Nature Conservation Council
The voice for nature in NSW

NATIONAL PARKS ASSOCIATION OF NSW
protecting nature through community action

Planning legislation updates 2017
NSW Department of Planning and Environment
GPO Box 39
Sydney NSW 2001

15 March 2017

NCC – NPA Submission to the Environmental Planning and Assessment Amendment Bill 2017

Dear Sir/Madam,

The Nature Conservation Council of New South Wales (**NCC**) is the state's peak environment organisation. We represent over 150 environment groups across NSW. Together we are dedicated to protecting and conserving the wildlife, landscapes and natural resources of NSW.

The National Parks Association of NSW (**NPA**) is a community-based organisation with over 20,000 supporters from rural, remote and urban areas across the state. The NPA promotes nature conservation and evidence-based natural resource management. We have a particular interest in the protection of the State's biodiversity and supporting ecological processes, both within and outside of the formal conservation reserve system.

We welcome the opportunity to comment on draft amendments to the *Environmental Planning and Assessment Act* 1979 set out in the Environmental Planning and Assessment Amendment Bill 2017 (the Bill). Our members have a strong interest in planning and environment decisions across the State and in their local areas.

Land-use planning and development is intrinsically linked with environmental protection, nature conservation and natural resource management. Effective planning can help us tackle our most pressing environmental challenges, including: loss and fragmentation of native vegetation and wildlife habitat; degradation of rivers, wetlands and water catchments; urban sprawl, traffic congestion and urban air pollution; and carbon pollution and impacts of climate change.

Our groups have actively engaged on the Coalition Government's planning reform agenda over the past six years and are disappointed that the Government has not improved the planning system nor delivered positive outcomes for the environment and communities.

Once again, the proposed suite of amendments fail to recognise the environment as central to planning, or truly implement the principles of ecologically sustainable development as required by the objects of the Act. There continues to be an emphasis on fast approvals and multiple approval pathways for development which increases the complexity of the planning system, rather than making it more efficient and user-friendly.

While some aspects of the Bill are welcomed, we are concerned that proposed new provisions will override important environmental protections, reduce transparent and accountable decision making and limit local council planning powers. These include:

- New 'step in' powers for the Secretary of the Department of Planning and Environment to give advice, concurrence or general terms of approval on behalf of another agency;
- The introduction of additional internal review rights for proponents without equivalent rights for the community or public interest;
- Provisions that would allow the Minister to require local planning panels to make decisions in place of local councils;
- Failure to reinstate third party merit appeal rights after a public hearing of the Independent Planning Commission; and
- Power to create new panels that act in place of elected officials, with little oversight or accountability.

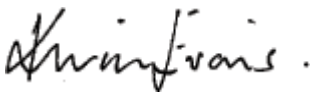
Further, the Bill is a missed opportunity for the Government to address the ongoing concerns of community and environment groups. Consideration should be given to making additional amendments to the EPA Act that would:

- Improve the legislative framework for strategic planning;
- Strengthen the rules around biodiversity offsetting;
- Provide appropriate protection for areas of high conservation value;
- Limit the use of exempt and complying development;
- Improve the quality of environmental impact assessment; and
- Better consider and respond to the impacts of climate change.

NSW needs robust planning laws that truly implement the principles of ecologically sustainable development and deliver positive outcomes for the environment and communities. The Bill will not achieve this.

We urge the Government to reconsider proposals that will override important environmental protections, reduce transparent decision making and limit local planning powers. These changes will contribute to ongoing community dissatisfaction with the planning system. We also urge the Government to consider additional changes that will deliver positive results for the environment and communities.

Yours sincerely,



Kate Smolski
Chief Executive Officer
Nature Conservation Council of NSW

Kevin Evans
Chief Executive Officer
National Parks Association of NSW

NCC SUBMISSION TO THE ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT BILL 2017

INTRODUCTION

We welcome the opportunity to comment on draft amendments to the *Environmental Planning and Assessment Act* 1979 (**EPA Act**) set out in the Environmental Planning and Assessment Amendment Bill 2017 (**EPA Amendment Bill 2017**).

Land-use planning and development is intrinsically linked with environmental protection, nature conservation and natural resource management. Effective planning can help us tackle our most pressing environmental challenges, including: loss and fragmentation of native vegetation and wildlife habitat; degradation of rivers, wetlands and water catchments; urban sprawl, traffic congestion and urban air pollution; and, carbon pollution and impacts of climate change.

While some aspects of the Bill are welcomed, we are concerned that proposed new provisions will override important environmental protections, reduce transparent and accountable decision making and limit local council planning powers. Further, the EPA Amendment Bill is a missed opportunity for the Government to address the ongoing concerns of community and environment groups.

The EPA Amendment Bill 2017 fails to recognise the environment as central to planning, or truly implement the principles of ecologically sustainable development as required by the objects of the Act. There continues to be an emphasis on fast approvals and multiple approval pathways for development which increases the complexity of the planning system, rather than making it more efficient and user-friendly.

Part 1 of our submission responds to key proposals in the EPA Amendment Bill. Part 2 of our submission outlines in more detail missed opportunities for the EPA Amendment Bill to address ongoing concerns of community and environment groups, and deliver improved outcomes for the environment and communities.

PART 1 – RESPONSE TO THE ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT BILL 2017

PROPOSED NEW OBJECTS OF EPA ACT

The EPA Amendment Act will repeal the existing objects of the EPA Act and replace them with a new set of objects. This is an opportunity to update and modernise the objects of the EPA Act, including with respect to the challenges facing NSW in planning for an ecologically sustainable future.

We provide the following feedback on the proposed new objects:

- ***Ecologically sustainable development***: We support ecologically sustainable development (ESD) being retained in the objects of the EPA Act, and support the retention of the current definition of ESD, as defined in s6(2) of the *Protection of the Environment Administration Act* 1991. However we are concerned that by expanding the object's wording it could undermine the important, established principles of ESD, including the precautionary principle, intergenerational equity, conservation of biological diversity, and the polluter pays principle. We also suggest that the object should be to 'achieve' ecologically sustainable development, rather than 'facilitate' ecologically sustainable development.

- ***Protection of 'populations and ecological communities, and their habitats'***: We note that 'populations and ecological communities, and their habitats' has been removed from the existing object relating to the protection of the environment (s5(vi) EPA Act), which currently provides that an object of the Act is to encourage "the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats". It is unclear why the wording has been narrowed, particularly as modern conservation initiatives recognise the importance of protecting not just individual threatened species, but populations, ecosystems and habitats. We suggest that this is a weakening of the current object, and the original wording should be retained.

- ***Climate change:*** The proposed new objects should include an object to respond to climate change and reduce greenhouse gas emissions.

- ***Good design:*** We support a proposed new object relating to good design, but suggest that good design needs to be clearly defined within the Act, including with reference to environmental performance standards.

- ***Heritage:*** We generally support the inclusion of an object relating to built and cultural heritage (including Aboriginal cultural heritage), but suggest the object should require the 'conservation and sustainable management' of heritage[1]. Additionally, we are concerned that separating built and cultural heritage from natural heritage is artificial as both built and cultural heritage must be assessed in a landscape context. Consideration should be given to adding natural heritage to this object.

CHANGES TO COMMUNITY PARTICIPATION REQUIREMENTS

Our members and supporters often raise concerns with poor community engagement on planning issues, at both local and State levels. Repeat concerns that are often raised include that:

- Planning authorities 'tell' or' inform' rather than truly engage with the community;
- Consultation is tokenistic and carried out simply as a 'tick the box' exercise;
- Consultation does not lead to outcomes which address community concerns, and people do not feel that their input influences decisions;
- Consultation periods are inadequate - planning and development information is complex, people do not have time and capacity to fully appraise and understand information; and
- There are too many processes happening at the same time. The community does not have time and capacity to critically evaluate information and respond within set time frames.

Improving community consultation in environment and planning decisions is challenging. There is a clear need to set mandatory requirements in legislation while at the same time providing flexibility for planning authorities to tailor community engagement tools to different circumstances.

[1] It is noted the Planning Bill 2013 contained the wording 'conservation and sustainable management of built and cultural heritage (including Aboriginal cultural heritage)' www.parliament.nsw.gov.au/bills/DBAssets/bills/BillText/3228/b2012-088-d31-House.pdf

The EPA Amendment Bill 2017 sets out new, additional requirements for community participation, including new community participation principles; a requirement for planning authorities to prepare community participation plans; and an explicit requirement to provide reasons for decisions.

We make the following comments with respect to the proposed changes:

- We generally support the inclusion of new community participation principles and the requirement for planning authorities to prepare community participation plans taking into consideration those principles. However, we are concerned that the community participation principles need only be considered (not implemented) in developing a community participation plan and that the provisions of a community participation plan are only mandatory if the plan specifies so.

- We strongly support provisions allowing the validity of community participation plans to be challenged.

- We support the proposed requirement for planning authorities to provide reasons for decisions.

- Mandatory provisions for community participation could be improved by increasing minimum public exhibition requirements, particularly for higher impact development applications (including State significant development) or policy proposals (such as SEPP proposals). As noted above, planning and development information is complex and the mandatory time periods are often insufficient for the community, who have limited time and capacity to properly understand and evaluate the information.

- There should be mandatory requirements in relation to the re-exhibition of amended applications. This should not be left to the regulations or community participation plans (see page 20 EPA Amendment Bill 2017).

- The ongoing expansion of exempt and complying development means that a greater range of development can now be carried out without community consultation. This undermines efforts to improve community engagement in planning decisions. Exempt and complying development should be limited to genuinely low impact development and not be permitted on any environmentally sensitive land.

LOCAL STRATEGIC PLANNING STATEMENTS

The EPA Amendment Bill 2017 will introduce a new requirement for councils to prepare local strategic planning statements to guide local strategic planning. We generally support the concept of local strategic planning statements and establishing a clear relationship between regional and local planning strategies, however there is a risk of 'top down' planning that will limit the ability of local communities and councils to develop a strategic planning vision for their local areas. Additionally, the legislation must include clear provisions around how the community is to be engaged in developing those statements.

LOCAL PLANNING PANELS

The EPA Amendment Bill 2017 will introduce new provisions that allow a council to constitute local planning panels that can carry out the consent authority functions of local councils. The regulations may require councils to establish local planning panels and the Minister may direct councils on the circumstances in which the function of determining development applications is to be exercised on behalf of the council by a local planning panel.

We generally support changes that will provide greater consistency with respect to the establishment and governance of local planning bodies, however we have a number of concerns with the new provisions.

The new provisions provide that local planning panels are to be made up of (a) an independent person with relevant expertise appointed as the chairperson of the panel, and (b) another independent person with relevant expertise, and (c) a community representative (clause 2.18 EPA Amendment Bill). While we generally support the inclusion of a community representative it is unclear exactly what constitutes a community representative or the requirements for appointing someone as a community representative.

We are also concerned with proposed provisions that will allow the Planning Minister to direct local planning panels to make decisions in place of local councils (Schedule 4, clause 3 EPA Amendment Bill, which inserts a new section 76(8) into EPA Act). This contradicts the Coalition's promise to return planning powers to local communities, by mandatorily removing powers from publicly elected officials. There is a risk that this power could be abused by the State to override decision-making by local councils and the interests of local communities. We therefore suggest that these powers are permitted only in a narrow set of circumstances, as clearly defined in the legislation.

STANDARDISED DEVELOPMENT CONTROL PLANS

The NSW Government proposes to standardise Development Control Plans (DCPs). The EPA Amendment Bill 2017 will include a new provision that will allow the regulations to provide for the form, structure and subject-matter of development control plans.

Standardisation of DCPs could provide consistency across local government areas, and make planning rules easier for the community to understand, however there needs to be sufficient flexibility to allow for local issues and concerns to be incorporated. We strongly encourage the Government to consult with local communities as it continues to explore this opportunity and develop a standard format for DCPs.

PROPOSED CHANGES TO COMPLYING DEVELOPMENT PROVISIONS

While we have significant concerns with the ongoing expansion of exempt and complying development (see Part 2 of our submission), we generally support the following changes proposed by the EPA Amendment Bill:

- Amendments proposed to prevent planning authorities from approving modifications in relation to works already completed (Schedule 4, clause 4.1[15]).

- Amendments to make it clear that, where a Complying Development Certificate does not comply with the relevant standards in the State Policy, it can be declared invalid (see Schedule 4, clause 4.1[9]).

- Proposed regulations requiring notification of complying development certificates (see page 24 of the Department's *Summary of proposals January 2017*).

- New provision that will allow the regulation to specify certain categories of development for which only a council certifier is authorised to issue a complying development certificate (see Schedule 4.1[7] on page 49 of the Bill).

- A new investigative power proposed for councils to allow better enforcement (see Schedule 9.1[2], clauses 9.33 and 9.34 of the Bill).

NEW STEP-IN POWERS FOR SECRETARY FOR INTEGRATED DEVELOPMENT

The EPA Amendment Bill will introduce new 'step in' powers for the Secretary of the Department of Planning and Environment to give advice, concurrence or general terms of approval on behalf of another agency, including for example, the Office of Environment and Heritage, where the agency has not provided the advice, granted or refused concurrence, or provided general terms of approval within statutory timeframes; and/or the advice, concurrence or general terms of approval from two or more agencies are in conflict.

We strongly oppose these proposed new provisions. Concurrence and approval requirements play an important role in managing impacts of development on significant matters such as marine environments, air pollution, heritage, and Aboriginal heritage. For example, integrated development requires not only planning approval under the EPA Act, but also environment permits and approvals under other environmental protection legislation[2]. In other circumstances the concurrence of a person other than the planning consent authority is required before development consent can be given[3]. Approval and concurrence is given by expert agencies, often considering prescribed assessment criteria set out in other environmental legislation.

The proposed new provisions however remove the requirement for this expert oversight. Further, instead of needing to consider existing, relevant criteria under environmental legislation, the Secretary only need consider assessment requirements yet to be prescribed by the regulations as 'State assessment requirements'. There is a real risk that the assessment of impacts of development, particularly environmental impacts, will not be subject to the same level of scrutiny as currently required.

The proposal to provide the Secretary with new 'step in' powers does not address the real drivers of delay, which are often lack of resourcing or coordination between agencies. Already, 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. It also provides some certainty to the proponent that it will be able to obtain the additional approval or permit in the event development consent is granted. Rather than overriding this process altogether, processes should be put in place to

[2] See, for example, section 90- 93B of the EP&A 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*

[3] See for example ss 79B(3) and section 112C of the EP&A 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)

make the existing system more efficient, while maintaining the important oversight and rigorous assessment by expert approval and concurrence agencies. Speeding up assessment of proposals for the convenience of proponents should not override the public interest in achieving sound environmental outcomes.

Further, environmental approval requirements should be restored for State significant development. 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[4].This has essentially removed a critical component of the assessment and management of environmental impacts including pollution, and impacts on heritage, water and Aboriginal cultural heritage. This goes against the fundamental idea that proposals likely to have the most impact should be subject to the most scrutiny.

Finally, we note that the Department's *Summary of proposals 2017* indicates that the Department will undertake a comprehensive, whole-of-government review of referrals and concurrence. This review should involve community consultation and should not result in the important oversight of expert agencies being removed from key decision making processes.

NEW NAME AND FUNCTION OF INDEPENDENT PLANNING COMMISSION

Under the proposed changes to the EPA Act, the Planning Assessment Commission (**PAC**) will become the Independent Planning Commission (**IPC**). The Commission will no longer have a statutory function to review development proposals. Instead there will be a new public hearing process, with the IPC holding more inquisitorial public hearings during the public exhibition period.

There is significant community concern around the operation of the PAC, including the perception that the PAC is not truly independent, open to influence and simply 'rubber stamps' decisions of the Department. There is also concern that there is no oversight of PAC decisions and that it has inappropriately replaced the important role of the Land and Environment Court, with merit appeal rights being removed following a public hearing of the PAC.

We recognise that there is a need to improve the functions and processes of the Planning Assessment Commission, however do not believe that simply changing the name of the Commission and providing it with a more interrogative function will fully address community concerns.

In particular we remain concerned that public hearings of the IPC will continue to be a substitute for merits review. Even if the public hearings become more inquisitorial, as proposed, they are not as rigorous or equitable as a court hearing. A 2016 report from EDO NSW demonstrates the public benefits of third party appeals to the Land and Environment Court against development consents for high impact major resource projects[5]. We also note that the Independent Commission Against Corruption has previously recommended that in order to reduce corruption risks and improve transparency in the NSW planning system that the scope of third party merit appeal rights be expanded.[6] IPC decisions should be subject to

[4] See section 89J of the EPA Act which provides that certain environmental approvals are not required for State significant development. Section 89K also limits the function of approval agencies in other circumstances by providing that authorisation for certain approvals cannot be refused if it is necessary for carrying out State significant development that is authorised by a development consent under this Division and is to be substantially consistent with the consent

[5] EDO NSW, Merits Review in Planning in NSW, 2016, www.edonsw.org.au/merits_review_in_planning_in_nsw

6 Independent Commission Against Corruption, *Anti-corruption safeguards in the New South Wales planning system*, (2012) - Recommendation 16 - 'That the NSW Government considers expanding the categories of development subject to third party merit appeals to include private sector

judicial oversight and it is not appropriate for the IPC to be seen as a replacement for the Court. Third party merit appeal rights must be fully restored.

We also note that the NSW Audit Office has recently published a report on the assessment of major development applications by the Planning Assessment Commission[7]. The Audit Office's report outlines six key recommendations for improving the internal process of the PAC, and consideration should be given as to whether any of these recommendations could be supported by legislative change[8].

An additional change proposed by the Government is that the types of development to be determined by the IPC will now be prescribed in the *State Environmental Planning Policy (State and Regional Development)* 2011 (instead of by delegation, which is currently the case for the PAC). Clearly defining the types of development the IPC will determine in a SEPP could provide greater transparency and certainty. The community should be consulted as to what types of development are determined by the IPC.

NEW INTERNAL REVIEW PROVISIONS FOR PROPONENTS

The EPA Amendment Bill will expand developer's rights to seek an internal review of decisions, including for integrated development and State significant development (Schedule 8, EPA Amendment Bill).

We strongly oppose the proposal to expand a proponent's right for internal review of a decision. The introduction of additional internal review rights for proponents will contribute to what many see as an already unbalanced planning system that favours proponents over the environment, communities and the public interest.

There is no clear policy justification for introducing internal review rights in place of existing, formal review mechanisms, including proponent initiated merits review. The proposed internal review process does not promote transparency or accountability in decision making and should not be included in the final Bill.

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development that is significant and controversial, represents a significant departure from existing development standard, or is the subject of a voluntary planning agreement'.

[7] New South Wales Auditor-General's Report - Performance Audit - Assessing major development applications Planning Assessment Commission, January 2017, www.audit.nsw.gov.au/publications/latest-reports/assessing-major-development-applications

[8] The Audit Office recommendations are as follows:

The Planning Assessment Commission should:

By July 2017:

1. improve transparency by publishing on its website a summary of the Commissioners' conflict of interest declarations for each development application referred to the Commission for determination, and how any conflicts were handled
2. keep better records of how it considers each matter under section 79C of the EP&A Act for all decisions it makes on major development applications
3. improve the public's involvement in public meetings by:
    a. identifying and implementing additional mechanisms to notify the community of public meetings to ensure as many interested parties are advised as possible
    b. allowing the chair of decision-making panels discretion to extend the time allowed for individual speakers beyond five minutes
4. continue to improve how it communicates the reasons for its decisions to the public by:
    a. including a summary in its reports of the issues raised during the consultation process and how they were considered by the Commission
    b. clearly outlining in its reports how any conditions placed on a development will address the issues raised
    c. detailing in its reports how section 79C of the EP&A Act has been addressed
    d. issuing fact sheets to accompany its reports for all decisions where public meetings were held
5. work with the Department of Planning and Environment to:
    a. develop an agreed approach to presenting the Department's views in its assessment reports on whether the project meets relevant legislative and policy requirements, reflecting the Commission's status as an independent decision-maker
    b. refer applications to the Commission earlier in the process to ensure the Department's assessment report covers matters that Commissioners consider important when assessing projects under section 79C of the EP&A Act.

CONDITIONS OF CONSENT

The EPA Amendment Bill will introduce new provisions allowing 'transferrable' conditions. These are conditions of consent that will cease to apply if they are substantially consistent with conditions subsequently imposed under other regulatory approvals or licences. We have some reservations with this proposal as it is unclear how 'transferable conditions' will work in practice and what safeguards there are in place to ensure that robust environmental protections are maintained.

The new provisions will also allow the Minister to vary or revoke monitoring or environmental audit requirements in existing approvals. The EPA Act should include safeguards to ensure that these new provisions are not used to reduce the scope of monitoring or environmental auditing.

Consideration should also be given to allowing the Minister to vary conditions to update environmental standards (e.g. in accordance with updated environmental regulations). At present, due to the long life-span of some projects (e.g. resource projects) conditions of consent can refer to outdated environmental standards and there is no ability for the Minister to update conditions to reflect modern environmental standards. The Government should explore options for allowing conditions to be updated in line with current environmental regulations.

We note that consideration is also being given as to whether special provisions should be made with respect to conditions relating to offsets for the impacts of proposed development. The *Summary of proposals 2017* indicates that these amendments would confirm that conditions of consent can apply offset requirements to address any environmental impact of a project, not just biodiversity impacts. It is unclear exactly what other environmental impacts would be considered for offsetting, or how these conditions will operate in practice.

We also note that while we would generally support conditions requiring financial assurance in some circumstances, including for the rehabilitation of sites, we have significant concerns about financial contributions allowed as a means of meeting biodiversity offsetting requirements in lieu of identifying and protecting genuine like-for-like offsets[9].

TRANSITIONAL PROVISIONS FOR PART 3A TO END

The Government proposes to remove transitional provisions that allow the former Part 3A to continue to apply to certain projects approved or pending at the time of its repeal.

We generally support removing transitional provisions that currently allow some projects to continue as Part 3A projects, however the exact wording of the relevant provisions are not provided in the Bill. Further consultation should be undertaken on the relevant provisions that will be included in the Regulations.

[9] See The Future for Biodiversity In NSW - Environment groups' joint response to the consultation package of reforms to land management and biodiversity conservation in NSW, June 2016, www.nature.org.au/media/265232/160628-sb-ncc-submission-proposed-biodiversity-conservation-reform-package.pdf

PART 2 – MISSED OPPORTUNITIES FOR IMPROVING OUTCOMES FOR THE ENVIRONMENT AND COMMUNITIES

Environment and community groups have made ongoing calls for the EPA Act to be strengthened in order to deliver positive outcomes for the environment and communities[10]. It is the view of many that the EPA Act has failed to effectively integrate environmental considerations into strategic planning processes, and that amendments made over the past two decades have prioritised economic considerations over environmental and social considerations, undermining the implementation of principles of ecologically sustainable development. The result is an unbalanced system that facilitates development at all costs and that fails to deliver positive outcomes for the environment and communities.

The EPA Amendment Bill once again fails to address the key concerns of environment and community groups. The EPA Amendment Bill provides an opportunity to make additional amendments to the EPA Act that would address the following issues:

IMPROVE THE LEGISLATIVE FRAMEWORK FOR STRATEGIC PLANNING

The EPA Act does not include a clear legislative framework for strategic planning, including mandatory environmental assessment and public participation. In our view, this does not provide a sound basis for long term strategic planning, including the proper consideration of vital long term issues such as the implementation of ecologically sustainable development, conservation of biodiversity and connectivity, access to green space, provision of appropriate infrastructure, mitigation and adaptation to climate change and planning for population growth. We strongly recommend that the Government establishes mandatory requirements for strategic planning including proper environmental assessment, genuine community engagement and appropriate mechanisms for achieving environmental, social and economic outcomes.

With regional plans being rolled out across the State, the lack of a clear, mandated process within the planning system has become obvious, with many environment and community groups disappointed with the failure of those plans to address important environment and social issues[11]. While a new Part 3B has been inserted into the EPA Act, it lacks specific detail with respect to the consideration of environmental and social considerations, and was not used to develop the current iteration of Regional Plans that are in the process of being finalised.

As part of the NSW Planning System Review process Moore and Dyer noted that:

> "*During the course of the consultation process, a consistent theme was the lack of early strategic planning under the present planning legislation. A framework of strategic planning would inform local planning, apply across geographic areas wider than one council (potentially on a much wider basis than a small group of councils) and link with plans for infrastructure and its sequencing*".

[10] See our previous submissions to the NSW Planning System Review:

- NCC Submission to the White Paper - *Charting a new course: Delivering a planning system that protects the environment and empowers local communities* (June 2013)
- NCC Submission to the Green Paper - *Planning for a Sustainable Future Submission in the Green Paper - A New Planning System For NSW* (September 2012)
- NCC Submission to the Issue Paper - *Planning For Ecologically Sustainable Development - Opportunities for Improved Environmental Outcomes and Enhanced Community Involvement in the Planning System* (March 2012)

See also the Community Charter for Good Planning: https://thecommunitycharter.org/

[11] See NCC submission to the various draft Regional Plans. Submissions available on our website: www.nature.org.au/resources/submissions/

"Two propositions were also near-universally supported across the spectrum of interests:

- *express provision should be made for strategic planning in any new legislative framework*
- *such legislative provision should be accompanied by practical measures to encourage community engagement with, and participation in, the development of such strategic plans".*

Moore and Dyer made a number of specific recommendations for strategic planning in a new planning system, including objects for strategic planning (Recommendation 8) and assessment of cumulative impacts (Recommendation 12 and 13)[12].

Our 2012 report *Our Environment, Our Communities - Integrating environmental outcomes and community engagement in the NSW Planning System,* highlighted the intrinsic link between land use planning and development, environmental protection, nature conservation and natural resource management[13].

The report identifies a number of key elements for effective strategic planning, including:

- a whole-of-Government approach to strategic and land use planning,
- baseline studies of environmental and natural resource values to underpin strategic and land use planning,
- strategic environment assessment that includes mandatory consideration of prescribed environmental criteria, and assessment of cumulative impacts,
- sharing of data across sectors,
- consistency with other government strategies, including, for example, in the areas of natural resource management, transport, infrastructure and health,
- identification of competing land uses and values and mechanisms for achieving environmental outcomes,
- early, sustained and genuine community engagement in strategic and land use planning processes,
- appropriate statutory weight and relationship between planning instruments.

[12] See further Chapter 4 of the Moore and Dyer report *The Way Ahead for Planning in NSW - Recommendations of the NSW Planning System Review*, Volume 1 – Major Issues, May 2012. Moore and Dyer recommended that the objects 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.
- 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.
- Identify 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.
- Have regard to expected population changes, including seasonal or temporary population fluctuations whether for tourism or seasonal labour reasons.
- Consider the scientifically anticipated impact of climate change within the footprint of the strategic planning study area and the broad measures required to mitigate its impact.
- Have regard to the impacts of natural risks such as flooding or bushfire.
- 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.

[13] Nature Conservation Council of NSW, Total Environment Center, EDO NSW, *Our Environment, Our Communities - Integrating environmental outcomes and community engagement in the NSW Planning System* 2012

Without a clear framework for strategic planning that mandates key requirements such as environmental studies and strategic environmental assessment, regional plans will fail to deliver the necessary environmental outcomes that are needed for an ecologically sustainable future.

STRENGTHEN THE RULES AROUND BIODIVERSITY OFFSETTING

Environment and community groups oppose biodiversity offsetting rules in NSW that have allowed high impact development to go ahead under a false premise that the impacts on biodiversity will be offset through biodiversity offsets. As biodiversity offsetting has become wide spread research shows that there are limitations to what biodiversity offsetting can achieve. Biodiversity offsetting is viewed by many as inherently flawed and unable to achieve the biodiversity outcomes necessary to compensate for environmental impacts and biodiversity loss[14]. Further, biodiversity offsetting rules in NSW have become weaker as standards have slipped and rules changes to better facilitate development rather than achieve outcomes for biodiversity[15].

The current *NSW Biodiversity Offsetting Policy for Major Projects* allows variations from like-for-like offsetting, the use of supplementary measures (such as research and education) and mine site rehabilitation in lieu of genuine offsets. Alarmingly, the *Draft Biodiversity Assessment Methodology* proposed under the new *Biodiversity Conservation Act* 2016 carries over many of the criticised elements of the *NSW Biodiversity Offsets Policy for Major Projects*. It continues a significant shift away from best practice offsetting rules, towards a more flexible system that allows decision makers to vary rules and proponents to move through various options until they can simply discharge offset obligations by paying money into a fund and ultimately proceed with development.

Independent reviews by leading scientists and submissions by experts including the NSW Scientific Committee and the EDO NSW continues to raise concerns with the changes to biodiversity offsetting policy settings in NSW[16].

Our own concerns with the proposed new *Draft Biodiversity Assessment Methodology* include that:

- There is no clear and objective aim to protect biodiversity or achieve net positive outcomes;
- Limits on biodiversity offsetting ('red flag' areas) in the *Draft Biodiversity Assessment Methodology* are limited and uncertain;
- It allows for variations to "like for like" offsetting;
- It allows the use of supplementary measures (now called "biodiversity conservation actions") in place of genuine offsets;
- It allows mine site rehabilitation to be attributed as biodiversity offset credits;
- It allows proponents to pay money into an Offsets Fund prior to adequate offsets being identified;
- The *Draft Biodiversity Conservation Bill* 2016 and *Draft Local Land Services Amendment Bill* 2016 allow for discounting of biodiversity credits;

[14] Walker, S. et al. (2009). Why Bartering Biodiversity Fails, Conservation Letters 2 (2009) 149-157; Maron, M. et al. (2012). Faustian bargains? Restoration realities in the context of biodiversity offset policies, Biological Conservation 155 141-148; Curren, M. et al. (2014). Is there empirical support for biodiversity offset policy? Ecological Applications, 24(4) pp 617-632.

[15] Nature Conservation Council of NSW (2016) Paradise Lost - The weakening and widening of NSW biodiversity offsetting schemes, 2005-2016, www.nature.org.au/media/250550/bio-offsetting-report_v14.pdf

[16] NSW Scientific Committee Submission on the draft NSW Biodiversity Offsets Policy for Major Projects (www.environment.nsw.gov.au/resources/biodiversity/offsets/66NSWScientificCommittee.pdf);
EDO NSW (2014a) Submission on the draft NSW Biodiversity Offsets Policy for Major Projects (www.environment.nsw.gov.au/resources/biodiversity/offsets/62EnvironmentalDefendersOffice.pdf)

- The *Draft Biodiversity Conservation Bill* 2016 does not protect offsets sites in perpetuity and allows for "offsetting of offsets";
- It is unlikely that the NSW policy as proposed will meet federal standards[17].

In our view the *Draft Biodiversity Assessment Method* will not deliver environmental outcome for NSW. It will simply make it easier for unsustainable development to continue to destroy important vegetation and fauna, water resources, and soil fertility across the NSW landscape.

PROVIDE ABSOLUTE PROTECTION FOR AREAS OF HIGH CONSERVATION VALUE

We have significant concerns that the NSW planning system is failing to protect areas of high conservation value. In our experience, the Government has failed to implement mechanisms that provide absolute protection for areas of high conservation value (e.g. no-go zones, prohibitions), leaving matters to be considered with significant discretion on a case-by-case basis at the development assessment stage, where, more often than not, private economic interests outweigh other social and environmental interests.

With more native species being added to the threatened species list, sensitive landscapes such as wetlands and rainforests greatly impacted by climate change and increasing pressure on the natural environment from ongoing growth and development, the need to provide stronger protection for areas of high conservation value is greater than ever.

Recently, there have been a number of opportunities to provide improved protection for areas of high conservation value, but reluctance on the behalf of governments to put in place real protections.

For example:

- The *Environmental Planning and Assessment Amendment (Gateway Process for Strategic Agricultural Land) Regulation* 2013 amended the EPA Act and EPA Regulation to establish a gateway process for mining and petroleum development on strategic agricultural lands. The Gateway Process allows for additional scientific scrutiny, but it does not afford definitive protection such as the ability to 'shut the gate' on inappropriate development, and has significant shortcomings such as the failure to specifically incorporate high conservation areas into the process.

- While the current iteration of regional plans do identify areas of high environmental value, there are no clear mechanisms in place that provide protection for those areas (i.e. identification as an area of high conservation value does not provide any additional protection).

- New provisions under the *Biodiversity Conservation Act* 2016, including with respect to 'Areas of Outstanding Biodiversity Value, 'serious and irreversible impacts' and 'code exclusion areas' could be used to protect high ecological value land, but at this stage the details of how those provisions will operate in practice are yet to be finalised.

Until the Government commits to providing real protections for areas of high conservation value these areas will continue to be degraded by inappropriate and unsustainable development.

[17] See Part 4.7, The Future for Biodiversity In NSW - Environment groups' joint response to the consultation package of reforms to land management and biodiversity conservation in NSW, June 2016, www.nature.org.au/media/265232/160628-sb-ncc-submission-proposed-biodiversity-conservation-reform-package.pdf,

LIMIT THE USE OF EXEMPT AND COMPLYING DEVELOPMENT

We have significant concerns with the ongoing expansion of exempt and complying development in NSW. Exempt and complying development does not include robust requirements for environmental assessment or community engagement and should be limited to genuinely low impact development.

While we recognise there are some restrictions on the application of exempt and complying development in some areas, including critical habitat, wilderness and environmentally sensitive areas[18], we do not believe these restrictions provide sufficient protection for the environment given the scope of development that is now permitted, and proposed to be permitted as exempt and complying development. This includes:

- new industrial buildings up to 20,000m2 and additions and expansions to shops or commercial office buildings to be assessed as complying development[19]
- medium density housing including dual occupancy, manor homes and terraces and town houses[20]
- child-care facilities, schools, TAFEs and universities [21]

This broad expansion of exempt and complying development is not supported because:

- The use of a uniform codes for complying development across the State can be problematic, as local government areas in NSW vary greatly in terms of their locality, diversity, social pressures and environmental sensitivity. It is therefore not always appropriate to define exempt and complying development in a uniform manner across NSW. Some developments which may be considered 'minor' in a highly developed urban area may have significant impacts in areas of environmental sensitivity such as waterways, lakes, coastal, forest, heath, woodlands and wetlands. We do not believe that the exhibited draft Inland NSW Regional Code was intended to address this particular issue.

- "Code" based assessment does not provide a mechanism for assessing the cumulative impacts of a myriad of 'minor' developments, which, when considered in isolation, have minimal environmental impacts, but when considered on the whole, lead to "death by a thousand cuts" for the environment.

- It is inappropriate to remove community consultation processes and appeal rights for a potentially large number of development applications.

Given the potential impacts of development on the environment and on communities, exempt and complying development codes should only apply to development that is truly low risk, low impact development.

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[18] See section 76 of the EPA Act and clause 1.17A of the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008

[19] The *State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Commercial and Industrial Development and Other Matters) 2013* made changes to the *State Environmental Planning Policy (Exempt and Complying Development Codes)* to allow new industrial buildings up to 20,000m2 and additions and expansions to shops or commercial office buildings as complying development

[20] A Medium Density Guide and Explanation of Intended Effect (EIE) for a Medium Density Housing Code was exhibited in late 2016

[21] The Government is currently seeking public comment on a proposed new Draft State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 that would allow child-care providers, schools, TAFEs and universities to build new facilities as complying development

INTRODUCE CHANGES TO IMPROVE THE INTEGRITY OF ENVIRONMENTAL IMPACT STATEMENTS

We recognise that the Government is looking to improve the quality of environmental impact assessment for major projects as part of its EIA improvement process. We provided a detailed response to this proposal in our written submission to the EIA Improvement Project[22], including 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.

We submit that further consideration should be given to improving the integrity of all environmental assessment carried out under the EPA Act, not just major projects and the proposed amendment of the EPA Act in 2017 would be a good opportunity to put in place legislative provisions that achieve this outcome.

ENSURE THE NSW PLANNING SYSTEM RESPONDS TO THE THREATS AND IMPACTS OF CLIMATE CHANGE

Climate change is one of the greatest challenges currently facing society. Increased CO_2 levels are causing warming of the atmosphere and oceans, the breakup of ice sheets, glacial retreat, sea level rise, and ocean acidification. At present Australia is seeing the impacts of climate change with more severe and frequent events such as droughts, bushfires, heat waves, floods and cyclones.

There is significant opportunity for the NSW planning system to recognise and respond to the impacts of climate change. This is particularly pertinent given international agreement to keeping global average temperatures to below 2 degrees Celsius and the recent commitment of the NSW government to achieve net-zero emissions by 2050.

Unfortunately the proposed changes to the EPA Act fail to include any substantial provisions that would require planning authorities to better consider and respond to the impacts of climate change. For example, as outlined above, the proposed new objects of the EPA Act do not include an object to address climate change, which is a significant omission.

In July 2016 EDO NSW released a report titled *Planning for climate change: How the NSW planning system can better tackle greenhouse gas emissions*[23]. The report sets out 14 key recommendations for integrating climate change and greenhouse gas emissions reduction into planning and environmental laws. We strongly urge the NSW Government to implement the recommendations of EDO NSW, including where relevant, through proposed changes to the EPA Act.

[22] NCC Submission on the Environmental Impact Assessment Improvement Project Discussion Paper, November 2016, www.nature.org.au/media/265235/161125-sb-ncc-submission-eia-improvement-project.pdf

[23] EDO NSW, *Planning for climate change: How the NSW planning system can better tackle greenhouse gas emissions,* July 2016, www.edonsw.org.au/planning_for_climate_change