- Ensuring the planning system is efficient and effective.<sup>203</sup>

One of the Department’s priorities is ‘(s)ustainable growth in the right locations’. This includes ‘(t)he right balance between jobs and the environment through comprehensive assessment of major economic developments and infrastructure projects’.<sup>204</sup>

We believe the reference to a ‘balance between jobs and the environment’ is a false dichotomy. It is symptomatic of a broader cultural problem that divorces economic and environmental considerations rather than integrating them. As a result:

*Reports on planning reforms – such as the Major Development Monitor – have tended to focus on the numbers (such as the economic bottom-line of large developments, jobs created, the number of days taken to assess a development, or the percent of development types that can be streamlined) rather than a qualitative ‘triple bottom line’ assessment of the environmental and social impacts of decisions made and outcomes achieved. To prioritise the economic over the social and environmental impacts is clearly out of balance.*<sup>205</sup>

To ensure the planning system is ‘efficient and effective’, the NSW Government should coordinate across agencies, including the Planning Department and the Office of Environment and Heritage, to develop more appropriate benchmarks for success. As the Productivity Commission noted in its benchmarking report on Australian planning systems:

*...a combination of several benchmarks is often needed to reflect system performance. For example, while longer development approval times may seem to be less efficient, if they reflect more effective community engagement or integrated referrals, the end result may be greater community support and preferred overall outcome.*<sup>206</sup>

Finally, in prioritising actions, a planning system based on ecologically sustainable development (ESD) should seek to promote development, employment and infrastructure that maintains or improves the environment of NSW communities. As envisaged in 1979, the system should ensure decisions ‘are made within the physical capacity of the environment in order to promote the

<sup>203</sup> Department of Planning and Infrastructure, ‘About us’, at [www.planning.nsw.gov.au](http://www.planning.nsw.gov.au).

<sup>204</sup> Department of Planning and Infrastructure, ‘Our priorities in NSW’, <http://planning.nsw.gov.au/SettingtheDirection/OurprioritiesinNSW/tabid/93/language/en-US/Default.aspx>.

<sup>205</sup> TEC and EDO NSW, *The State of Planning in NSW* report (December 2010).

<sup>206</sup> Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (April 2011), Vol. 1, p xxviii.

economic and social welfare of the people...'.<sup>207</sup> We believe ecological sustainability, conservation of the natural environment and provision of 'green infrastructure'<sup>208</sup> should be central planning priorities for the Department under the new planning system.

**F3 What can be done to ensure community ownership of a new planning system?**

**F4 What actions can be undertaken by bodies preparing strategic plans to increase community engagement with the planning system?**

We have emphasised throughout our submission that the new planning system must guarantee genuine and meaningful public participation in decision making throughout the system, including for both strategic planning and development assessment. This is important for ensuring community ownership of a new planning system.

The Grattan Institute's *Cities: Who Decides?* paper describes the need for deep engagement with the community to address the planning decisions and challenges faced by Australian cities, and that this engagement must be 'an order of magnitude' greater than current efforts.<sup>209</sup> Relevantly, the Organisation for Economic Co-operation and Development (OECD) developed a series of principles to be followed to ensure adequate metropolitan governance which provide further insight for the planning review. Some of these OECD principles include:

- *Cities for Citizens* – governance should meet the needs and aspirations of people who live in them
- *Coherence* – 'who does what' should be clear to the electorate
- *Coordination* – local authorities and regional agencies should work together, particularly on strategy planning
- *Effective financial management* – the costs of measures should reflect the benefits received
- *Flexibility* – institutions should be able to adapt as necessary to changing economic, social, and technological change
- *Participation* – community representation should be open to a diverse range of groups
- *Social cohesion* – institutions should promote non-segregated areas, public safety, and opportunity
- *Subsidiarity* – services should be delivered by the most local level that has sufficient scale to reasonably do so
- *Sustainability* – economic, social, and environmental objectives should be integrated and reconciled.<sup>210</sup>

*Please refer further to our introductory comments in Part 1 of our submission and our response to Question A9*

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<sup>207</sup> *NSW Parliamentary Debates*, Legislative Assembly, 17 April 1979, Hansard p 4278, The Hon Bill Haig.

<sup>208</sup> Such as parks, gardens, cycleways and urban green space.

<sup>209</sup> See Grattan Institute media release, "Give city dwellers a real say", 18 October 2010, at: [http://www.grattan.edu.au/news/20101018\\_media\\_release\\_cities\\_who\\_decides.pdf](http://www.grattan.edu.au/news/20101018_media_release_cities_who_decides.pdf).

<sup>210</sup> JF Kelly, *Cities: Who Decides?* (2010) Grattan Institute, Melbourne.

## F6 What checks and balances can be put in place to ensure probity in the planning system?

Addressing the risks and perceptions of corruption in the planning system has been a central tenet of the current Government's election platform, along with restoring a focus on community engagement, accountability and the public interest.<sup>211</sup> These commitments to 'kick-start an era of integrity and transparency' are welcome and long overdue.<sup>212</sup> We have documented the negative consequences of increased discretion, reduced public consultation, centralised power, snowballing complexity and unaccountable decision making in a range of prior submissions and reports.<sup>213</sup> Recent investigations have revealed further misconduct under the previous government.<sup>214</sup> The new planning system is the opportunity to deliver substantially on the current Government's commitments and reverse these trends. In our opinion, the best means of eliminating the potential for corruption or perceived corruption is to strengthen transparency and accountability mechanisms in legislation, rather than simply relying on lobbying codes and guidelines. This submission outlines a range of ways to improve checks and balances in the planning system, to ensure greater accountability and probity. These mechanisms include:

- placing greater limits and objective criteria on discretionary decision making,
- requiring information to be made publicly available, prior to decisions being made,
- improving public accountability through deeper community engagement and mandatory public consultation processes,
- breaking the nexus between developers, environmental consultants and private certifiers, to bring greater independence and rigour to assessment and certification,
- expanded third party merits appeals to promote greater equity, access to justice, lower corruption risks and better decisions,
- a greater range of orders and penalties to improve compliance and enforcement, and
- improved transparency, monitoring and reporting on objectives, decisions, compliance and enforcement.

In addition to these recommendations, we note the recent ICAC report on *Anti-corruption safeguards and the NSW planning system*.<sup>215</sup> This report lists six key corruption prevention safeguards, many of which reinforce the points above: providing certainty; balancing competing public interests; ensuring transparency; reducing complexity; meaningful community participation and consultation; and expanding the scope of third party merit appeals.<sup>216</sup> Among the ICAC report's 16 recommendations, we particularly note and paraphrase the following:

- Recommendation 1- Ensuring that discretionary planning decisions are made subject to mandated, robust and objective criteria
- Recommendation 3 - Adequate oversight safeguards for assessing and determining development applications for prohibited uses

<sup>211</sup> See, for example, NSW Government state plan, *NSW 2021* (2011), at <http://www.2021.nsw.gov.au/restore-accountability-government>, in particular State Goals 29-32.

<sup>212</sup> The Hon Brad Hazzard MP, media release, "Overhaul of the planning system heralds a new era in NSW", 12 July 2011.

<sup>213</sup> See, for example, TEC and EDO, *Reconnecting the Community with the Planning System* (August 2010); and *The State of Planning in NSW* (December 2010); EDO NSW, *Submission to ICAC on corruption risks and the regulation of lobbying in NSW* (June 2010); see also NCC and EDO submissions to the Planning Review Stage 1 (November 2011).

<sup>214</sup> See, for example, ICAC media release, "Former minister and ex-LPMA chief corrupt, finds ICAC", 12 December 2011, at <http://www.icac.nsw.gov.au/media-centre/media-releases/article/3998>.

<sup>215</sup> Available via [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au).

<sup>216</sup> ICAC, *Anti-corruption safeguards and the NSW planning system* (2012), p 6.

- Recommendation 4 - Increased oversight and safeguards for voluntary planning agreements<sup>217</sup>
- Recommendation 5 - Clear articulation of objectives, and guidance on prioritising them
- Recommendation 8 - Adopting a protocol to document decisions, and publish reasons for decisions, where the Planning Minister disagrees with departmental recommendations on a planning matter
- Recommendation 9 - Produce and maintain a community guide to development processes
- Recommendations 11-13 - Require community consultation and due consideration of public submissions on major strategic planning documents, draft voluntary planning agreements and state significant planning instruments.<sup>218</sup>
- Recommendation 14 - Give statutory backing to community consultation requirements for draft LEPs
- Recommendation 16 - Expand third party merits appeals to a range of additional categories of private sector development.

We strongly support the tenor of the ICAC's 2012 recommendations, along with the other accountability and probity mechanisms outlined in this submission. We look forward to further consultation on their detailed design and implementation.

#### **F7 How can information technology support the establishment of a new planning system?**

Designing the new planning system is an important opportunity to integrate and develop better information technology (IT) systems and policies for planning and public engagement. This includes in the areas of:

- information aggregation, synthesis and data quality (for policymaking and public access)
- easier access to information on strategic plans and development applications
- increased dialogue between the community, councils, departments and developers
- accessibility and convenient mediums for contact.

These areas are explored below. We also note there is a National ePlanning Strategy,<sup>219</sup> and that the NSW Planning Department is pursuing, for example, online lodgement and processing of development applications, and providing increased information online (maps, regulations, state and local planning policies).<sup>220</sup>

In summary, we recommend the following for using IT in the new planning system:

- better integrate environmental data-sets from different sources, and build in mechanisms to ensure data sources are comprehensive, accurate and up-to-date

<sup>217</sup> Consistent with uncommenced provisions set out in Schedule 3 of the *Environmental Planning and Assessment Amendment Act 2008*. Safeguards included establishing 'reasonableness' as a consideration in making VPAs; and ensuring council VPAs do not involve public infrastructure without ministerial agreement in certain circumstances. See ICAC report, 2012, p 11 and recommendation 4; see further Planning Review Issues Paper (December 2011), p 112.

<sup>218</sup> See specific recommendations for detail. For example, ICAC recommends community consultation on state significant instruments except in exceptional and publicly justified circumstances where there is an adverse public interest.

<sup>219</sup> National ePlanning Steering Committee, <http://www.eplanningau.com>.

<sup>220</sup> Department of Planning and Infrastructure, 'ePlanning for NSW', at <http://www.planning.nsw.gov.au/PolicyandLegislation/ANewPlanningSystemforNSW/EPlanningforNSW/tabid/107/language/en-AU/Default.aspx>.

- address current practical limitations by overhauling existing systems for electronic access and alerts
- look to new online engagement tools to supplement community engagement
- consult further with indigenous groups, rural and remote stakeholders, seniors, young people and cultural and linguistically diverse representatives on effective engagement (using IT or otherwise).

### ***Information aggregation and data quality***

This submission emphasises the need for an improved inter-agency approach to planning. Importantly, this includes better integration and synthesis of reliable data-sets from different sources (such as planning and environmental authority databases, strategic and site-based environmental assessments, state and national reporting tools<sup>221</sup>).

According to the federal State of the Environment (SoE) report (2011), “Australia is positioned for a revolution in environmental monitoring and reporting.” The challenge is to create and use systems that allow efficient access to environmental information.<sup>222</sup> The SoE report notes a range of new technical and policy innovations to address these challenges. These include more intelligent monitoring, increased standardisation and data-sharing, better data management and modelling, and national benchmarks for environmental and sustainability indicators. We support the development and integration of such tools in the NSW planning system.

Data quality is crucial for effective data integration. This and other submissions from our organisations highlight examples of poor data quality in the current system (for example, in reviews of environmental factors).<sup>223</sup> The new planning system therefore needs to build in mechanisms to ensure data sources are comprehensive, accurate and up-to-date. This includes regular review and information update requirements; independent environment assessment; effective auditing and oversight; and penalties for inaccurate or misleading information. Better information will assist good decision making and management,<sup>224</sup> and improve public understanding and confidence in the system.

### ***Easier access to information – examples of current limitations***

The Government has committed to improving government transparency and community involvement in decision making in its state goals.<sup>225</sup> Below we note some specific problems with electronic access to documents in the current planning system, based on our experience and that of members and clients.

The planning review should address these practical issues in improving the use of IT in the planning system generally, including by overhauling existing systems for electronic access and alerts:

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<sup>221</sup> For example, see NSW OEH, BioMetric: Terrestrial Biodiversity Tool for the NSW Property Vegetation Planning System, at <http://www.environment.nsw.gov.au/projects/BiometricTool.htm>; see also South Africa National Biodiversity Institute’s BiodiversityGIS tool (generating biodiversity plans using GIS and interactive mapping tools to assist with development decisions), at <http://bgis.sanbi.org/index.asp>; see further, Australia’s National Plan for Environmental Information, which aims to co-ordinate and manage ‘comprehensive, trusted and timely environmental information’ over the long term, at <http://www.environment.gov.au/npei/pubs/npei-factsheet.pdf>.

<sup>222</sup> Australian Government, State of the Environment (2011), ‘Future reporting’, <http://www.environment.gov.au/soe/2011/report/future-reporting.html>.

<sup>223</sup> See, eg, EDO NSW, Submission to the NSW Legislative Council Inquiry into Coal Seam Gas (2011) and Appendix 1 to that submission, *Ticking the Box: Flaws in the environmental assessment of CSG exploration*.

<sup>224</sup> As the federal SoE report (2011) notes, “Better information, combined with evidence-based decision-making, will support better management.” See <http://www.environment.gov.au/soe/2011/report/future-reporting.html>.

<sup>225</sup> NSW Government state plan, *NSW 2021*, goals 31 and 32, at [www.2021.nsw.gov.au](http://www.2021.nsw.gov.au).

- There is a demand for improved functionality to receive tailored electronic updates from authorities (eg email alerts for certain types of development, or developments in a certain geographical area or site). Current systems do not offer this.
- Online information provided by authorities is sometimes inaccurate or incomplete, limiting public scrutiny.
- Councils sometimes cite copyright issues as a basis to limit or deny access to plans and expert reports online. The review should look to overcome this issue so that the public can access documents relevant to submissions, potential enforcement action etc.<sup>226</sup>
- There are strong concerns about the modification of development proposals (and strategic planning documents) after any exhibition period, without a statutory requirement of further community notification or consultation.<sup>227</sup> ICAC recommends adopting new technology to address this, and ensuring “that planning authorities are required to provide regular information and updates to the public about development applications under assessment, including any significant changes made to an application.”<sup>228</sup>

#### *Increased dialogue on planning – use of ‘web 2.0’*

The new planning system should look to the use of new online engagement tools to supplement other means of community engagement by councils, departments and developers. A good example of ‘web or gov 2.0’ technology in the local government sphere is ‘Fix My Street’. This is an online portal that enables the public to report local municipal problems such as air pollution and noise, litter and illegal dumping and problems with trees. The ACT Government has implemented this online facility, along with NGOs and authorities in the UK and New Zealand.<sup>229</sup> By allowing an immediate, two-way interaction between authorities and the public, such systems contribute to transparency, dialogue and in this case improved enforcement (because the issues, and the time taken to resolve them, are made public).<sup>230</sup> Other online tools such as wikis, podcasts and blogs could also be used for consultation, education and information sharing at various stages in the planning system.<sup>231</sup> Such tools can be simple at the front-end, and use powerful data aggregation and mapping at the back-end, to synthesise public views and feed them into policy development.<sup>232</sup>

#### *Accessibility and convenient mediums for contact*

We welcome a focus on increasing the availability of information electronically. At the same time, in the interests of access to justice, the review should also consider the need to engage effectively

<sup>226</sup> Noting it should be clear that such documents are made available for limited appropriate purposes, and that liability issues would need to be clarified.

<sup>227</sup> See, for example, EP&A Regulation 2000, clauses 54 and 55.

<sup>228</sup> ICAC *Anti-corruption safeguards and the NSW planning system* (2012), recommendation 15, p 21.

<sup>229</sup> See for example, ACT Government, [https://www.contact.act.gov.au/app/answers/detail/a\\_id/1146/~/fix-my-street](https://www.contact.act.gov.au/app/answers/detail/a_id/1146/~/fix-my-street); MySociety (UK NGO), at <http://www.mysociety.org/projects/fixmystreet/>; FixMyStreet NZ, at <http://fixmystreet.org.nz/>.

<sup>230</sup> In the words of Mysociety.org (UK): “FixMyStreet works on a simple premise: it puts your report on the website as well as sending it to the relevant council. This simple action has a number of valuable side-effects: it increases council accountability. It helps prevent the same problem being reported multiple times. It allows you to see how many issues have been reported in your own local community. And it allows councils to show how many of them it has fixed.”

<sup>231</sup> See, for example, Office of the Australian Information Commissioner, *Issues Paper: Towards an Australian Government Information Policy* (2010), via [http://www.oaic.gov.au/infopolicy-portal/reports\\_infopolicy.html](http://www.oaic.gov.au/infopolicy-portal/reports_infopolicy.html). See also, Australian Government Information Management Office, *Government 2.0*, <http://www.finance.gov.au/e-government/strategy-and-governance/gov2.html>.

<sup>232</sup> P. Waugh, verbal presentation, GovCamp NSW, 19 November 2011 (<http://govcampnsw.info/>). See also Senator Kate Lundy, “The Digital Culture Public Sphere”, consultation on national cultural policy, at <http://www.katelundy.com.au/2011/09/06/the-digital-culture-public-sphere/> and <http://digidculture.wikispaces.com/>.

with a range of groups who may not access information via the internet, or who have limited ability to do so (for example, only via their local library, or on slow connections). The review should consult further with indigenous groups, rural and remote stakeholders, seniors, young people and cultural and linguistically diverse representatives on:

- how to provide effective ways for these groups to engage in planning decisions (using IT or otherwise), and
- How the increased use of IT can best assist these groups to understand and participate in planning and development decisions.

These accessibility issues need to be considered when deciding on how information and opportunities for participation in the planning system are made available.

**F8 Should the new planning system contain mechanisms for reporting on and evaluating objectives of the legislation?**

Yes, the new planning system should contain mechanisms for reporting on and evaluating objectives of the legislation. Increased monitoring becomes a necessity in an era of accelerated environmental degradation and increased competition for resources, particularly where better technology provides opportunities to objectively measure impacts (see F7). In particular, monitoring performance where ESD is at the centre of planning and development decision making is vital. This means monitoring programs must include a triple bottom line suite of indicators rather than focusing on traditional economic indicators alone (see F1).<sup>233</sup>

*Please refer to our responses to Questions B12 and B13 in relation to review periods.*

**F9 How should information about the planning system be made more accessible in a multicultural society?**

*Please refer to our responses to Questions A9 and F7.*

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<sup>233</sup> J Blair and D Prasad, University of NSW Faculty of the Built Environment, personal communication (30/11/2011). See also Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (April 2011), Vol. 1, p xxviii.