# Charting a new course: Delivering a planning system that protects the environment and empowers local communities

SUBMISSION ON THE WHITE PAPER - A NEW PLANNING SYSTEM FOR NSW | JUNE 2013

Nature Conservation Council of NSW
The voice for the environment since 1955

TOTAL ENVIRONMENT CENTRE INC

**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. 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.
www.nccnsw.org.au


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.
www.tec.org.au

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## EXECUTIVE SUMMARY

**The Nature Conservation Council of NSW (NCC) and the Total Environment Centre (TEC) do not support the planning White Paper, Exposure Planning Bill 2013 and Exposure Planning Administration Bill 2013.**

In our view, the White Paper and Exposure Planning Bills are seriously flawed. Unamended, they will comprehensively fail to provide an adequate framework for a new planning system for NSW that ensures meaningful community participation, protection of the environment, heritage and community well-being, and avoidance of corruption risks. Rather, there is an overemphasis on economic growth, and facilitation of development, at all costs.

We urge the Government to abandon the Exposure Planning Bills and present an entirely new proposal for a planning system that will provide positive and balanced environmental, social and economic outcomes for NSW into the future. It is imperative to ensure that economic growth takes place within the physical capacity of the environment, having regard to the significant environmental, social and economic costs of unsustainable, poorly planned development.

This submission identifies our key concerns with the White Paper and Exposure Planning Bill 2013 **(Exposure Planning Bill)** and provides recommendations for addressing these key concerns.

We note the obvious shift from the *Environment Planning and Assessment Act* 1979 (**EPA Act**), once recognised as being at the forefront in terms of environmental protection and community participation, to the new Exposure Planning Bill with its unbalanced, regressive emphasis on economic growth, with limited emphasis on ecological sustainability.

When it was introduced in 1979, the EPA 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*".[1]

There are a number of fundamental proposals in the White Paper and Exposure Planning Bill that, taken together, represent the most significant backward step in public participation and environment protection in more than a generation. These include:

- The removal of the principles of ecologically sustainable development, including the precautionary principle,
- The proposal to have 80% of development in NSW assessed as complying or code assessment, with no community consultation and no assessment of the environmental and social impacts of proposed development, and no legislative restriction to genuinely low impact development,
- Proposals to reduce the number of environment protection zones, removing important protection for hundreds of thousands of hectares of land in NSW, and
- Provisions that seek to restrict third party merit appeal proceedings and judicial review proceedings (despite statements that appeal rights will not be changed in the new planning system).

[1] NSW *Parliamentary Debates*, Legislative Assembly, 17 April 1979, Hansard p 4278, Hon Mr Haig, Minister for Corrective Services

Further, we observe that the Exposure Planning Bill falls short of best practice in strengthening the link between environmental protection, natural resource management and land use planning, for example:

- The Exposure Planning Bill refers to protection of threatened species, populations and ecological communities, but does not require the protection of non-threatened species, biological diversity and ecosystem function,

- The strategic planning principles in the Exposure Planning Bill do not establish clear outcomes-based objectives for achieving environmental and social outcomes,

- While regional growth plans and sub-regional delivery plans can include environmental targets this is not mandatory, and the Exposure Planning Bill fails to prescribe clear outcomes based objectives for environmental protection and natural resource management,

- There are no provisions in the Exposure Planning Bill for managing climate change impacts and mitigation.

We also have significant concerns that the Exposure Planning Bill fails to deliver the vision for a new planning system set out in the White Paper, particularly with respect to community participation and a shift to upfront strategic planning. For example:

- The community participation charter, and associated participation plans, are largely unenforceable, and there are no clear legislative requirements for fundamental processes such as notification, public exhibition and provision of reasons for decisions.

- The framework for strategic planning set out in Part 3 of the Exposure Planning Bill fails to establish clear legislative requirements to support effective and robust strategic triple bottom line planning, for example:

    - There are no clear and mandatory provisions requiring a consistent and reliable base data set to be established across NSW to underpin strategic planning,

    - As outlined above, the strategic planning principles in the Exposure Planning Bill do not establish clear outcomes-based objectives for achieving environmental and social outcomes,

    - There is no requirement to consider existing environment and natural resource management policies such as Catchment Action Plans, Regional Conservation Plans, Regional Strategies or the NSW Coastal Policy,

    - There are no provisions mandating the strategic environmental assessment of strategic and local plans.

- Further, there are a number of mechanisms available to developers to override strategic plans and local plans including rezoning proposals and strategic compatibility certificates. Far from increasing certainty, these proposals have the potential to be misused by developers and undermine any certainty and community buy-in that would have come out of effective strategic planning.

Finally, despite promises to improve accountability and transparency in the NSW planning system, the proposals:

- Continue to provide the Minister and Director General with substantial discretionary powers,

- Prescribe subjective decision making criteria rather than clear and objective criteria,

- Limit third party merit appeal rights and, more alarmingly, seek to restrict the availability of judicial review rights to remedy unlawful decisions.

In its current form, the Exposure Planning Bill will significantly weaken environmental protection and community engagement in the NSW planning system, and will place the environment, essential natural resources and communities at risk. In our view, the proposed changes are inconsistent with the public's desire to maintain and improve the condition of the natural environment and to have a say in the future of their local community.

There is a widening gap between the government's rhetoric and the implications of the exposure legislation which will adversely impact on the government's credibility. The problem is compounded by the fact that the Exposure Planning Bills fail to address a number of serious corruption risks previously identified by the Independent Commission Against Corruption.

As outlined above, **we urge the Government to abandon the Exposure Planning Bills and present an entirely new proposal for a planning system that recognises that economic growth must take place within the physical capacity of the environment, and genuinely recognises the important role of the community in environment and planning decisions.**

**LIST OF KEY RECOMMENDATIONS**

**Recommendation 1:** The new planning system should define ecologically sustainable development with clear reference to the established principles of ESD. This can be achieved by continuing to adopt the definition in section 6(2) of the *Protection of the Environment Administration Act* 1991.

**Recommendation 2:** Ecologically sustainable development, defined with clear reference to the established principles of ESD, is the overarching objective of the new planning system.

**Recommendation 3:** With respect to the proposed objects in section 1.3 of the Exposure Planning Bill, we recommend that:

- Objective (b) is strengthened to "ensure guaranteed and meaningful public involvement and participation in environmental planning and assessment decisions"

- Objective (e)(i) is strengthened by referring more specifically to the protection of biodiversity and ecological integrity, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats

- Objective (f) is strengthened by requiring the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages

- A specific objective is added aimed at promoting resilience to climate change for communities, wildlife and the environment, addressing risks and opportunities via mitigation and adaptation.

**Recommendation 4:** The new planning system must set out clear and mandatory requirements for:

- Notification of the preparation of strategic plans and local plans
- Making information publically available (including studies that have been prepared)

- Decision makers to take into account submissions made in respect of draft strategic plans and local plans
- Decision makers to provide reasons for decisions when making, repealing or amending strategic plans or local plans

**Recommendation 5:** The new planning system must set out clear and mandatory requirements for:

- The notification of development applications
- Making information publically available including all information supporting a development application
- Decision makers to take into account submissions made in respect of development applications
- Decision makers to provide reasons for decisions when determining development applications

**Recommendation 6:** To provide improved certainty for decision-makers, proponents and the community, enact legislative provisions that:

- Make compliance with the Public Participation Charter mandatory
- Provide for the review and approval, and ongoing monitoring of the implementation of community participation plans by an independent body
- Deem compliance with an approved community participation plan by the relevant planning authority to constitute compliance with the Public Participation Charter.

**Recommendation 7:** Ensure all community participation provisions of the new planning system are mandatory and legally enforceable in a substantial manner and are not optional.

**Recommendation 8:** The new planning system must include clear outcomes based objectives for strategic planning. Recommendation 8 of the Independent Panel of the NSW Planning System Review provides a useful starting point for developing outcomes based objectives for strategic planning.

**Recommendation 9:** The Government commits to establishing a robust and reliable data set that will underpin strategic planning prior to starting the process to develop NSW Planning Policies, Regional Growth Plans, Sub-Regional Delivery Plans and Local Plans, and this requirement is mandated in the planning legislation.

**Recommendation 10:** The new planning system includes a provision requiring the data set underpinning strategic planning to be made publically available prior to developing NSW Planning Policies, Regional Growth Plans, Sub-Regional Delivery Plans and Local Plans.

**Recommendation 11:** The new planning system includes clear legislative provisions for strategic environmental assessment of strategic plans and local plans, including requirements for:

- an assessment of the existing state of the environment,
- identification of the likely environmental impacts of the development envisaged in a plan (including cumulative impacts), and the consideration of reasonable alternatives,
- consultation on an environmental report on the plan at the same time as on the plan itself, and
- ongoing monitoring of the significant effects of implementation of the plan.

**Recommendation 12:** The new planning system should include a clear legislative requirement for planning authorities to consider environmental and natural resource management policies when developing strategic plans and local plans.

**Recommendation 13:** Review and improve existing model clause provisions of the Standard Instrument to include minimum mandatory standards for environmental outcomes.

**Recommendation 14:** Develop standard codes that contain clear, legally binding requirements in relation to environmental outcomes either in quantitative terms or as clear descriptors.

**Recommendation 15:** Ensure the planning legislation includes clear and objective decision making criteria for merits assessment, including for example a 'maintain and improve' threshold test.

**Recommendation 16:** Retain existing environmental protection zones in the new planning system.

**Recommendation 17:** The Minister's powers to make, amend or repeal strategic plans or local plans should be restricted to minor administrative amendments.

**Recommendation 18:** The Government abandons the policy intention that 80% of all development in NSW be assessed as either code or complying development.

**Recommendation 19:** The new planning system includes provisions that give effect to the policy intention that complying and code assessment only be available for genuinely low impact development, for example:

- Include a provision that provides that only low impact development can be identified as complying or code assessment, and insert a definition for low impact.
- Include a provision that provides that code assessment cannot be carried out on land identified as environmentally sensitive land and insert a definition for environmentally sensitive land.

**Recommendation 20:** Any proposal to establish code assessable development, includes requirements for the code to assess environmental and social impacts.

**Recommendation 21:** The Government abandons its proposal to introduce strategic compatibility certificates in the new planning system.

**Recommendation 22:** Under the new planning system proposed amendments to a planning instrument must be required to go through an assessment, consultation and approval process that is at least as rigorous as the process for developing the principle instrument.

**Recommendation 23:** Proposals that override or constrain the issuing of environmental approvals by relevant agencies for public priority infrastructure, State infrastructure development or State significant should be removed.

**Recommendation 24**: Provisions to set up a 'one-stop-shop' that coordinates the assessment of concurrences and approvals that are required under other legislation should be revised and approval power should not be centralised in the Director General.

**Recommendation 25:** Resources should be directed to those agencies that are required to undertake concurrence and approval functions.

**Recommendation 26:** The new planning system must prescribe clear criteria for the preparation of environmental impact statements, including requirements for the assessment of cumulative impacts and also climate change impacts.

**Recommendation 27:** The new planning system must prescribe clear and objective criteria as to the types of development that can be declared State significant development by the Minister.

**Recommendation 28:** Require all applications for State significant development to be accompanied by an environmental impact statement.

**Recommendation 29:** The NSW Government should work with stakeholders and the community to develop a legislative framework for the accreditation and, more importantly, independent appointment of environmental consultants.

**Recommendation 30:** In order to further improve the integrity of environmental impact statements, the new planning system should:

- Ensure the assessment and scrutiny of development is commensurate with potential impacts,
- Require consent authorities to reject reports that are unsatisfactory,
- Require external auditing of environmental assessment reports, and
- Include annual reporting requirements.

**Recommendation 31:** Ensure that discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective and open to judicial review.

**Recommendation 32:** Remove the restriction to third party merit appeal rights against decisions that have been made following a public hearing by the Planning Assessment Commission

**Recommendation 33**: Remove any restriction on the right of any person to remedy or restrain a breach of the Act, including section 10.12 of the Exposure Planning Bill

**Recommendation 34:** The Government should seek a report by the Independent Commission Against Corruption into the corruption risks inherent in its Exposure Planning Bill and proposed planning system, and delay moving ahead with the Exposure Planning Bill until the Commission has publically reported its findings.

## OUTLINE OF KEY CONCERNS

### INTRODUCTION

Since the Government announced the review of the NSW planning system in June 2011, our organisations have welcomed opportunities to contribute to the process of developing a new planning system for NSW.

The review is an opportunity to not only address issues such as complexity and perceived corruption risks in the current planning system, but to also develop a modern planning system that is consistent with contemporary community expectations for environmental protection and sustainability, and community participation in planning and development decisions.

The review of the NSW planning system arose from wide-spread community concern and dissatisfaction with the planning system in NSW, particularly in relation to the former Part 3A of the *Environmental Planning and Assessment Act* 1979 (**EPA Act**). Part 3A vested significant discretionary power in the Minister for Planning, introduced provisions to override important environmental approvals and limited third party appeal rights. The O'Farrell Government promised to repeal Part 3A and put the community back in to planning.

While the impetus for the review may have been to address such community concerns, the process appears to have been overtaken by strong pressure from developer interests to fast track development assessment processes, and Government initiatives to deliver increased housing and economic growth for NSW.

NCC and TEC have made substantial contributions to the reform process since the Minister for Planning and Infrastructure announced the NSW planning system review in June 2011. Our policy recommendations are set out in our various reports, including:

- *Planning for Ecologically Sustainable Development - Opportunities for Improved Environmental Outcomes and Enhanced Community Involvement in the Planning System.*[2]

- *Our Environment, Our Communities – Integrating environmental outcomes and community engagement in the NSW planning system.*[3]

- *Planning for a sustainable future – Submission on the Green Paper – The way ahead for planning in NSW.*[4]

We also recognise the substantial work of Independent NSW Planning System Review Panel, and its two volumes of recommendations, which have largely been ignored by the Government in developing the White Paper and Exposure Planning Bill.[5]

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[2] *Planning for Ecologically Sustainable Development - Opportunities for Improved Environmental Outcomes and Enhanced Community Involvement in the Planning System* (March 2012), Nature Conservation Council of NSW, Total Environment Centre and the Environmental Defender's Office, available at www.planningreview.nsw.gov.au/LinkClick.aspx?fileticket=sUBZriIb4fU%3d&tabid=119&mid=569

[3] *Our Environment, Our Communities – Integrating environmental outcomes and community engagement in the NSW planning system* (May 2012) Nature Conservation Council of NSW, Total Environment Centre and EDO NSW, available at www.nccnsw.org.au/sites/default/files/Our_Environment_Our_Communities_0.pdf

[4] *Planning for a sustainable future – Submission on the Green Paper – The way ahead for planning in NSW* (September 2012), ) Nature Conservation Council of NSW and Total Environment Centre, available at www.planning.nsw.gov.au/Portals/0/PolicyAndLegislation/GreenPaperSubmissions/Nature_Conservation_Council_of_NSW_and_Total_Environment_Centre.pdf

[5] The report of the Independent NSW Planning System Review is available to download from the NSW Planning System Review website: www.planningreview.nsw.gov.au/

We are alarmed that the White Paper and Exposure Planning Bill released by the Government fall far short of a modern vision for a planning system that protects the environment and communities in NSW. Unamended, the Exposure Planning Bill would represent the most significant backward steps in public participation and environmental protection in the planning system in more than a generation.

We are also concerned that there is a significant gap between the rhetoric in the White Paper, and the legislative framework in the Exposure Planning Bill. The Government's failure to deliver on its promises will adversely impact on the government's credibility.

There is already significant and growing frustration amongst our supporters and the wider community that key concerns raised during the twenty-four months of the NSW planning system review to date are not reflected in the White Paper and Exposure Planning Bill, and that the proposed reforms deliver significant, unbalanced concessions to developers and industry.

We do not support the White Paper and Exposure Planning Bills and urge the Government to abandon the Exposure Planning Bills and develop entirely new draft legislation that will provide positive and balanced environmental, social and economic outcomes for NSW now and in the future.

## 1. OBJECTS OF THE ACT

### 1.1 Ecologically sustainable development

**We strongly oppose the removal of the principles of ecologically sustainable development from the new planning system.** This is a major step backwards for the environment and communities, and is inconsistent with environment and planning policy in Australia.

One of the current objects of the EPA Act is to encourage ecologically sustainable development (section 5, EPA Act). Ecologically sustainable development is defined, with reference to section 6(2) of the *Protection of the Environment Administration Act* 1991 (**POEA Act**), as the implementation of the following principles:

- the precautionary principle
- inter-generational equity
- conservation of biological diversity and ecological integrity
- improved valuation, pricing and incentive mechanisms, including the polluter pays principle.

This reflects several decades of international and Australian environment and planning policy:

- The term Sustainable Development was first defined in the 1987 Brundtland Commission report, *Our Common Future*, as: '*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*'.[6]

- The concept was further developed in materials coming out of the 1992 Earth Summit held in Rio de Janeiro, Brazil. The Rio Declaration set out the key principles of sustainability as the principle of integration of environmental considerations and development objectives, the precautionary principle, the conservation of biological diversity, intergenerational equity and the promotion of improved valuation, pricing and incentive mechanisms (including the polluter pays principle).

- In Australia, the concept of sustainable development was captured in the *National Conservation Strategy for Australia* and the *Intergovernmental Agreement on the Environment* (1992), which

[6] Available at http://www.un-documents.net/ocf-ov.htm#1.2

refers to the internationally accepted principles listed above. The term 'ecologically sustainable development' was adopted in Australia.

- Ecologically sustainable development is the standard terminology used in over 60 NSW statutes, including the *Environmental Planning and Assessment Act (*1979) , the *Mining Act* (1992), *Coastal Protection Act* (1979), the *Local Government Act* (1993), *Water Management Act* (2000), *Native Vegetation Act* (2003) and *Rural Fires Act* (1997). The definition used in all of these Acts refers back to the definition provided in the *Protection of the Environment Administration Act 1991* (NSW).[7]

- A body of case law has developed around the interpretation and application of these principles both in NSW and across Australia.[8]

It is important to recognise that ecologically sustainable development does not seek to raise environmental matters above other matters. Ecologically sustainable development seeks to integrate environmental, economic and social considerations in decision making.

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'.[9]

To this end, we note that the report prepared by the Independent Planning System Review panel found that:

> "*It is desirable that a consistent approach be taken to the definition of 'sustainable development'. As a result, the definition adopted in the present planning legislation should be retained, as the same definition is used in the Protection of the Environment Operations Act 1995 (sic)".*[10]

The Government's White Paper is misleading, in that it makes reference to sustainable development as defined in the Brundtland Commission report, but then goes on to say that 'for the purposes of the White Paper and legislation, sustainable development is achieved by the integration of economic, environmental and social considerations, having regard to present and future needs, in decision making about planning and development'.

This is then reflected in the Planning Bill which provides that one of the objects of the Act is "economic growth and environmental and social well-being through sustainable development" (section 1.3(1)(a)), Exposure Planning Bill).

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[7] We note representations made by the Department of Planning and Infrastructure during community consultation sessions on the White Paper, and in correspondence from the Minister for Planning and Infrastructure, that social considerations are not encompassed in the current definition of ESD. Our understanding of the ecologically sustainable development, as outlined in our previous submissions to the NSW Planning System Review, is that it is the integration of economic, social and environment considerations. This is reflected in the principles of ESD, particularly the principle of intergenerational equity. The omission of 'social' from the definition in section 6(2) of the *Protection of the Environment Administration Act* 1991 could be remedied by a minor amendment to that provision.

[8] 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.

[9] 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.

[10] *The Way Ahead for Planning in NSW – Recommendations of the NSW Planning System Review,* Volume 2 – Other Issues (June 2012), page 81

The Planning Bill then defines sustainable development by saying sustainable development is achieved by the "integration of economic, environmental and social considerations, having regard to present and future needs, in decision-making about planning and development" (section 1.3(2), Exposure Planning Bill).

Essentially the Government is replacing the recognised concept of sustainable development with its own definition. This new, narrow definition of sustainable development is a significant step away from the established principles of ecologically sustainable development, which have underpinned environmental planning and development decisions in NSW since the late 1990's. In particular, the Planning Bill makes no reference to the precautionary principle, a central tenet of environmental policy and case law in NSW for more than two decades.

The move away from the principles of ecologically sustainable development is not consistent with other environment and planning legislation in Australia: see, for example, section 9 of the *Planning and Development Act* (ACT) 2007, Chapter 1 of the *Sustainable Planning Act* 2009 (Qld) and section 3A of the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth).

It is also unclear why the Government has made a conscious decision to introduce a new, narrow definition of sustainable development given the wide-spread support for maintaining ecologically sustainable development in the new planning system.[11]

**We reject the definition of sustainable development in the Exposure Planning Bill.** Environment and planning decisions must be underpinned by the established principles of ecologically sustainable development. The conscious decision of the NSW Government to redefine sustainable development and remove the principles of ESD represents a fundamental failure of the Government's proposed reforms.

**Recommendation 1:** The new planning system should define ecologically sustainable development with clear reference to the established principles of ESD. This can be achieved by continuing to adopt the definition in section 6(2) of the *Protection of the Environment Administration Act* 1991.

The Exposure Planning Bill lists nine components to the object of the Act and these appear to be equally weighted. There is a risk that some components will be given greater weight by decision makers than others; and because the environment is subsumed by a plethora of economic objectives. For example, under the EPA Act, where there are ten equally-weighted objects, environmental considerations are often set aside for economic outcomes .[12]

[11] For example, *Green Paper Feedback Summary*, December 2012, prepared by the Department of Planning and Infrastructure recognised that "many submissions suggested that ecologically sustainable development (ESD) should be included amongst the purposes of the planning system", p40; The Local Government and Local Shires Associations state that they were "disappointed that the principles of Ecologically Sustainable Development (ESD) that have underpinned the planning system for decades, are not specifically included in any framework outlined in the *Green Paper*. ESD is one of a number of core objectives of the existing planning system that we believe should be retained as the first objective in a hierarchy of objectives under the new land use planning Act" *Local Government and Shires Associations of NSW Submission to NSW Planning System Review -- Green Paper,* September 2012, p 11; 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 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

[12] 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

We therefore recommend that ecologically sustainable development, itself being the balance of economic, social and environmental considerations, be identified as the overarching object of the new planning system. This would be consistent with Recommendation 6 of the Independent Commission against Corruption 'that the NSW Government ensures that the new planning legislation clearly articulates its objectives and provides guidance on the priority (if any) to be given to competing objective'.[13]

**Recommendation 2:** Ecologically sustainable development, defined with clear reference to the established principles of ESD, is the overarching objective of the new planning system.

### 1.2 Other objects

The Exposure Planning Bill outlines components of the object of the Act as follows:

1.3 (1) The object of this Act is to promote the following:

(a) economic growth and environmental and social well-being through sustainable development,
(b) opportunities for early and on-going community participation in strategic planning and decision-making,
(c) the co-ordination, planning, delivery and integration of infrastructure and services in strategic planning and growth management,
(d) the timely delivery of business, employment and housing opportunities (including for housing choice and affordable housing),
(e) the protection of the environment, including:
    i. the conservation of threatened species, populations and ecological communities, and their habitats, and
    ii. the conservation and sustainable use of built and cultural heritage.
(f) the effective management of agricultural and water resources,
(g) health, safety and amenity in the planning, design, construction and performance of individual buildings and the built environment,
(h) efficient and timely development assessment proportionate to the likely impacts of proposed development,

Our previous submissions to the NSW planning system review highlight the need for clear, outcomes based objects in the new planning system.[14] With respect to the proposed objects in the Exposure Planning Bill, we suggest that:

- Objective (b) is strengthened to "ensure guaranteed and meaningful public involvement and participation in environmental planning and assessment decisions".

- Objective (e)(i) be strengthened by referring more specifically to the protection of biodiversity and ecological integrity, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats.

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.

[13] *Anti-corruption safeguards and the NSW planning system* (February 2012), Independent Commission Against Corruption

[14] See, for example, *Planning for Ecologically Sustainable Development- Opportunities for Improved Environmental Outcomes and Enhanced Community Involvement in the Planning System*, above no. 2, p 31

This wording better reflects the pivotal concept that new planning system must be concerned not only with the protection of threatened species, populations and ecological communities, and their habitats, but rather the broader protection of biodiversity and ecological integrity.

- Objective (f) is replaced with text from the existing objective at s5(a)(i) of the EPA Act -"the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages

  The proposed objective (f) is too narrow and does not cover the range of natural and artificial resources that need to be protected under the new planning system.

- A specific objective is added to aim at promoting resilience to climate change for communities, wildlife and the environment, addressing risks and opportunities via mitigation and adaptation is added.

**Recommendation 3:** With respect to the proposed objects in section 1.3 of the Exposure Planning Bill, we recommend that:

- Objective (b) is strengthened to "ensure guaranteed and meaningful public involvement and participation in environmental planning and assessment decisions"

- Objective (e)(i) is strengthened by referring more specifically to the protection of biodiversity and ecological integrity, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats

- Objective (f) is strengthened by requiring the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages

- A specific objective is added aimed at promoting resilience to climate change for communities, wildlife and the environment, addressing risks and opportunities via mitigation and adaptation.

## 2. COMMUNITY PARTICIPATION

The White Paper states that community participation is at the centre of the planning system (page 25, White Paper). The White Paper proposes a new Community Participation Charter to be introduced establishing seven high level principles for community participation. This Community Participation Charter is set out in Part 2 of the Exposure Planning Bill.

Despite an emphasis on improved community participation in the White Paper, the Community Participation Charter will be largely unenforceable. The Exposure Planning Bill provides that the mandatory requirements for community participation with respect to the community participation are set out in Part 1 of Schedule 2 (which deals with notification and exhibition period) (sections 2.6, Exposure Planning Bill).

Furthermore, the Bill states that the entire chapter dealing with public participation (Part 2) is non-mandatory and unenforceable (except Part 1, Schedule 2, which deals with notification and exhibition periods) (section 10.12, Exposure Planning Bill). The potential implication of these provisions is that members of the community will not be able to take legal action to enforce the Charter. In addition,

measures proposed in the White Paper to monitor and assess the quality and implementation of community plans do not appear in the legislation, even though they are essential provisions.

When our organisations originally proposed the idea of public participation charter, we proposed that it would be supported by clear and mandatory legislative requirements in relation to consultation, notification, provision of information, consideration of submissions, providing reasons for decisions and appeal rights in the new planning legislation.[15] To this end, we wrote the Minister in February 2013 to express our concerns that without a clear legislative framework and necessary resourcing, genuine and meaningful public participation will not be achieved.

In that letter we also highlighted our opposition to proposals that would substantially reduce public participation opportunities in development assessment, including proposals to significantly expand code complying development and proposals to limit third party review and appeal rights.

A copy of our letter dated 7 February 2013 is included as **Attachment 1** to this submission.

Importantly, the Government cannot claim to be genuinely involving people in planning if the very mechanisms can be ignored and the strategic plans in which they participate can be easily overridden (see 3.6 below).

In our report *Our Environment, Our Communities – Integrating environmental outcomes and community participation in the NSW planning system*[16]we recognised that a general framework for achieving improved community engagement in the planning system would require:

- A legislative right of public participation in all key processes, including:
  - law reform processes
  - preparation of planning instruments and strategies,
  - development assessment, and
  - review, compliance and appeals.

- Maintaining traditional public participation processes including notification, exhibition and consultation on planning instruments and development proposals (to ensure there this minimum standard of community consultation continues). These processes should be improved to reflect modern and current practices, such as providing information online, and holding public hearings.

- A statutory obligation to ensure that community consultation is carried out in accordance with prescribed implementation principles. For example, the planning system should adopt a public participation charter which sets out key implementation principles and require all consultation to be carried out in accordance with the adopted Charter.

- A requirement that all agencies and councils develop Community Engagement Strategies that are consistent with the Charter for Public Participation.

**Appendix 2 of *Our Environment, Our Communities – Integrating Environmental Outcomes and Community Participation in the NSW planning system* provides recommendations for a legislative framework for improved community participation in the NSW Planning System. A copy is included at Attachment 2.**

[15] The idea of a Charter for Public Participation was proposed in our joint report *Our Environment, Our Communities – Integrating Environmental Outcomes and Community Participation in the NSW planning system,* below no. 11, and follows the work done by the Total Environment Centre and the Environmental Defender's Office as part of the *Reconnecting the Community with the Planning System* project.
[16] Above no. 3

Without clear and mandatory requirements for public participation the new planning system will, despite the introduction of a new public participation charter, signify a significant backwards step in public participation in environmental and planning decisions in NSW. **For these reasons we do not support the community participation provisions in the White Paper and Exposure Planning Bill.**

**Recommendation 4:** The new planning system must set out clear and mandatory requirements for:

- Notification of the preparation of strategic plans and local plans
- Making information publically available (including studies that have been prepared)
- Decision makers to take into account submissions made in respect of draft strategic plans and local plans
- Decision makers to provide reasons for decisions when making, repealing or amending strategic plans or local plans

**Recommendation 5:** The new planning system must set out clear and mandatory requirements for:

- The notification of development applications
- Making information publically available including all information supporting a development application
- Decision makers to take into account submissions made in respect of development applications
- Decision makers to provide reasons for decisions when determining development applications

**Recommendation 6:** To provide improved certainty for decision-makers, proponents and the community, enact legislative provisions that:

- Make compliance with the Public Participation Charter mandatory
- Provide for the review and approval, and ongoing monitoring of the implementation of community participation plans by an independent body
- Deem compliance with an approved community participation plan by the relevant planning authority to constitute compliance with the Public Participation Charter.

**Recommendation 7:** Ensure all community participation provisions of the new planning system are mandatory and legally enforceable in a substantial manner and are not optional.

## 3. STRATEGIC PLANNING

The White Paper proposes a major shift towards evidence-based strategic planning. The White Paper says the transformation to strategic planning is the key tool for better facilitating the delivery of housing and jobs in the right locations, while protecting and managing the environment and people's way of life (page 60, White Paper).

We have significant concerns that the framework for strategic planning in the Exposure Planning Bill falls short of delivering an improved strategic planning framework. Our specific key concerns are outlined below.

### 3.1 Strategic Planning Principles

The ten strategic planning principles that will underpin strategic planning in the new planning system (section 3.3, Exposure Planning Bill) prioritise economic growth at the expense of environmental and social outcomes. While the strategic planning principles provide that economic, environmental and social considerations are to be taken into account, they do not prescribe clear environmental or natural resource

management outcomes. Additionally, there is no reference to assessment of cumulative impacts, climate change or urban sustainability.

Outcomes based objectives are important in setting the framework in which decisions are made and providing key performance indicators for performance monitoring and evaluation. It is not enough to simply have regard to environmental and social considerations. In particular strategic planning principles should require strategic plans to identify and protect sensitive areas, improve or maintain biodiversity and ecosystem function, improve or maintain catchment health and water quality, ensure the sustainable use of prime crop and pasture land, plan for scientifically anticipated impact of climate change, and consider and minimise the cumulative impacts.

The use of prescriptive outcomes based objectives for strategic planning is consistent with Recommendation 8 in the Independent Panel's report *The Way Ahead for Planning in NSW*.[17] In our earlier submission to the *Green Paper* we recommended using the Independent Panel's recommendations as a starting point for establishing outcomes based objects for strategic planning. Figure 1 below illustrates Recommendation 8, with our suggestions emphasised.

**Figure 1:** Extract from *Planning for a Sustainable Future – Submission on the Green Paper*, September 2012[18]

**TABLE 2: Outcomes based objectives for strategic planning and local land use plans**

**Recommendation 8, Volume 1**

8. The objects in the proposed Sustainable Planning Act for strategic planning are to be as follows:

- Identify anticipated human settlement locations, areas expected to increase in density of settlement patterns and the timeframes over which this might be expected to occur.
- **To ensure an appropriate mix of land uses that provide for housing choices and that enable easy access to employment, commercial, recreational, open space and community facilities**.
- Identify future State, regional and local infrastructure needs as well as the timelines, corridors and general locations required for its provision.
- Identify and take into account relevant matters from any current State plan.
- **To** identify **and protect** sensitive areas containing (or likely to contain) factors that will limit or prevent development taking place, such as:
  - biodiversity and other ecological constraints
  - significant landscapes or features, including Aboriginal cultural landscapes or sites
  - riparian corridors
  - items or localities of likely or known heritage significance
  - existing land uses that can be expected to place constraints on land use in their vicinity.
- **To improve or maintain biodiversity and ecosystem function.**
- **To improve or maintain catchment health and water quality.**
- **To ensure the agricultural use of prime crop and pasture land by minimising development which has an adverse and irreversible impact on the land's agricultural potential**
- Have regard to expected population changes, including seasonal or temporary population fluctuations whether for tourism or seasonal labour reasons.
- To **consider and plan for** scientifically anticipated impact of climate change within the footprint of the strategic planning study area and the broad measures required to mitigate its impact.
- **To consider and plan for the scientifically anticipated** impacts of natural risks such as flooding or bushfire **and coastal erosion.**
- Identify areas where competing and potentially conflicting land use expectations are likely to arise.
- Identify past and present human activity constraints with broader than localised impacts.
- **To consider and minimise the cumulative impacts of anticipated development in the strategic planning area.**

[17] *The Way Ahead for Planning in NSW – Recommendations of the NSW Planning System Review,* Volume 2 – Major Issues (May 2012)

[18] *Planning for a Sustainable Future – Submission on the Green Paper*, Nature Conservation Council of NSW and Total Environment Centre (September 2012),

**Recommendation 8:** The new planning system must include clear outcomes based objectives for strategic planning. Recommendation 8 of the Independent Panel of the NSW Planning System Review provides a useful starting point for developing outcomes based objectives for strategic planning.

### 3.2 Evidence based decision making

Best practice strategic and land use planning must be underpinned by scientific, factual and up-to-date data. It is impossible to effectively develop long term strategic plans without a clear understanding of the existing state of the environment and an assessment of the impacts of planned future growth and development.

Despite the fact that the White Paper proposes a shift to upfront evidence based strategic planning, there are no clear legislative requirements in the Exposure Planning Bill to establish a robust and reliable evidence base that will underpin strategic planning.

Ensuring that there is a robust and reliable data set available prior to developing strategic plans is a fundamental requirement needed for improved evidence based strategic planning. Without robust and reliable data, it is impossible to identify areas of high conservation value, prime agricultural land, water resources or threatened species and endangered ecological communities. Further, without a base data set, it is impossible to anticipate and measure environmental impacts.

The Government must commit to undertaking significant preliminary work to develop and complete a reliable data set, including robust vegetation mapping, across all elements for NSW, before it can begin the task of preparing strategic planning documents.[19] Mapping provides critical scientific input and a legitimate reference point for strategic planning. This robust and reliable data set must be available to all users of the planning system to enable users to effectively engage in meaningful community participation. The new planning system must include a legislative requirement to establish a robust and reliable evidence base prior to developing strategic plans and local plans.

It is also important to recognise that mapping and environmental assessment at this landscape scale, even if done properly, does not remove the need for site specific impact assessment at the development stage. The White Paper's assumption that effective strategic planning removes the need for further assessment at the development assessment stage is flawed. The landscape scale mapping, while required for effective strategic planning, cannot possibly identify impacts at the scale required to properly assess the impact of individual development particularly where complex environments exist. For this reason, it is essential that the planning system contains appropriate mechanisms for assessing site specific impacts at the development assessment stage. We recommend a number of mechanisms for improving impact assessment at the development assessment stage throughout this submission.

**Recommendation 9:** The Government commits to establishing a robust and reliable data set that will underpin strategic planning prior to starting the process to develop NSW Planning Policies, Regional Growth Plans, Sub-Regional Delivery Plans and Local Plans, and this requirement is mandated in the planning legislation.

[19] For example, it is concerning the NSW Government is seeking to finalise its Metropolitan Plan for Sydney but has not yet finalised the Sydney Region Vegetation Mapping which will provide maps of vegetation types, threatened species and endangered ecological communities, and high priority bushland habitat corridors. The mapping must be finalised in order to provide accurate input, in conjunction with planning and development proposals.

**Recommendation 10:** The new planning system includes a provision requiring the data set underpinning strategic planning to be made publically available prior to developing NSW Planning Policies, Regional Growth Plans, Sub-Regional Delivery Plans and Local Plans.

### 3.3 Strategic environmental assessment

The White Paper suggests that strategic impact assessment will now form part of the framework for the preparation of Regional Growth Plans and Sub-regional Delivery Plans:

"*A central part of sectoral strategies will be the consideration of the impacts associated with different options over the life of the plan, including the cumulative impacts of those options, and the presentation of that information to the community. In keeping with the approach for Regional Growth Plans, the important function of considering the impacts of land use options will be informed by Strategic Impact Assessment. This new approach for strategic planning centres on an assessment of the positive and negative impacts of proposed policy options at a strategic planning stage. Effectively, it represents a systematic process for evaluating the economic, social and environmental consequences of proposed policy options for significant land use planning decisions to achieve sustainable development. Where possible, Strategic Impact Assessment will attempt to measure the economic, social, and environmental costs and benefits of the options for land use planning on a common basis. Where this information is available, Strategic Impact Assessment will follow the principles of economic appraisal or cost benefit analysis. Consistent with the strategic planning principles, proposed options must be realistic, deliverable and achievable*".[20]

Once again, the White Paper can be seen to be taking a recognised concept (in this case, strategic environmental assessment, also known as strategic impact assessment) and reframing it in its own terms. In explaining strategic impact assessment, the White Paper places a higher emphasis on economic issues, rather than genuinely trying to balance economic, environmental and social issues**.** The emphasis is on the cost benefit analysis and whether proposed options are realistic, deliverable and achievable.

In our report *Our Environment, Our Communities – Integrating environmental outcomes and community engagement in the NSW planning system*, we recognise that strategic environmental assessment provides 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.[21]

This outcome is achieved through setting minimum requirements for environmental assessment processes alongside plan preparation, including:

- an assessment of the existing state of the environment,
- identification of the likely environmental impacts of the development envisaged in a plan (including cumulative impacts), and the consideration of reasonable alternatives,
- consultation on an environmental report on the plan at the same time as on the plan itself, and
- ongoing monitoring of the significant effects of implementation of the plan.[22]

[20] White Paper, page 88

[21] 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); see also European Directive 2001/42/EC "on the assessment of the effects of certain plans and programmes on the environment" (commonly known as the Strategic Environmental Assessment (or SEA) Directive) (available at: http://ec.europa.eu/environment/eia/sea-legalcontext.htm)

[22] See also the Hawke report, which makes recommendations as to the framework for strategic assessment, Hawke, A. (2009), "*Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*", October 2009, see in particular 3.43 – 3.50 . In summary, such a framework should:

- require an assessment of the extent to which a plan, policy or program:

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.[23] There is no specific environmental assessment required for making a SEPP, although there are consultation (not concurrence) requirements with respect to threatened species.

We emphasise the need for any strategic impact assessment to include, not only a cost benefit analysis but also a robust assessment of existing and future cumulative environmental and social impacts, in accordance with best practice strategic environmental assessment.

**Recommendation 11:** The new planning system includes clear legislative provisions for strategic environmental assessment of strategic plans and local plans, including requirements for:

- an assessment of the existing state of the environment,
- identification of the likely environmental impacts of the development envisaged in a plan (including cumulative impacts), and the consideration of reasonable alternatives,
- consultation on an environmental report on the plan at the same time as on the plan itself, and
- ongoing monitoring of the significant effects of implementation of the plan.

### 3.4 Environmental targets and improved environmental outcomes

The White Paper and Exposure Planning Bill make a number of references to establishing environment targets and environmental objectives, for example:

- Proposed Strategic Planning Principle 9, states that strategic plans should set realistically deliverable targets and take account of economic, environmental and social considerations (Section 3.3, Exposure Planning Bill).

- The White Paper suggests that regional plans should present 'planning policies and actions relating to environmental objectives and natural resources, including waste, water, natural hazards, air quality, biodiversity and energy resources. It may include established environmental targets for a region (for example air pollution targets), agreed areas of conservation and policies relating to state significant resources' (White Paper, page 77). However, as outlined earlier in our submission, there is a significant gap between the White Paper rhetoric and the legal framework for established by the Exposure Planning Bill.

Recognising that the planning system has a role to play in setting targets and objectives for environmental protection is critical. It reflects the fundamental notion that land use planning and development is intrinsically linked with environmental protection, nature conservation and natural resource management (NRM). This is because actions that may affect the environment and our natural resources are regulated, either directly or indirectly, through the planning system. The impact of planning and development on the

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- protects the environment promotes ESD
- promotes the conservation of biodiversity
- provides for the protection of heritage
- set minimum standards of acceptable environmental impacts (including and assessment of cumulative impacts) and
- set of higher level considerations, for example for any subsequent development approval

[23] See, for example, EDO factsheet, 'LEPs and SEPPs', 2.1.3a, available at http://www.edo.org.au/edonsw/site/factsh/fs02_1_3a.php.

environment is therefore a key consideration for decision makers in preparing planning instruments and determining development applications. Conversely, land use planning has the potential to support the achievement of environmental outcomes including the protection and sustainable management of water resources, biodiversity, agricultural land and basic raw materials.[24]

Throughout the review process we have placed a strong emphasis on the fundamental link between planning, environmental protection and natural resource management. Our report, *Our Environment, Our Communities*, highlighted various efforts across Australian jurisdictions to greater marry natural resource management with strategic planning.

For example, the Western Australia Planning Commission's *Directions Paper on the Integration of NRM into Land Use Planning* is premised with the recognition that the:

> "*land use planning system is integral to achieving NRM outcomes in Western Australia. Land use planning can protect natural resources from incompatible uses, locate development away from sensitive environments and require sustainable management of natural resources through change in land use*".[25]

The review of the NSW planning system, with its emphasis on improved strategic planning and whole-of Government approach, provides clear opportunities to improve the link between strategic planning, environmental protection and natural resource management in NSW – but fails to do so.

There are two fundamental ways in which the new planning system can strengthen the link between environmental protection and natural resource management, and land use planning.

First, there must be a clear legislative requirement to consider key environmental and natural resource management policies as environmental targets and objectives are established under the new planning system including, for example:

- The Natural Resources Commission State Wide Natural Resource Management targets[26]
- Regional Conservation Plans,
- Regional Strategies
- Catchment Action Plans, and
- The NSW Coastal Strategy.

We note that the White Paper suggests that '*detailed planning policies and actions will be provided on environment and natural resource issues, including environmental targets from plans such as Regional Conservation Plans or Catchment Act Plans, where appropriate, and identification of conservation areas'* (White Paper, page 86). However there does not appear to be any clear legislative requirement for this in the Exposure Planning Bill.

Second, the planning system requires in-built mechanisms to ensure that these targets are achieved, and to allow monitoring and performance review for achieving these outcomes. For example:

- Review and improve existing model clause provisions of the Standard Instrument to include minimum mandatory standards for environmental outcomes[27]

[24] *Directions Paper on the Integration of NRM into Land Use Planning* (February 2011), Western Australia Planning Commission, p 12

[25] Ibid, p iii

[26] Available at http://www.nrc.nsw.gov.au/content/images/Image%20-%20State-wide%20targets.jpg

[27] For example, the model natural resource management clauses in Standard Instrument only require consideration and minimisation of environmental impacts, not avoidance of impacts. Model clauses should implement minimum mandatory standards.

- Ensure development codes contain clear, legally binding requirements in relation to environmental outcomes.[28] This will not only ensure that environmental targets are being achieved, but will provide an incentive for low impact development with high sustainability and environmental standards to be fast-tracked (noting that our organisations remain concerned at any potential increase of code-based approvals beyond proven low impact, low risk development).
  For example, the Building Sustainability Index (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.[29]

- Establish clear, objective decision making criteria for merit assessment of development applications.[30] Objective decision making processes are already being used in NSW to ensure that proposed development satisfies prescribed criteria. For example:

  - The *Native Vegetation Act* 2003 (NV Act) establishes an 'improve or maintain environmental outcomes' 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.[31] The tool requires an objective assessment to determine if prescribed environmental indicators are improved or maintained.[32] The application of the assessment tool is mandatory and is based on objective scientific criteria. It has helped overcome problems associated with subjectivity and inconsistent decision making under the previous regime.

  - The *State Environmental Planning Policy (Sydney Drinking Water Catchment)* 2011[33] provides that a consent authority must not grant consent to the carrying out of development under Part 4 of the Act on land in the Sydney drinking water catchment unless it is satisfied that the carrying out of the proposed development would have a neutral or beneficial effect on water quality.[34] The SEPP is underpinned by the methodology prescribed in the *Neutral or Beneficial Effect on Water Quality Assessment Guideline* prepared by the Sydney Catchment Authority.[35]

[28] Codes should also have clear, legally binding requirements with respect to matters such as design and amenity, landscape values, heritage and local character

[29] Note 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.

[30] *Integrating Natural Resource Management into Local Government Operations - Volume 2: Land Use Planning,* prepared by UTS Centre for Local Government, Gibbs Consulting, Walsh Consulting, (principal author Planning Volume Walsh Consulting) Available at: http://www.lgsa.org.au/resources/documents/NRM_Guidelines_Land_Use_Planning_020709.pdf

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

[32] The *Environmental Outcome Assessment Methodology* applies the 'improve or maintain test' with respect to water quality, salinity, biodiversity and land degradation (soil).

[33] *State Environmental Planning Policy (Sydney Drinking Water Catchment)* 2011 satisfies section 34B(2) of the EP&A Act which requires provision to be made in a State Environmental Planning Policy requiring a consent authority to refuse to grant consent to a development application relating to any part of the Sydney drinking water catchment unless the consent authority is satisfied that the carrying out of the proposed development would have a neutral or beneficial effect on the quality of water.

[34] See clause 10 of State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011.

[35] Available at: http://www.sca.nsw.gov.au/__data/assets/pdf_file/0007/4300/NorBE-Assessment-Guideline.pdf

Implementing clear and objective decision making criteria will not only help achieve environmental outcomes but is consistent with Recommendation 1 of the Independent Commission against Corruption that the NSW Government ensures that discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective.[36]

**Recommendation 12:** The new planning system should include a clear legislative requirement for planning authorities to consider environmental and natural resource management policies when developing strategic plans and local plans.

**Recommendation 13:** Review and improve existing model clause provisions of the Standard Instrument to include minimum mandatory standards for environmental outcomes.

**Recommendation 14:** Develop standard codes that contain clear, legally binding requirements in relation to environmental outcomes either in quantitative terms or as clear descriptors.

**Recommendation 15:** Ensure the planning legislation includes clear and objective decision making criteria for merits assessment, including for example a 'maintain and improve' threshold test.

**We also note that Appendix 1 of *Our Environment, Our Communities – Integrating environmental and community engagement outcomes in the NSW planning system* provides recommendations for a legislative framework for achieving environmental outcomes in the NSW Planning System. A copy is included at Attachment 2.**

### 3.5 Environment protection zones

The White Paper proposes to reduce the number of zones available for land use planning. Of particular concern is the proposal to remove important environmental protection zones by assimilating the existing environmental zones as follows:

- Environment Protection and Hazard Management (incorporating E1 National Parks and Nature Reserves, E2 Environmental Conservation and W1 Natural Waterways)
- Rural (incorporating RU2 Rural Landscape, RU6 Transition and E3 Environmental Management)
- Residential (incorporating R1 General Residential, R2 Low Density Residential, R3 Medium Density Residential, R5 Large Lot Residential, RU5 Village and E4 Environmental Living)

**We oppose the aggregation of environmental protection zones, as proposed in the White Paper.** This single policy decision will have the effect of removing vital protections for hundreds of thousands of hectares of environmentally sensitive land including native vegetation and wildlife habitat.

Environmental protection zones, as part of existing Local Environment Plans, have provided fundamental protection for our natural areas in NSW for nearly 30 years. Identifying and managing environmental values through land use planning is vital for the proper conservation and management of biodiversity and natural resources. It is at this spatial level that there can be a robust assessment of environmental values, and identification and protection of areas of high conservation value, including endangered ecological communities, critical habitat and wildlife corridors.

[36] Above no. 13

The proposal to reduce the number of environment zones is also contrary to the Department of Planning and Infrastructure's 2012 proposal to expand the number of environment zones by introducing an E5 Environment Protection zone in response to local government requests for an additional environmental zone that will provide for mandatory prohibition of a wide range of land uses, including residential accommodation and that may apply to land other than national parks and nature reserves identified by the NSW Government.

In addition to our concerns with the proposal to aggregate environmental zones, we also note:

- We have significant concerns about the proposal to introduce 'enterprise zones', which will be characterised by very little, if any, development controls.
- The White Paper is unclear as to how 'suburban character' areas will protect local heritage.

**Recommendation 16:** Retain existing environmental protection zones in the new planning system.

### 3.6 Certain and enforceable strategic plans and local plans

Proper and effective strategic planning requires considerable time, money and resources. Significant work will need to be done to undertake base line studies, effectively engage the community and apply a whole-of-government approach to develop long term strategic plans. The outcome should be robust and reliable strategic plans that set high level policy outcomes and specific targets, and local land use provisions. Done properly, strategic planning will set the framework for long-term growth and development while protecting the environment and communities.

If there is to be considerable investment in strategic planning, then it is important that strategic planning frameworks are robust and that strategic plans are certain, reliable and enforceable. We have concerns with a number of proposed legislative provisions that have the potential to undermine strategic planning.

Firstly, the Planning Bill contains provisions that allow the Minister for Planning to retain significant powers to make, amend or repeal strategic plans and local plans and to determine, in some instances the requirements for community participation (sections 3.9, 3.14, 3.21(2)(c), Planning Bill).

The Exposure Planning Bill outlines a wide range of circumstances in which the Minister is able to exercise these powers.

Under section 3.9 (3) of the Exposure Planning Bill, the Minister may make or amend a strategic plan (NSW planning policies, regional growth plans and subregional delivery plans) without compliance with the provisions of this Division relating to the conditions precedent to doing so in order to do any one or more of the following:

(a) to correct an obvious error or misdescription or to address matters that are of a consequential, transitional, machinery or other minor nature,
(b) to deal with matters that the Minister considers do not warrant compliance with those conditions precedent because they will not have any significant adverse impact on the environment or adjoining land,
(c) to deal in an expeditious manner with matters that give effect to strategic or infrastructure plans or that are of State, regional or subregional significance

Under section 3.14 Exposure Planning Bill, the Minister may make, amend or replace any provisions of a local plan without compliance with the requirements of the planning legislation relating to the conditions precedent to doing so in order to do any one or more of the following:

(a) to correct an obvious error or misdescription or to address matters that are of a consequential, transitional, machinery or other minor nature,
(b) to deal with matters that the Minister considers do not warrant compliance with those conditions precedent because they will not have any significant adverse impact on the environment or adjoining land,
(c) to deal with matters that the relevant planning authority has been duly directed to deal with by the Minister but has failed to deal with or to deal with appropriately,
(d) to deal in an expeditious manner with matters that give effect to strategic plans or infrastructure plans or that are of State, regional or subregional significance,
(e) to rezone land or make other changes as a consequence of any development that is made permissible with development consent by a strategic compatibility certificate if development consent has been granted for the development,
(f) to declare the development whose likely effect on threatened species may be assessed in accordance with a biodiversity assessment procedure adopted by the regulations (as referred to in clause 1.5 (2) of Schedule 1).

While we recognise that there are some circumstances in which it is appropriate for the Minister to have the ability to amend strategic plans or local plans (for example minor administrative amendments to correct errors), we oppose the expanded and discretionary circumstances in which the Minister can exercise this function. We are particularly concerned that these powers may be exercised without compliance with the necessary conditions precedent under the legislation.

Providing the Minister with a wide range of discretionary power to make, amend or repeal strategic plans or local plans has the potential to undermine the efforts to improve strategic planning and improve the community's confidence in the NSW planning system. It is also contrary to concerns raised by the Independent Commission against Corruption regarding wide discretionary powers in the NSW planning system.[37]

Secondly, the Exposure Planning Bill includes various mechanisms available for developers to override strategic plans and local plans. For example:

- Developers will be able initiate proposals for the rezoning of land.
- The Government will introduce provisions that will allow developers to apply to the Director General for a strategic compatibility certificates (Division 4.7, Exposure Planning Bill).

Our specific concerns with these proposals are outlined below. The point to make here is that these mechanisms have the potential to undo robust and effective strategic planning, and will do little to improve community confidence in the planning system.

Thirdly, section 10.12 of the Exposure Planning Bill seeks to restrict legal challenges to unlawful decisions to make, repeal or amend strategic plans or local plans. Despite claims by the Government appeal rights will be unchanged in the new planning system, the Exposure Planning Bill contains provisions that seek to drastically limit judicial repeal proceedings, including proceedings to remedy the unlawful making, amending or replacing of the provisions of local plan or strategic plan. Our specific concerns on appeal rights outlined at 5.2 below.

**Recommendation 17:** The Minister's powers to make, amend or repeal strategic plans or local plans should be restricted to minor administrative amendments.

[37] Above no 13.

## 4. DEVELOPMENT ASSESSMENT

### 4.1 Code Assessment

**We strongly object to the White Paper proposal that 80% of development in NSW will be determined as complying or code development.** We see no clear policy rationale for requiring 80% of development in NSW to proceed with no community consultation and limited assessment of impacts. We also have significant concerns about the ability of code assessment to deliver acceptable environmental and social outcomes.

The Government's White Paper suggests that code assessment will be for low impact development only (page 31, White Paper), however there is no provision in the Exposure Planning Bill that reflects this.

Further, the assumption that 80% of development in NSW is low impact development everywhere, has no evidentiary base. The types of development listed in the White Paper as examples of complying development and code development include industrial and commercial buildings, residential apartments, townhouses and villas, and subdivision of land (pages 126-130, White Paper). These types of development cannot be said to be genuinely low impact development.

Codes are expected to deal with matters such as overshadowing, privacy, height and how the building will look from the street and public areas (page 129, White Paper). There is no mention in the White Paper that there will be any assessment of the environmental and social impacts of proposed development. As outlined earlier in our submission, the White Paper's assumption that effective strategic planning removes the need for further assessment is flawed. Further, some developments which may be considered 'minor' in a highly developed urban area may have significant impacts in environmentally sensitive areas such as waterways, lakes, coastal, forest, heath, woodlands and wetlands. Environmental assessment at the landscape scale is not sufficient to identify all the potential risks of proposed development, particularly before the details of a proposal are known. There is a real risk that under code assessment proposed by the Government, that there will be no assessment of the potential impacts of development proposals on the environment, heritage and amenity.

For this reason it is important that the code incorporates mechanisms for assessing potential environmental and social impacts of a development. This is discussed in more detail at 3.4 of this submission. Further, code assessment should not be available in environmentally sensitive areas.

Councils will not be able to refuse development that complies with the Codes (page 130, White Paper). Councils will be forced to approve development despite concerns that it, or the community, may have including, for example, concerns about public health and safety. This is contrary to statements that local planning powers will be returned to councils and communities under the new planning system.

The proposal to remove community consultation for the majority of development applications in NSW is inconsistent with commitments in the *NSW 2021* State Plan 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).

Community input on development proposals can lead to improved planning outcomes by incorporating local knowledge, identifying potential impacts and contributing to accountability. The public interest value and benefit of community consultation processes must not be abandoned simply to increase the speed of development assessment.

**Recommendation 18:** The Government abandons the policy intention that 80% of all development in NSW be assessed as either code or complying development.

**Recommendation 19:** The new planning system includes provisions that give effect to the policy intention that complying and code assessment only be available for genuinely low impact development, for example:

- Include a provision that provides that only low impact development can be identified as complying or code assessment, and insert a definition for low impact.
- Include a provision that provides that code assessment cannot be carried out on land identified as environmentally sensitive land and insert a definition for environmentally sensitive land.

**Recommendation 20:** Any proposal to establish code assessable development, includes requirements for the code to assess environmental and social impacts

### 4.2 Strategic compatibility certificates

**Our organisations are strongly opposed to the proposal to introduce strategic compatibility certificates**.

The provisions of Division 4.7 of the Exposure Planning Bill will allow developers to apply to the Director General for a certificate certifying that the carrying out of specified development on specified land is permissible with development consent, despite any prohibition for the carrying out of the development under the planning control provisions of the local plan (Division 4.7, Planning Bill).

The implication is that development will be able to proceed before key strategic planning processes (in particular, the preparation of sub-regional plans and local land use plans) have been completed. There is no reason why existing legislation and/or policies should not remain in force until subregional delivery plans and local land use plans are put in place.

NSW Planning Policies and Regional Plans are non-statutory instruments and it is intended that they will be given effect through statutory controls set out in subregional delivery plans and local land use plans. It is inappropriate for development that would otherwise be prohibited or restricted by an existing environmental planning instrument to proceed before the statutory controls implementing these policies are introduced. It essentially gives developers that opportunity 'jump the queue'. Further, the proposal to allow only councils or proponents to appeal decisions for the issuing of strategic compliance certificate is not supported as it expands developer rights without providing equal rights for the community.

The strategic compatibility certificate proposals will also centralise power in the Director-General for Planning. The Director General's grounds for issuing a certificate are broad and discretionary. This raises a significant corruption risk, particularly given developers are likely to gain significant windfalls as the result of these decisions.

The White Paper claims that strategic compatibility certificates will only be an interim measure and once regional growth plans and subregional delivery plans are complete, or the program set out by the sub-regional delivery plan is complete, certificates will no longer be issued (White Paper, p145). However provisions allowing the issuing of strategic compatibility certificates up until the point that planning control provisions in the local plan are amended appear in the Exposure Planning Bill. Further, these provisions are embedded in the legislation and have the potential to be manipulated by developers for years to come.

The White Paper also suggests that a higher level of community engagement will be required as part of the assessment of any subsequent development application permitted by the certificate, but there does not appear to be any mechanism in the Exposure Planning Bill requiring this higher level of community engagement.

Already developers are 'pushing the envelope' on such certificates and other policy instruments – effectively making the community redundant in planning.[38] There is a high level of concern amongst our supporters and the wider community with respect to the strategic compatibility certificates and we urge the Government to abandon plans to introduce strategic compatibility certificates in the new planning system.

**Recommendation 21:** The Government abandons its proposal to introduce strategic compatibility certificates in the new planning system.

### 4.3 Developer initiated rezoning proposals

The White Paper confirms that the independent reviews of pre-gateway and gate way decisions (relating to developer initiated rezoning proposals) introduced in November 2012, will be continued in the new planning system.

As outlined in our May 2012 submission to the draft policy statement '*More local, more accountable plan making',* there is significant community concern over proponent initiated spot rezoning proposals and whether there is any public benefit associated with them. Spot rezoning has the potential to undermine strategic planning processes. If strategic planning is done properly then there should be little need for rezoning to take place between periodic reviews of local land use plans. Again, the outcomes of these decisions have the potential to deliver significant windfalls for developers.

Retaining developer initiated spot rezoning in the new planning system does little to build community confidence in the shift to improved upfront strategic planning. We would recommend that any proposed amendment to a planning instrument be required to go through an assessment, consultation and approval process that is at least as rigorous as the process for developing the principle instrument, to dissuade proponents from 'unpicking' the outcomes of a strategic planning process.

**Recommendation 22:** Under the new planning system proposed amendments to a planning instrument must be required to go through an assessment, consultation and approval process that is at least as rigorous as the process for developing the principle instrument.

### 4.4 Concurrences, consultation and other legislative approvals

The planning system has an important role in managing and mitigating the impact of development on the environment and communities. It also has an important role in helping to secure important environmental outcomes, such as ensuring there is no further loss of endangered species or endangered ecological communities.

[38] Urban Taskforce (2013), Making NSW No 1. in Planning and Building

Historically, the EPA Act has recognised the important concurrence role of Government agencies, and has also facilitated the process of obtaining permits and approvals required under environmental protection legislation, through provisions for integrated development.[39] For example:

- In order to ensure that impacts are properly assessed and managed, the EPA Act requires that in certain circumstances the concurrence of a person other than the consent authority is required before development consent can be given.[40]

- The EPA Act has also facilitated the process of obtaining permits and approvals required under environmental protection legislation, through provisions for integrated development.[41] Such approvals and permits play an important role in managing impacts of development on significant matters such as marine environments, air pollution, heritage, and Aboriginal heritage.

The integrated development provisions of the EPA Act require the development consent authority to obtain general terms of approval from other approval bodies during the assessment of development applications. This process has the benefit of having all impacts of development considered at the same time, supports a whole-of-Government approach to planning and provides the consent authority with expertise advice on the impacts of proposed development. It also provides certainty to the proponent that it will be able to obtain the additional approval or permit in the event development consent is granted.

When Part 3A was introduced it removed important licensing and approval requirements from other agencies for Part 3A projects. This has continued with the repeal of Part 3A and the reintroduction of state significant development under Part 4.

The White Paper and Exposure Planning Bill continue with this push to override important environmental approvals:

- For the purpose of public priority infrastructure, State infrastructure development or State significant development the Exposure Planning Bill identifies approvals that are not required (section 6.2, Exposure Planning Bill) or approvals that must be issues consistently with development approval issued under the planning legislation (section 6.3, Exposure Planning Bill).

- With respect to development requiring consent (other than State significant development or complying development), proposals to introduce 'one-stop referrals' now have the Director General, Department of Planning and Infrastructure acting in the place of the approval body that would issue the environmental approval (section 6.12(1), Exposure Planning Bill).

While we recognise the desire to improve the efficiency of the concurrence and referral process, the outcome is going to be poorer outcomes for the environment. Specifically:

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[39] See, for example, section 90- 93B of the EPA Act. Examples of other legislation requiring permits include *Fisheries Management Act 1994, Heritage Act 1977, Protection of the Environment Operations Act 1997, and Water Management Act 2000, National Parks and Wildlife Act 1974, Roads Act 1993*

[40] See for example ss 79B(3) and section 112C of the EPA Act which require that the concurrence of the Director General of the Department of Environment, Climate Change and Water (or current equivalent) is obtained. This requirement is imposed to ensure that there is proper assessment of potential impacts on threatened species and endangered ecological communities and allows the primary decision maker to draw on the expertise of the Department of Environment, Climate Change and Water (or current equivalent). See also State Environmental Planning Policy No 14 (Coastal Wetlands) and State Environmental Planning Policy No 26 (Littoral Rainforest) which requires the concurrence of the Director of the Department of Planning (or current equivalent). We also note that some local environment plans preceding the *Standard Instrument (Local Environmental Plans) Order* 2006 (Standard Instrument) may also contain provisions requiring the concurrence of the head of a different agency. The Standard Instrument contains a compulsory clause that requires the concurrence of Director General of the Department of Planning for variations to development standards.

[41] Section, for example, section 90- 93B of the EPA Act. Examples of other legislation requiring permits include *Fisheries Management Act 1994, Heritage Act 1977, Protection of the Environment Operations Act 1997, and Water Management Act 2000, National Parks and Wildlife Act 1974, Roads Act 1993*

- Provisions that override environmental approvals for public priority infrastructure, State infrastructure development and State significant development are contrary to the proposition that development that is likely to have the most impact should be subject to the highest scrutiny.[42]

- Environmental approvals are often subject to prescribed assessment criteria. By overriding environmental approvals, there is a real risk that the assessment of impacts of development will not be subject to the same level of scrutiny as intended by those permits and approvals.[43] In order to ensure there is no weakening of environmental protection the consent authority must ensure that its level of assessment matches that required in the relevant environmental protection legislation.

- Centralising the assessment of environmental approvals in the Department of Planning and Infrastructure is contrary to a whole-of Government approach to planning, and fails to draw on the expertise of specialised Government agencies.

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 sustainable outcomes. 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.*[44]

If the Government is committed to proper environmental protection and facilitating a whole -of - government approach to planning, it would support environmental approvals, including for State significant development, and the important role of expert agencies in planning and development decisions.

**Recommendation 23:** Proposals that override or constrain the issuing of environmental approvals by relevant agencies for public priority infrastructure, State infrastructure development or State significant should be removed.

**Recommendation 24**: Provisions to set up a 'one-stop-shop' that coordinates the assessment of concurrences and approvals that are required under other legislation should be revised and approval power should not be centralised in the Director General.

**Recommendation 25:** Resources should be directed to those agencies that are required to undertake concurrence and approval functions.

[42] We note on of the proposed objects of the Exposure Planning Bill is 'efficient and timely development assessment proportionate to the likely impacts of the proposed development (section 1.3, Exposure Planning Bill). The provisions of Part 6 of the Exposure Planning Bill which seek to override important environmental approvals and the proper assessment of impact is contrary to this object.

[43] See for example section 45 of the *Protection of the Environment Operations Act* 1997 which sets out the matters to be taken into consideration for environmental protection licenses; see also clause 26 of the *Water Management Regulation* 2011 outlining matters affecting consideration for water approvals under the *Water Management Act* 2000

[44] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (April 2011), Vol. 1, p xxviii.

### 4.5 Merit assessment

The White Paper proposes that development that requires development consent under Part 4 (other than code or complying development) will be merit assessed. This will include EIS assessed development and State significant development. We also note that there are separate approval processes for State infrastructure development and public priority infrastructure.

We make the following general comments with respect to merit assessment:

- The White Paper proposes a category of EIS assessed development, similar to the current designated development. An environmental impact statement will be required for EIS assessed development; however we note that the Department of Planning and Infrastructure will review the current process of issuing assessment requirements to better streamline assessment (White Paper, page 136). Once again we have strong concerns that important environmental and social impact assessment will be weakened by efforts to streamline development assessment processes. We submit that the new planning system include clear requirements for the preparation of environmental impact statements, including requirements that the assessment include an assessment of cumulative impacts and also climate change impacts.

- We also note our comments at 4.7 with respect to improving the integrity of environmental impact assessments.

- Other than a suggestion EIS assessed development will include development with the potential to have high environmental impacts, such as mining and waste management facilities, there is no commitment to maintaining the current categories of designated development, or seeking community input into the proposed categories of EIS assessed development. The Government must provide a clear indication of the types of development that will be EIS assessed development.

- Provisions in Part 4 of the Exposure Planning Bill prescribe broad discretionary criteria for merit assessment of development applications. Elsewhere in this submission we highlight our concerns with broad discretionary criteria and recommend that the new planning system adopt clear and objective decision making criteria to not only improve transparency and accountability but to deliver improved environmental and social outcomes.

In addition to Recommendation 16 at 3.4, and Recommendation 30 and Recommendation 31 at 4.7, we make the following recommendations:

**Recommendation 26:** The new planning system must prescribe clear criteria for the preparation of environmental impact statements, including requirements for the assessment of cumulative impacts and also climate change impacts.

### 4.6 State significant development

As outlined above, the review of the NSW planning system arose from wide-spread community concern, particularly with the former Part 3A of the *Environmental Planning and Assessment Act* 1979 (**EPA Act**). Part 3A vested significant discretionary power in the Minister for Planning, introduced provisions to override important environmental approvals and limited third party appeal rights.

Despite the repeal of Part 3A, some of the most concerning aspects were retained in the provisions relating to State significant development in Part 4 of the EPA Act. It is now proposed to carry many of these provisions over the new planning system.

As highlighted above, it is a recognised proposition that development that is likely to have the most impact should be subject to the greatest level of scrutiny. Yet despite substantial community feedback and recommendations from the Independent Commission against Corruption, the new planning system continues to:

- Provide the Minister with wide discretionary power for declaring a project as 'State significant development' (section 4.29, Exposure Planning Bill)
- Prescribe a range of discretionary matters for consideration by the consent authority in assessing a development application for State significant development, rather than providing clear and objective criteria
- Override important environmental approvals; a number of environmental approvals are not required and others must be consistent with approvals given by the planning consent authority
- Limit third party objector appeal rights for State significant development where there has been a public hearing by the Planning Assessment Commission

The Exposure Planning Bill also includes provisions that seek to prevent judicial review proceedings of State significant development approvals.[45] That is, it limits the grounds on which to challenge an unlawful decision to approve State significant development.

In addition, there are other concerns that arise on further inspection of the Exposure Planning Bill:

- An environmental impact statement (EIS) is only required for development that is also 'EIS assessed development'. It is possible that certain State significant development is not 'EIS assessed development' in which case Director General may issue environmental assessment requirements for an application which is to also be accompanied by a statement of environmental effects. We recommend that an EIS be required for all State significant development. Please see further our comments on improving the integrity of environmental planning instruments below.

- The criteria for undertaking a merit assessment of State significant development are broad-brush (e.g. any likely impacts on the natural or built environment). Refer to 3.4 above regarding our concerns with respect to discretionary decision making and our recommendation that planning legislation includes a clear objective decision making criteria for decision makers in assessment the merits of development applications, including for example a 'maintain and improve' threshold test.

- The 'public interest' criterion has been qualified to require, in particular, whether any public benefit outweighs any adverse impact. We do not consider it appropriate to include this proposed amendment to the public interest criterion because:
    - a body of case law as to what constitutes the 'public interest' already exists,
    - this provision skews the definition of 'public interest' in favour of harmful development, by asking the decision maker to place an emphasis on whether a claimed public benefit is sufficient to warrant adverse impacts on the environment or local community,
    - 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.

[45] See section 10.12, Exposure Planning Bill.

Given the significant and continuing community concern with the State significant development approval process despite the repeal of Part 3A, and in light of ICAC's recommendations for anti-corruption safeguards in the NSW planning system, the Government should ensure that development likely to have a significant impact on the environment and communities is subject to robust and transparent assessment processes.

**Recommendation 27:** The new planning system must prescribe clear and objective criteria as to the types of development that can be declared State significant development by the Minister.

**Recommendation 28:** Require all applications for State significant development to be accompanied by an environmental impact statement.

### 4.7 Integrity of environmental impact statements

The Government has indicated that it will work with stakeholders to examine different accreditation models and alternatives to address issues raised with respect to the integrity of environmental impact statements (White Paper, page 138).

We recognise that an accreditation scheme for environmental consultants has a number of benefits, for example:

- Ensuring that development plans are decided based on reliable information,
- Increasing the legitimacy of EISs for the public and reduces risks of corruption,
- Emphasising the need for continual education and training in planning matters,
- Encouraging the use of EIS as dependable sources for further efficient strategic planning.

We also submit that accreditation should apply to all persons preparing environmental assessments or studies under the planning system (for example, environmental studies that underpin strategic planning processes) and not just consultants preparing environmental impact assessments.

While we see the accreditation of environmental consultants as an important step forward in the process of improving the integrity of environmental consultants, we see the more important issue as being breaking the financial 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. In our previous submissions to the NSW planning system review we suggest that 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 and 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.[46]

[46] See above no. 2, no. 3 and no. 4.

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:

- Clear provisions that allow consent authorities to reject development applications that contain inadequate or inaccurate information,

- Strategic auditing and quality assurance processes 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,

- 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 EIA predictions over time.

**Finally we support the strengthening of the offence relating to false and misleading information, proposed in the Exposure Planning Bill 2013** (section 10.22, Exposure Planning Bill). We note that to the best of our knowledge there have been no prosecutions under the existing provision and would welcome increased compliance and enforcement efforts by the Department of Planning and Infrastructure under the new planning system, including with respect to this new provision.

**Recommendation 29:** The NSW Government should work with stakeholders and the community to develop a legislative framework for the accreditation and, more importantly, independent appointment of environmental consultants.

**Recommendation 30:** In order to further improve the integrity of environmental impact statements, the new planning system should:

- Ensure the assessment and scrutiny of development is commensurate with potential impacts,
- Require consent authorities to reject reports that are unsatisfactory,
- Require external auditing of environmental assessment reports, and
- Include annual reporting requirements.

### 4.8 State infrastructure development and public priority infrastructure

Part 5 of the Exposure Planning Bill sets out the assessment framework for State infrastructure development and public priority infrastructure. Development consent under Part 4 is not required.

While we support efforts to better improve the link between infrastructure and planning, we recognise that infrastructure projects can have significant environmental and social impacts, similar to private developments. It is therefore essential that infrastructure projects be subject to robust and reliable environmental assessment, and that the process for approving infrastructure projects in open and transparent.

Our concerns with the provisions of Part 5 reflect our overarching concerns with the Exposure Planning Bill, for example:

- The Minister's power to declare a project to be State Infrastructure Development are broad and discretionary (section 5.10, Exposure Planning Bill). As outlined elsewhere in our submission, we state that the Minister must be required to exercise his powers in accordance with clear and

objective decision making criteria. This would apply also to the Minister's powers under Part 5 of the Exposure Planning Bill.

- Part 5 requires the proponent of State infrastructure development to prepare an Environmental Impact Statement in accordance with the Director General's requirements. Our submissions at 4.7 for improving the integrity of environmental impact statements apply equally to environmental impact statements prepared under Part 5 of the Exposure Planning Bill.

- Section 10.12 seeks to limit judicial review proceedings for any provisions under Part 5 relating to approval for State infrastructure development. We strongly oppose provisions that seek to restrict the remedying of unlawful decisions, as further outlined in 5.2 of this submission.

Finally, we note that the EDO NSW submission to the White Paper makes a number of recommendations to improve the legislative framework for the approval of state infrastructure development and public priority infrastructure.

**Please refer also to Appendix 1 of our report *Our Environment, Our Communities - Integrating environmental outcomes and community engagement in the NSW planning system* for recommendations on improving development assessment processes in the NSW Planning System. A copy is included at Attachment 1 to this submission.**

## 5. ACCOUNTABILITY AND TRANSPARENCY

One of the central tenets of the Government's election promise was to address the risks and perceptions of corruption in the planning system and restore focus on community engagement, accountability and the public interest.[47]

Unfortunately, and despite the repeal of Part 3A, components of the EPA Act that are recognised as having potential corruption risk, or which are criticised for limiting accountability and transparency in decision making have been carried into the Exposure Planning Bill. Of greater concern are new provisions that increase corruption risk and are contrary to Government messaging about increasing transparency and accountability in the new system. Our key concerns our outlined below.

### 5.1 Concentration of discretionary powers in the Minister and Director General

The White Paper suggests there will be improved accountability and transparency in the new planning system however a substantial amount of discretionary power remains with the Minister and Director General:

- The Minister has significant discretion to make, amend or repeal strategic plans and local plans, and in some instances, can determine the requirements for community participation, or that no community participation is required (sections 3.9, 3.14, 3.21(2)(c), Planning Bill).

- The issuing of strategic compatibility certificates is at the discretion of the Director General (Division 4.7, Planning Bill).

- The Minister has the power to make an order that development on specified land be State significant development (section 4.29, Planning Bill). There are no constraints on the Minister's power other than he must seek advice from the Planning Assessment Commission and make this advice publically available.

[47] *Putting the Community Back Into Planning – The NSW Liberal and National Parties' plan to reform the State's planning system*, September 2009

As outlined at 3.6, 4.2 and 4.6 of this submission, far from increasing certainty and improving transparency, these proposals have the potential to be misused by developers and undermine any certainty and community buy-in that would have come out of effective strategic planning.

**Recommendation 31:** Ensure that discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective and open to judicial review.

### 5.2 Appeal rights and open standing

**We strongly oppose provisions that seek to limit third party merit appeal rights or judicial review proceedings.**

There are important benefits from third party appeal rights and public interest litigation, including participative democracy, executive accountability, institutional integrity, improved decision making and rational development of the law. The open standing provision in the EPA Act provides public confidence that laws will be adhered to and are able to be enforced and that potential transgressors may have second thoughts, and ensures that limited resources are directed to the resolution of substantive issues.

The White Paper says applicant and merit appeal rights will remain unchanged in the new development assessment system (page 143, White Paper), and the right for any person to go the Land and Environment Court to remedy a breach of the Act (the open standing provision) will be continued (page 147, White Paper). However, the new planning system contains provisions that restrict third party appeal rights and the open standing provision:

- The Planning Bill continues to restrict appeal rights against decisions that have been made after a public hearing by the Planning Assessment Commission (section 9.6(3), Planning Bill). Such a restriction seeks to override judicial oversight of planning decisions, and reduces the transparency and accountability of decisions of the Planning Assessment Commission.

- More alarmingly, section 10.12 of the Planning Bill seeks to substantially limit judicial review proceedings to remedy an unlawful decision made with respect to (a) the making or amending of local plans and strategic plans; (b) approval of State significant development and State significant infrastructure; and (c) implementation of the Public Participation Charter.

- Section 10.12 also seeks to limit third party environmental appeal proceedings under the *Protection of the Environment Operation Act* 1997 to remedy breaches of any Act where there is a likelihood of environmental harm.

- The restrictions imposed by section 9.6(3) and 10.12 significantly curtail the ability for third parties to remedy poor or unlawful decisions, and breaches of the planning legislation. This is contrary to the premise of increasing accountability in the NSW planning system. The amendments also seek to give effect to Recommendation 16 of the Independent Commission against Corruption in its report *Anti-corruption safeguards and the NSW planning system* (February 2013).

At the same time, proponent and developer review rights will be expanded. As outlined above, the independent reviews of pre-gateway and gate way decisions (relating to developer initiated rezoning proposals) introduced in November 2012, will be entrenched in the new planning system (see 4.3 above). Proponents will also have court appeal rights if council fails to approve code-assessed development within 25 days, and an expanded range of appeals will now be steamed into mandatory conciliation-arbitration.

This creates an unbalanced system with limited checks and balances to ensure due process and accountability.

We are alarmed that, despite Government statements that appeal rights will not be changed under the new planning system, there are clear reductions in third party appeal rights in the Exposure Planning Bill, and expanded rights for proponents and developers. Provisions that seek to restrict legal proceedings are not only contrary to improving transparency and accountability on the new planning system, it is an abuse of faith for the Government to publically make false claims on this issue.

**Recommendation 32:** Remove the restriction to third party merit appeal rights against decisions that have been made following a public hearing by the Planning Assessment Commission

**Recommendation 33**: Remove any restriction on the right of any person to remedy or restrain a breach of the Act, including section 10.12 of the Exposure Planning Bill

### 5.3 Reducing corruption risks in the NSW Planning System

In February 2012, the Independent Commission for Corruption (ICAC) released its report *Anti-corruption safeguards and the NSW planning system*.[48] The report sets out key corruption prevention safeguards that would reduce the frequency of corruption if integrated into the NSW planning system.

In our view, the White Paper has failed to adequately address the key recommendations of the Independent Commission Against Corruption in its report, *Anti-corruption safeguards and the NSW planning system* (February 2012). In particular, our key concerns with the White Paper and Exposure Planning Bill outlined in this submission highlight that new planning system does not go far enough in responding to ICAC recommendations that :

- Discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective (Recommendation 1)
- Adequate oversight safeguards are in place for the assessment and determination of development applications that propose prohibited uses (Recommendation 3)
- The standard community consultation requirements for draft local environmental plans be given statutory backing (Recommendation 14)
- The NSW Government considers expanding the categories of development subject to third party merit appeals to include private sector development that is significant and controversial, or represents a significant departure from existing development standards, or is the subject of a voluntary planning agreement (Recommendation 16).

In light of the Government's failure to adequately address the ICAC's recommendations, we recommend that the Government commission the Independent Commission Against Corruption to undertake an assessment of the corruption risks inherent in its Exposure Planning Bill and proposed planning system, and to halt its reform timetable until the commission has publically reported its findings.

**Recommendation 34:** The Government should seek a report by the Independent Commission against Corruption into the corruption risks inherent in its Exposure Planning Bill and proposed planning system, and delay moving ahead with the Exposure Planning Bill until the Commission has publically reported its findings.

[48] Above no. 13

**ATTACHMENT 1:** Letter to Minister Hazzard dated 7 February 2013

Nature Conservation Council of NSW
The voice for the environment since 1955

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The Hon. Brad Hazzard MP
Minister for Planning and Infrastructure
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By email: office@hazzard.minister.nsw.gov.au

7 February 2013

**Release of Planning White Paper**

Dear Minister Hazzard,

We write in anticipation of the White Paper, which we understand is due to be released for public comment in February 2013.

As you are aware, our organisations, together with EDO NSW, have been actively engaged in the NSW Planning System Review for the past eighteen months and we thank you for the opportunity to contribute to this important reform process. We look forward to continuing to engage with both the Department of Planning and Infrastructure, and your office, as the process continues.

Throughout the review process our organisations have continued to emphasise that the NSW Planning System Review presents an opportunity to develop a modern planning system that is consistent with contemporary community expectations that planning and development in NSW will be carried out within the capacities of our fragile natural environment and will create healthy, liveable and sustainable communities.

We were disappointed that the Green Paper placed a strong emphasis on delivering rapid approval for development, that had the potential to prioritise time or targets over risk management, with limited information about the protection of environmental and social values. We remain deeply concerned that the Government's proposals prioritise short-term economic objectives at the expense of a balanced long-term vision for NSW.

We are also concerned that the proposed reforms do not go far enough in addressing the systemic lack of transparency and accountability. Given the genuine community dissatisfaction with the planning system, including the perceived levels of corruption and distrust that plagued the former Labor government, we would expect that the O'Farrell Government would be doing more to address wide community concerns, particularly by implementing the recommendations of the Independent Commission against Corruption.

Further, while we recognise that genuine efforts are being made to improve community participation at the strategic planning stage, we are concerned that without a clear legislative framework and necessary resourcing, genuine and meaningful public participation will not be achieved.

In addition, we have consistently argued against proposals to substantially reduce public participation opportunities in development assessment, including proposals to significantly expand code complying development and proposals to limit third party review and appeal rights. To this end, we do not wish to be identified, explicitly or implicitly, as endorsing the proposal to substantially reduce community participation at the development assessment stage.

The proposal to substantially reduce community involvement in development assessment is contrary to the spirit and intent of the *Public Participation Charter*, as originally proposed by our organisations, which was intended to ensure appropriate community involvement in strategic planning, development assessment and consideration of risk.

Finally, in light of our concerns and in anticipation of the release of the White Paper we have prepared a White Paper Checklist (***enclosed***) which we will be using to assess the White Paper against fifteen key criteria which we see as essential for a planning system that will achieve ecologically sustainable development and protect our environment and our communities.

We would be happy to discuss these matters with you further. Please do not hesitate to contact Cerin Loane, Planning Policy Officer on (02) 9516 1488 or cloane@nccnsw.org.au to make the necessary arrangements.

Yours sincerely,

Pepe Clarke
Chief Executive Officer
Nature Conservation Council of NSW

Jeff Angel
Director
Total Environment Centre

**ATTACHMENT 2:** Extract from *Our Environment, Our Communities - Integrating environmental outcomes and community engagement in the NSW planning system*

**APPENDIX 1**

**PROPOSED LEGISLATIVE MODEL FOR INTEGRATING ENVIRONMENTAL CONSIDERATIONS IN THE NSW PLANNING SYSTEM**

| Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|
| **OBJECTIVES** | | |
| Make Ecologically Sustainable Development (ESD) the overarching objective of the new planning system. | ESD should underpin all decisions made under the new planning system, and decision makers should be required to act in accordance with the principles of ESD.[i] | ▪ A proper application of ESD recognises that environmental integrity underpins social and economic health and takes full account of environmental costs and externalities.[ii]<br>▪ While ESD has obvious environmental benefits the economic and social benefits are also significant. [iii] |
| **STATUTORY BODIES** | | |
| Legislative provisions that establish a State Planning Commission | An independent State Planning Commission (or similar agency) 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 instruments, manage collaboration between Government agencies and maintain a central system of | ▪ Any proposal to introduce a State Planning Commission would need to be developed in consultation with industry and the community. |

| Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|
| | information.[iv] | |
| Legislative provisions to establish a central information agency to audit existing data sources, and coordinate collection and sharing of information.<br><br>*Note: Provisions for a central information agency may sit outside planning legislation | Efficiency and an improved 'whole-of Government' approach to planning would be facilitated by sharing of data across sectors | ▪ An extensive set of data already exists in NSW and Australia, that can be utilised to support strategic and land use planning processes. [v]<br><br>▪ Consideration would need to be given as to how to improve processes for sharing data across sectors and how to build on data, with a commitment to utilise new technologies as they become available. |
| **STRATEGIC PLANNING** | | |
| ***Legislative framework for strategic and land use planning***<br><br>The new planning system must set out a legislative framework for strategic and land use planning. Key elements for this framework are outlined below. These key elements should apply to all processes, including:<br><br>▪ the preparation and making of regional strategies (or their equivalents)[vi],<br>▪ the preparation and making of environmental planning instruments including, for example of local environment plans and state environmental planning policies (or their equivalents). | | |
| Legislative requirement to carry out robust baseline studies of environmental and NRM values. | Best practice strategic and land use planning must be underpinned by scientific, factual and up-to-date data. | This could be supported by:<br><br>▪ a State Planning Commission that coordinates the carrying out of baseline studies,<br>▪ the use of existing data sets and sharing of information, coordinated by a central agency. |

| Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|
| Legislative requirement to seek the concurrence of prescribed agencies. | Planning systems should not be concerned solely with development. Rather, strategic and land use planning requires that consideration be given to the complete range of interests that need to be managed for the future – including, for example, transport, infrastructure, resources, environment, health and community. | ▪ It is noted that section 34A of the EP&A Act requires that before an environmental planning instrument is made, the relevant authority must consult with the Director-General of the Department of Environment, Climate Change and Water (now Office of Environment and Heritage) if, in the opinion of the relevant authority, critical habitat or threatened species, populations or ecological communities, or their habitats, will or may be adversely affected by the proposed instrument.<br><br>▪ Consultation with the Office of Environment and Heritage should not be restricted to these limited circumstances, and that consultation with all relevant agencies must be mandatory in the strategic planning processes and with respect to the preparation of planning instruments.[vii] |
| Legislative requirement to undertake strategic environmental assessment, including assessment of prescribed environmental criteria. | Strategic environmental assessment 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.[viii] | ▪ The Hawke report recommends a framework for strategic assessment which would:<br>▪ require an assessment of the extent to which a plan, policy or program:<br>- protects the environment<br>- promotes ESD<br>- promotes the conservation of biodiversity<br>- provides for the protection of heritage<br>▪ set minimum standards of acceptable environmental impacts, and<br>▪ set of higher level considerations, for example for any subsequent development approval. [ix]<br><br>▪ Key criteria could include, for example:<br>- biodiversity and ecosystem function |

| Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|
| | | - catchment health and water quality<br>- assessment of cumulative impacts<br>- climate change impacts and opportunities for adaptation<br>- impacts on coastal processes<br><br>▪ Mandatory provisions could be supported by methodologies that assist in meeting essential criteria.[x] |
| Legislative requirement that strategic plans and planning instruments are developed having consideration to existing strategic documents, including for example, regional conservation plans and Catchment Action Plans (CAPs). | Effective strategic planning would require planning instruments and strategies to be aligned (as best as possible) with environmental protection and conservation strategies. | In order to ensure that environmental considerations are appropriately integrated the provisions should require strategic planning and planning instruments to be consistent with CAPs and to be prepared in conjunction with regional conservation plans.<br><br>Legislation should prescribe other information that must also be considered, including, for example:<br><br>▪ bushfire risk mapping<br>▪ Aboriginal land use plans<br>▪ coastal strategies. |
| Legislative requirement that planning instruments identify competing and complementary land uses and values. | An effective strategic planning framework should identify competing land uses and values, and provide mechanisms for assigning appropriate land uses. | This process would support, for example:<br><br>▪ identification of high level protection zones, being 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.<br>▪ a land use matrix that provides for appropriate environmental protection zones<br>▪ identification of areas to which prescribed controls would apply (for example, coastal protection zones). |

| Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|
| | | ▪ caps on certain types of development to manage cumulative impacts |
| A legislative requirement that planning instruments (including regional strategic plans) achieve prescribed environmental thresholds (such as a rigorous 'improve or maintain' test). | ▪ NSW 2021: Goal 22 - Protect our natural environment (including protect and conserve land, biodiversity and native vegetation)[xi]<br>▪ Natural Resources Commission State Wide Goals.[xii] | For example, the Local Government and Shires Association suggests that consideration be given to initiating an "improve or maintain target for all significant natural resource features in strategic land use planning".[xiii] |
| Legislative provisions for community engagement in strategic and land use planning processes. | Effective and genuine public participation in strategic and land use planning is imperative for assisting decision makers in identifying public interest concerns, utilising local knowledge and ensuring community 'buy-in' | See further **Part 2** of this Report – Community Engagement in the NSW Planning System, and **Annexure 2** |
| Provisions that give appropriate weight to planning instruments. | Any framework for strategic planning should provide local land use planning that is consistent with long term strategic planning. [xiv] | Further consideration should be given the weight to of regional strategic plans and other key policy documents. |
| Legislative provision to report on and review strategic plans and environmental planning instruments at regular intervals. | 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.[xv] The new planning system should mandate clear minimum review periods that are appropriate to the significance and intended period of application of the plan or instrument.[xvi] |
| | | |

| Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|
| **DEVELOPMENT ASSESSMENT** | | |
| ***Integrity of Environmental Impact Assessments*** | | |
| Legislative framework for the independent appointment of environmental consultants.[xvii] | 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.[xviii] | Further measures to ensure the integrity of environmental impact statements include:<br>▪ accreditation of environmental and planning consultants,<br>▪ ensuring assessment and scrutiny is commensurate with potential impacts,<br>▪ requirements to reject reports that are unsatisfactory,<br>▪ external auditing of environmental assessment reports, and<br>▪ annual reporting requirements<br>▪ strengthening penalties for providing inaccurate information beyond false and misleading to include negligent or reckless inaccuracies.[xix] |
| ***Objective decision making framework:*** The new planning system should include legislative provisions that require the decision maker to ensure that development achieves prescribed objective environmental criteria before granting approval to a development proposal**.** These criteria 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. This will help to ensure development which is ecologically sustainable, while providing for economic and social wellbeing. **Each of these objective environmental criteria is further discussed below.** | | |

| Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|
| The decision maker must ensure that development improves or maintains biodiversity and ecosystem function. | Implementing an improve or maintain test will help address the very real issue of declining biodiversity in NSW[xx] and achieve the goals set by the Natural Resources Commission State Wide Goals[xxi] and the NSW 2021 State plan.[xxii] | This could be support by a methodology (similar to that used under the Native Vegetation Act[xxiii]) that allows a decision maker to make an objective assessment of whether a proposed development improves or maintains biodiversity and ecosystem function. |
| The decision maker must ensure that development improves or maintains catchment health and water quality. | ▪ NSW 2021: Goal 22 - Protect our natural environment (including protect rivers, wetlands and coastal environments)[xxiv]<br>▪ Natural Resources Commission State Wide Goals.[xxv] | This provision could be supported by a methodology that allows a decision maker to make an objective assessment of whether a proposed development improves or maintains catchment health and water quality. See for example, the *Neutral or Beneficial Effect on Water Quality Assessment Guideline* prepared by the Sydney Catchment Authority for the *State Environmental Planning Policy (Sydney Drinking Water Catchment)* 2011). |
| Proposed development must comply with energy and water efficiency standards (for example, a BASIX type model). | The new planning system must support improved urban sustainability outcomes, including reduction in energy and water usage. | While we generally support the existing BASIX system as a method for achieving energy and water reduction targets for house and units, we recognise the following shortcomings:<br>▪ 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.<br>▪ It does not allow LEPs or DCPs to impose improved standards for energy or water consumption.<br>▪ Auditing and monitoring can be improved, to ensure that commitments made in a BASIX certificate continue to be met.<br><br>The existing BASIX model should be improved and its application extended to ensure improved urban sustainability outcomes. |

| Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|
| The cumulative impacts of proposed development must not exceed prescribed environmental thresholds.[xxvi] | Cumulative impacts must be properly accounted for in development decisions, so that development occurs within environmental limits (based on identified environmental thresholds and outcomes) | We note that the Namoi Catchment Management Authority has recently been involved with developing a methodology for assessing cumulative impacts from mining.[xxvii] The work being done by the Namoi CMA could be continued and developed for application in the planning system. |
| Proposed development must comply with prescribed standards for climate change adaption and mitigation. | 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:<br>▪ rises in sea levels,<br>▪ increased bushfire activity,<br>▪ decreased rainfall,<br>▪ increased ocean temperatures and acidification,<br>▪ increased storm activity, and<br>▪ loss of biodiversity.[xxviii] | This would require an appropriate regime to deal with coastal threats, environment rehabilitation, other climate change mitigation and adaptation mechanisms.[xxix] |
| Proposed development must comply with prescribed pollution laws and standards.[xxx] | The new planning system must support reduced environmental impact from pollution and regulate pollution based on environmental limits. | ▪ Pollution limits should be set based on the receiving environment's ability to maintain ecosystem health and biological processes in light of the pollution.<br>▪ Need to consider point and diffuse sources plus transport of contaminants within the system and the contaminants ability to move between receiving environments post release |

| Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|
| ***Interagency approach to development assessment***: There is an important role for interagency collaboration in the new planning system in order to achieve the effective integration of environmental considerations. The new planning system should require consultation with relevant agencies, and the concurrence of agencies in circumstances where permits or approvals are required under other legislation. | | |
| Legislative requirement to **consult** with agencies | An interagency approach to development assessment is essential to integrating environmental considerations in the planning system. Decision makers must be required to consider all potential impacts of a proposed development and seek advice from other Government agencies where appropriate | An interagency approach is important because:<br>▪ it draws on expertise from other agencies and assists to identify developments that are inappropriate on environmental and technical grounds,<br>▪ ensures that appropriate conditions are attached to any consent for development, and streamlines the process for proponents who may otherwise have to approach each agency individually. |
| Legislative requirement to obtain the **concurrence** of agencies in circumstances where permits or approvals are required under other legislation. | Any requirement to obtain permits or approvals under other legislation must be facilitated by the planning system (not overridden). [xxxi] | An efficient concurrence system could be assisted by:<br>▪ an objective environmental criteria based decision making process (as outlined in this report)<br>▪ ePlanning systems that support interagency collaboration |

**APPENDIX 2**

**PROPOSED LEGISLATIVE MODEL FOR INTEGRATING COMMUNITY CONSIDERATIONS IN THE NSW PLANNING SYSTEM**

| Stage in the process | Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|---|
| **STRATEGIC PLANNING PROCESSES**<br><br>The following framework would apply to all processes for strategic planning, including the preparation of LEPs, SEPPs, regional strategic plans and other key policy documents.[xxxii] While the terminology used is comparable to the existing LEP making process, the framework can and should be applied to other processes. | | | |
| Preliminary stage<br><br>(e.g. pre-gateway) – early engagement | All planning authorities should be required to prepare a community engagement strategy that makes provision for early engagement with the community in strategic planning processes. | Early engagement of the community can create community 'buy-in' by having community involved in shaping a project | In Part 2 of the report we propose that all agencies and councils be required to prepare a community engagement strategy that is in accordance with an adopted Charter of Public Participation. |
| Obligation to consult | Legislative requirement for public consultation on planning proposals. | Genuine and meaningful public participation has the benefit of:<br><br>▪ empowering local communities,<br>▪ improving decision making by assisting decision makers in identifying public interest concerns and utilising local knowledge,<br>▪ ensuring community 'buy-in' of decisions which can reduce potential disputes,[xxxiii]<br>▪ helping to ensure fairness, justice and accountability in decision making. | The obligation to consult should not be discretionary. A framework for community consultation should be clearly prescribed in legislation. |

| Stage in the process | Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|---|
| Notification of planning proposal | Legislative requirement to give notification. This provision should mandate:<br><br>▪ That notice is to be given:<br>- in Government Gazette, and<br>- in appropriate newspaper, and<br>- on the website of the relevant planning authority.[xxxiv]<br><br>▪ That the planning authority take other reasonable steps to ensure notification is in accordance with the implementation principles of the public participation charter (Charter)[xxxv] (Table 2).<br><br>▪ That the notice is to include the following information:<br>- the matter being consulted on<br>- where information is available<br>- process for making a submission<br>- closing date for making submission | All persons that will be affected by a planning proposal should be notified | Other reasonable steps may include alerts to those people who have signed up through an electronic system, notification through 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. |

| Stage in the process | Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|---|
| Provide information | ▪ Legislative requirement that the planning authority make the following information available:<br>- the planning proposal<br>- all reports and environmental studies that are required by legislation to be prepared[xxxvi]<br><br>▪ Legislative requirement that the information be made available:<br>- at the office of the planning authority<br>- on the website of the planning authority<br><br>▪ Legislative requirement that the planning authority take other reasonable steps to make information available in accordance with the Charter implementation principles | Best practice community engagement would require the information to be easily understood and accessible. | To ensure information is easily understood and accessible, the planning authority could:<br><br>▪ make the information available in various locations and formats (for example, in hard copy at various locations, electronically on CD, or on website),<br>▪ provide plain English explanations (for example, through facts sheets),<br>▪ establish a secretariat who would be available to respond to enquiries,<br>▪ facilitate community groups to engage independent consultants to provide advise on information. |

| Stage in the process | Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|---|
| Consultation on planning proposal – making submissions | ▪ Legislative right for the public to make a submission during the appointed consultation period<br><br>▪ Legislative requirement that the planning authority take reasonable steps to facilitate consultation in accordance with the Charter implementation principles | Best practice community consultation recognises the diversity within the community and seeks to ensure consultation methods are inclusive and accessible.<br><br>Time must be sufficient to allow public scrutiny, including where documents are large or complex. | As outlined in Part 2 of this report, there are emerging examples and opportunities to move beyond the traditional 'inform and consult' methods of engagement, to more inclusive and collaborative forms of engagement.<br><br>In addition to receiving written submissions, a planning authority can, for example:<br>- facilitate contributions through social media<br>- conduct community workshops (run by an independent facilitator)<br>- undertake surveys<br>- establish drop-in centres<br><br>Contributions arising through these engagement mechanisms must be recorded and form part of the submissions that must be considered by the planning authority. |

| Stage in the process | Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|---|
| Right to be heard | Legislative provision that facilitates the right to be heard | Providing the community with the opportunity to be heard can help assure the community that their views have been considered, facilitate dialogue between the community and the planning authority and supports genuine and meaningful participation | The right to be heard (either as part of a public hearing, or by an established Commission) is a feature of several jurisdictions. See, for example:<br>- Section 57(5)-57(8) of the *Environmental Planning and Assessment Act* 1979 (NSW)[xxxvii]<br>- Section 46 of the *Planning and Development Act* 2005 (WA)[xxxviii]<br>- Sections 23- 25 of the *Planning and Environment* Act 1987 (Vic)[xxxix] |
| Consideration of submissions | Legislative requirement for the appropriate planning authority to consider submissions | Including a legislative requirement that the decision maker must consider submissions made during the consultation period can assure the community that their views have been considered, and supports genuine and meaningful participation | See, for example:<br>- Section 57(8) of the *Environmental Planning and Assessment Act* 1979 (NSW)[xl]<br>- Section 22 of the *Planning and Environment Act 1987 (Vic)*[xli]<br>- Section 118 of the *Sustainable Development Act* 2009 (Qld)[xlii] |
| Respond to submissions | Legislative requirement that requires the planning authority to respond to submissions | Effective public participation communicates to participants how their input affected the decision. | See, for example,<br>▪ Section 118C(iv) of the *Sustainable Development Act* 2009 (Qld)[xliii]<br>▪ Section 30J of the *Land Use Planning and Approvals Act* 1993 (Tas)[xliv] |

| Stage in the process | Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|---|
| Further consultation - including consultation on draft instrument | Mandatory requirement to consult the community on the draft planning instrument | Just as it is important for the community to be consulted on planning proposals (this early engagement ensures community buy-in by allowing the community to shape the proposal) it is also important that the community be consulted on a draft planning instrument. This is because:<br>- there may be significant changes in what was originally proposed and what the final instrument looks like<br>- it is difficult to envisage how an LEP will look from the planning proposal – once drafted, the LEP may vary markedly or operate differently to how it was envisaged (in public's mind).<br>- drafting is complicated and undertaking further consultation on the draft instrument is a good opportunity for open scrutiny | Under existing LEP making process under the EP&A Act, it is within the Minister's discretion as to whether further community consultation is required if a planning proposal is varied (section 58) and there is no requirement to consult on the draft instrument. The new planning system should require consultation not only at the planning proposal phase, but also on the draft instrument. |

**DEVELOPMENT ASSESSMENT PROCESS**

The following framework can be applied to development assessment processes under a new planning system. It could be modified to suit different classes of development. The underlying premise would be that development that is likely to have the greatest impact would be subject to the highest level of community consultation.

| Stage in the process | Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|---|
| Pre – Development Application – early engagement | Requirement that projects of State, regional or local significance that will impact most on the community, and which are appropriate, be developed in consultation with community. | Early engagement of the community can create community 'buy-in' by having community involved in shaping a project. | Encourage developers of significant projects to undertake early community engagement (e.g. sustainable design competitions, WA's Enquiry-by-Design workshop model[xlv]). |
| Notification of Development Applications | Legislative requirement to give notification.<br><br>This provision should mandate:<br><br>▪ That notice is to be given:<br>- in Government Gazette, and<br>- in appropriate newspaper, and<br>- by direct mail to all adjoining/affected land owners,<br>- by signage on the proposed site, and<br>- on the website of the consent authority.<br>▪ That the planning authority take other reasonable steps to ensure notification is in accordance with the Charter implementation principles[xlvi]<br><br>▪ That the notice is to include the following information:<br>- the matter being consulted | All persons that will be affected by a planning proposal should be notified. | Other reasonable steps may include alerts to those people who have signed up through an electronic system, notification through 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. |

| Stage in the process | Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|---|
| | on,<br>- where information is available,<br>- process for making a submission, and<br>- closing date for making submission. | | |
| Provision of information | ▪ Mandatory requirement to make all documents relating to a development application (as prescribed by the legislation, for example, development application, DG requirements, environmental impact assessment or other supporting documentation) publically available<br><br>▪ Legislative requirement that the information be made available:<br>- At the office of the planning authority, and<br>- On the website of the planning authority[xlvii]<br><br>Legislative requirement that the planning authority take other reasonable steps to make information available in accordance with the implementation principles. | Participants should be provided with the information they need to participate in a meaningful way. | This could be achieved by:<br><br>▪ making the information available in various locations and formats (for example, in hard copy at various locations, electronically on CD, or on website)<br>▪ providing plain English explanations (for example, through facts sheets)<br>▪ establishing a secretariat who would be available to respond to inquiries<br>▪ facilitating community groups to engage independent consultants to provide advise on information |

| Stage in the process | Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|---|
| Consultation | ▪ Legislative right for the public to make a submission during the appointed consultation period<br><br>▪ Legislative requirement that the planning authority take reasonable steps to facilitate consultation in accordance with the implementation principles | Best practice community consultation recognises the diversity within the community and seeks to ensure consultation methods are inclusive and accessible.<br><br>Time must be sufficient to allow public scrutiny, including where documents are large or complex | As outlined in Part 2 of this report, there are emerging examples and opportunities to move beyond the traditional 'inform and consult' methods of engagement, to more inclusive and collaborative forms of engagement.<br><br>In addition to receiving written submissions, a consent authority can, for example:<br>- facilitate contributions through social media<br>- conduct community workshops (run by an independent facilitator)<br>- undertake surveys<br>- establish drop-in centres<br><br>Contributions arising through these engagement mechanisms must be recorded and form part of the submissions that must be considered by the consent authority |

| Stage in the process | Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|---|
| Consideration of and response to submissions | Legislative requirement to consider and respond to submissions. | Including a legislative requirement that requires a response to submissions can assure the community that their views have been considered, and supports genuine and meaningful participation. | It should be mandatory for an applicant to be provided with copies of all written submissions made during the consultation period (as opposed to a summary only)<br>▪ If other consultation techniques are used (other than traditional written submissions) then it must be mandatory to provide the applicant with summary of the outcomes of additional consultation (for example, a summary of any public meeting, social media campaign etc)<br>▪ The applicant must be required to provide a public response on submissions and input received during the consultation processes |
| Continued engagement throughout the process | Legislative requirement to make information publically available as it becomes available through the assessment process (this could be facilitated through an ePlanning system). | Community members and the ICAC have criticised the current planning system for not updating communities and stakeholders where appropriate (eg modifications; other agencies' input or decisions).[xlviii] | This could be facilitated by:<br>▪ Developing interactive websites where users can give their email address and be provided with further information during the process<br>▪ Having an appropriate secretariat ("someone on the |

| Stage in the process | Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|---|
| | | | end of the phone") to respond to community inquiries and supply information. |
| Give reasons for decisions | Mandatory requirement for decision makers to give reasons for decisions, including reasons as to why input from the community was adopted, or not adopted, in the final decision | Effective public participation should provide feedback to participants as to how their input affected the decision | For example, ICAC recommends a protocol to deal with situations where the Planning Minister disagrees with a departmental recommendation – to "ensure that any decision to adopt an alternative approach, and the reasons for such a decision, are clearly documented and made publicly available."[xlix] |
| Adequate rights of review and appeal | Legislation must retain and improve third party merits appeal rights for the community, on a more equitable footing with developers, for example:<br>▪ continue to allow third party merits appeals for designated development<br>▪ allow merits appeals for third party objectors where an approved (non-'designated') development exceeds local development standards<br>▪ expand third party appeal rights in other areas to reduce corruption risks and improve decision making, as per ICAC's 2007 and 2012 recommendations[l] | As participants in the decision making process and as people affected by decisions made in the planning process, the community should have recourse to a legislative decision review process<br>▪ Members of the community should have no lesser rights of review and appeal than development proponents<br>▪ Inequitable appeal rights can reduce accountability, increase corruption risks and undermine public trust in the planning system<br>▪ Barriers which inhibit access to justice for community members seeking to protect the public interest, including undue costs risks, should be removed. | ▪ The new planning system must also broaden mechanisms for community involvement in conciliation, mediation and neutral evaluation within the LEC framework |

| Stage in the process | Proposed legislative mechanism/s | Underlying principles | Additional comments |
|---|---|---|---|
| | ▪ reintroduce merit appeal rights for objectors in relation to State Significant Development without restriction<br>▪ make merits appeal and judicial review rights available for critical/ State significant infrastructure projects, and remove 'Ministerial consent' requirements to appeal<br>▪ reduce cost barriers to civil enforcement through an 'own costs' jurisdiction, and/or mandatory use of public interest costs orders for relevant proceedings<br>▪ 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. | | |

[ii] Refer to Part 1 of this report, and see also *Planning for Ecological Sustainable Development - Opportunities for improved environmental outcomes and enhanced community involvement in the*

[ii] See, for example: Australia's *National Strategy for Ecologically Sustainable Development (1992), available at* http://www.environment.gov.au/about/esd/index.html; 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; Hawke, A. (2009), "*Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*", October 2009

[iii] 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. ESD also 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[iii],
- assisting decision makers by properly assessing the true costs and benefits of particular development through full-cost accounting[iii],
- 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.

[iv] See for example, the Western Australian Planning Commission established under the *Planning and Development Act* 2005 (WA). Further information about the Western Australian Planning Commission is available at http://www.planning.wa.gov.au/651.asp

[v] For example, the Spatial eXchange (SIX) is set up as the official source of spatial data for NSW See https://six.nsw.gov.au/wps/portal/. Other information sources could include:

- 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

[vi] Currently, there is no statutory framework for the preparation of regional strategic plans in NSW. We recommend that the new planning system set out a statutory framework for the preparation of regional strategic plans. Environmental assessment at the regional level can help to identify significant habitat corridors, assess land use capacity and potential cumulative impacts and plan for climate change adaption and mitigation.

[vii] Collaboration with agencies could be facilitated by setting up partnership arrangements with CMAs (for example, NRM Senior Officer Groups have been used to ensure interagency coordination during the recent review of Catchment Action Plans) ; or establishing working groups with agency representatives (for example, the LGSA suggest establishing Planning Forum Meetings to coordinate engagement with agencies and key stakeholders, above no.**Error! Bookmark not defined.**, page 20)

[viii] 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[viii], and
- an environmental impact assessment is required when preparing a Fishery Management Strategy under the *Fisheries Management Act* 1994.[viii]

[ix] 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

[x] For example, 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. The work being done by the Namoi CMA could be continued and developed for application in the planning system.

[xi] See http://2021.nsw.gov.au/environment-communities

[xii] http://www.nrc.nsw.gov.au/WorkWeDo/StandardAndTargets/State-wideTargets.aspx.

[xiii] Integrating Natural Resource Management into Local Government Operations, LGSA, above no **Error! Bookmark not defined.**, p 26 and page 35

[xiv] See, for example, the case of Ontario in the Grattan Institute's *Cities: Who Decides?* (2010), J. Kelly, *Cities: Who Decides?* (2010), Grattan Institute, pp 14 and 42. The Ontario government has developed a regional initiative for land use – '*Places to Grow*' – which establishes a legal framework for the Province's long-term growth, including Toronto, and requires municipalities to make their official plans consistent with the growth plan.

[xv] EP&A Act, s 73 and s 33B.

[xvi] 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.

[xvii] Such a framework 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

[xviii] See for example the joint submission *Planning for Ecological Sustainable Development - Opportunities for improved environmental outcomes and enhanced community involvement in the planning system*, above no 4.

[xix] Ibid.

[xx] See for example, the NSW State of the Environment Report 2009, overview, part 7, available http://www.environment.nsw.gov.au/soe/soe2009/ ; Federal State of the Environment Report 2011, summary p 4, available at http://www.environment.gov.au/soe/2011/index.html

[xxi] http://www.nrc.nsw.gov.au/WorkWeDo/StandardAndTargets/State-wideTargets.aspx.

[xxii] See http://2021.nsw.gov.au/environment-communities, specifically Goal 22 - Protect our natural environment (including protect and conserve land, biodiversity and native vegetation)

[xxiii] See, for example, the explanation of the native vegetation environmental outcomes assessment methodology on the Office of Environment and Heritage website: http://www.environment.nsw.gov.au/vegetation/eoam/index.htm

"One of the key objectives of the *Native Vegetation Act 2003* is to end broadscale clearing except where the clearing will improve or maintain environmental outcomes. The *Native Vegetation Regulation 2005* sets out an *Environmental Outcomes Assessment Methodology* (EOAM) that the Catchment Management Authorities (CMAs) must use to assess whether clearing proposals for Property Vegetation Plans (PVPs) and Development Consents meet this criteria. The EOAM is applied using objective, computer-based decision support software known as the Native Vegetation Assessment Tools (NVAT). This software weighs up the positive and negative benefits of different management actions, helping assessment officers to make practical decisions based on the best scientific information available. The methodology and software has evolved as a result of extensive field trials, public submissions and review by panels of independent scientists, farming and environmental interests".

[xxiv] Ibid.

[xxv] Available at: http://www.nrc.nsw.gov.au/WorkWeDo/StandardAndTargets/State-wideTargets.aspx.

[xxvi] This would go beyond a mere consideration of the cumulative impacts and require the decision maker to undertake an assessment in accordance with a prescribed methodology and be satisfied that the cumulative impacts of the development does not exceed a prescribed threshold.

[xxvii] 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.

[xxviii] 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*".

[xxix] For example, Standards Australia (http://www.standards.org.au) has exhibited a draft *Principles-based Climate Change Adaptation Standard for Settlements & Infrastructure* (2011).

[xxx] Including for example standards set by the Environmental Protection Authority. See also for example: ANZECC and AMRCANZ water quality guidelines; National Pollution Protection Council standards for ambient air quality; Land based contamination can be considered under the National Framework for Chemicals Environment Management and the National Industrial Chemicals Notification and Assessment Scheme (NICNAS). See further, EDO NSW, *Clearing the Air: Opportunities for improved regulation of pollution in New South Wales* (2012), prepared at request of NCC, at http://www.nccnsw.org.au or http://www.edo.org.au/edonsw/site/policy_discussion.php.

[xxxi] As generally is the present case with State significant development and infrastructure

[xxxii] Some very minor amendments (for example minor administrative amendments to correct errors) would not be require consultation

[xxxiii] 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

[xxxiv] Notification by notice in the Government Gazette and in a newspaper remains the most common way of providing notification of proposed planning instruments (see for example, *Sustainable Development Act* 2009, sections 60 and 118; *Planning and Environment Act* 1987 (Vic), section 19); *Land Use Planning and Approvals Act* 1193 (Tas), section 30H 4. Best practice community engagement would encourage notification to be provided through wider channels – for example, on the website of the Department and relevant local council, or through other established communication channels.

[xxxv] This provision would require a planning authority to comply with the Charter for Public Participation, and the authority's community engagement strategy (developed having regard to the Charter) and take additional steps to ensure that there has been effective notification.

[xxxvi] See Appendix 1, which proposes a mandatory requirement for the preparation of environmental studies

[xxxvii] Section 57(5)-57(8) of the *Environmental Planning and Assessment Act* 1979 provides that if a person making a submission requests, and the relevant planning authority considers that the issues raised in a submission are of such significance that they should be the subject of a hearing, the relevant planning authority is to arrange a public hearing on the issues raised in the submission. The relevant planning authority may also arrange a public hearing on any issue whether or not a person has made a submission concerning the matter.

[xxxviii] Section 46 of the *Planning and Development Act* 2005 (WA) provides that planning commission is to give each person making a submission on a region planning scheme or amendment (or the person's agent) the opportunity of being heard on the submission by the Commission or by a committee established under Schedule 2 of that Act.

[xxxix] Specifically, section 24 of the *Planning and Environment Act* (Vic) provides that with respect to an amendment of a planning scheme the panel must consider all submissions referred to it and give a reasonable opportunity to be heard to any person who has made a submission referred to it, the planning authority and any responsible authority or municipal council concerned.

[xl] Section 57(8) of the *Environmental Planning and Assessment Act* 1979 (NSW) provides that consultation is finished when the relevant planning authority has considered any submissions made concerning the proposed instrument and the report of any public hearing.

[xli] Section 22 of the *Planning and Environment Act 1987 (Vic)* requires a planning authority to consider all submissions made on or before the date set out in the notice, and that the planning authority may consider a late submission and must consider one if the Minister directs.

[xlii] Section 118 of the *Sustainable Development Act* 2009 (Qld), which requires the decision maker to consider all properly made submissions about the proposed planning scheme or planning scheme policy

[xliii] Section 118C(iv) of the *Sustainable Development Act* 2009 (Qld) which requires the local government to advise persons who make a properly made submission about how the local government has dealt with the submission

[xliv] Section 30J of the *Land Use Planning and Approvals Act* 1993 (Tas) which requires a planning authority to provide a report to the Commission (decision maker) containing a statement of the planning authority's views as to the merit of each representation made to the authority under section 30I in relation to a local provision in the interim planning scheme.

[xlv] For further information see Western Australian Department for Planning and Infrastructure, at http://www.planning.wa.gov.au/publications/832.asp. See further EDO Submission to NSW Planning Review (Stage 1), pp 17-18.

[xlvi] This refers to the proposed public participation charter outlined in Table 2 of Part 2 of this report

[xlvii] This could link into ePlanning processes. See further the comments on ePlanning in Part 2 of this report.

[xlviii] NSW Independent Commission Against Corruption (ICAC), *Anti-corruption safeguards and the NSW planning system* (February 2012). See recommendation 15: "That the NSW Government ensures 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."

[xlix] ICAC, *Anti-corruption safeguards and the NSW planning system* (February 2012). See recommendation 8.

[l] See Independent Commission Against Corruption, *Corruption Risks in NSW Development Processes* (2007); See also Independent Commission Against Corruption, *Anti-corruption safeguards and the NSW planning system* (2012), both available at: www.icac.nsw.gov.au. For example, see ICAC's 2012 report recommendation 16: "That the NSW Government considers expanding categories of development subject to third party merit appeals to include private sector development that: is significant and controversial; represents a significant departure from existing development standards; [or] is the subject of a voluntary planning agreement.