



# ***Submission on A New Planning System for New South Wales – WHITE PAPER***

**prepared by**

**EDO NSW  
June 2013**

## About EDO NSW

EDO NSW is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

**Successful environmental outcomes using the law.** With over 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

**Broad environmental expertise.** EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

**Independent and accessible services.** As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

EDO NSW is part of a national network of centres that help to protect the environment through law in their [states](#).

Submitted online: <http://www.planning.nsw.gov.au/newplanningsystem>

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## Executive Summary

EDO NSW welcomes the opportunity to comment on *A New Planning System for NSW – White Paper* and the draft legislation. As EDO NSW was specifically created to provide the link between the community and planning laws in NSW, we see the current reform process as an opportunity to genuinely reform and improve planning laws and write a new Act. This means retaining fundamental principles and processes, while not repeating or perpetuating mistakes of the past.

Our focus in the NSW planning review centres on two issues – **community participation** and **protection of the environment**. We believe both these aspects are critical to public confidence in the new system. If the Government is to restore public trust and integrity to the planning system, the legislation will need to ensure a more equitable balance of rights and safeguards for the community and environment. It will need to move beyond the White Paper's economic 'growth' focus, and demonstrate the Government's commitment to ecologically sustainable development.

There are a number of elements of the proposed scheme that have the potential to improve planning in NSW. However, as currently drafted, the proposed legislation falls well short of delivering on the commitment to restore the community's confidence in the planning system and the sentiments in the White Paper.

The **objectives** of the new scheme as proposed are unbalanced. Instead of integrating economic, social and environmental factors throughout the legal decision making framework (the essence of *ecologically sustainable development*), the White Paper reforms imply a false choice – between economic prosperity on one hand, and environmental values and community rights on the other. Growth, prosperity and sustainability must be measured against a triple bottom line.

EDO NSW welcomes the commitment to improved **community participation** in strategic planning, and the inclusion of a Community Participation Charter in the legislation. How this is done over the coming years will be absolutely critical to the success of the reforms. As proposed, the new processes will hopefully encourage engagement and lead to increased community input at an earlier stage. However we have real concerns that faith in the new system will start to erode through the sheer magnitude of consultation processes required over the next few years; the limited scope in the planning hierarchy for local plans to influence neighbourhoods; and the absence of checks and balances for the community and environment. Accountability and review rights must apply equitably throughout the planning process.

We welcome the commitment to establish a clear **strategic planning** hierarchy, with community engagement emphasised during the development of all levels of strategic plans. If this is done properly – with a significant investment of time, resources and expertise – it may well reduce land use conflicts at the local level. However, again the provisions of the Bill that allow the Minister to override local plans, or to allow developers increased flexibility to bend the rules, have the potential to seriously undermine the strategic planning process. A community that puts significant effort into the development of their local plan would be understandably disillusioned to learn later that their efforts can be overridden.

Establishing five different risk-based assessment tracks for **development assessment** is appropriate. The integrity of this process will depend on the appropriate categorisation, and proportionate assessment, of development in practice. Non code-compliant development must be fully merit assessed or refused. There must also be safeguards so that development

in sensitive environmental and heritage areas will not be exempt, complying or code-assessable. The new system must ensure that the largest projects with the most significant potential impacts are subject to rigorous and comprehensive assessment, and not exempted from environmental or heritage assessment requirements. The new legislation must not reinstate the most dubious fast-tracking aspects of the former Part 3A – which favoured broad discretion, limited environmental assessment, and curtailed public participation and judicial oversight.

We welcome the intent to better integrate **infrastructure** and strategic planning, and we make a number of recommendations about community consultation on infrastructure plans, and ensuring appropriate objective and transparent processes are applied to the environmental impact assessment of infrastructure projects. We further emphasise the importance of green infrastructure (parks, waterways and green corridors) and improved urban sustainability and efficiency requirements.

Finally, and most importantly, there is a fundamental imbalance in relation to **merits review and appeal rights** as proposed. While there are expanded rights for proponents and developers, community review and enforcement rights are restricted by the draft legislation. Under the guise of giving the community new upfront engagement rights, existing review rights are being removed, and new obligations are being diluted. This is not a fair trade-off. In a new and untested system, it is absolutely essential to ensure that there are checks and balances in the legislation to guarantee due process and accountability. Absence of these safeguards has the potential to undermine the integrity of the proposed system.

This submission makes just over 100 **recommendations** for establishing best practice planning and putting balance back into the system. Our recommendations are evidence-based and drawn from extensive community feedback – through workshops, seminars and our legal advice line; from legal research and our technical experience with the system and the Court; and from our substantial body of planning law reform work in recent years. EDO NSW puts these recommendations forward to constructively assist in amending the draft legislation before it is introduced to the NSW Parliament.

## Introduction

EDO NSW is a community legal centre specialising in public interest environmental and planning law. EDO NSW was established following the introduction of the *Environment Planning & Assessment Act 1979 (EP&A Act)* and the creation of the Land & Environment Court. Our office was specifically created to provide the link between the community and planning laws. Since then, a constant stream of community members has sought our expert assistance on how to understand and engage with the planning system in NSW.

In this context, EDO NSW welcomes the opportunity to comment on one of the final stages of the NSW Government's planning reform proposals. These proposals are set out in:

- *A New Planning System for NSW – White Paper* (April 2013) (**White Paper**); and
- Two draft exposure bills:
  - *Planning Bill 2013 (Planning Bill)* which deals with substantive matters, and
  - *Planning Administration Bill 2013 (Administration Bill)* which deals with membership of planning authorities and other procedures.

This submission makes just over 100 recommendations for establishing a best practice planning system for NSW. Our recommendations focus on key issues that need to be addressed before the planning laws are put before the NSW Parliament. These evidence-based recommendations are drawn from EDO NSW's substantial body of planning law reform work in recent years,<sup>1</sup> and extensive community feedback – through 10 White Paper workshops and seminars; our free legal advice line; and from legal research and technical experience with the system and the Court.

Our focus in the NSW planning review centres on two issues – **community participation** and **protection of the environment**. We believe both these aspects are critical to public confidence in the new system, the State's future prosperity and the wellbeing of its citizens. If the Government is to restore public trust and integrity to the planning system, the legislation will need to ensure a more equitable balance of rights and safeguards for the community and environment. It will need to move beyond the White Paper's economic 'growth' focus, and demonstrate the Government's commitment to ecologically sustainable development (**ESD**).

The EDO NSW vision for a 21<sup>st</sup> century planning system is one that:<sup>2</sup>

- Places ESD at the centre of planning and development decisions.
- Ensures early, high and sustained levels of public engagement on decision-making.
- Mandates engaging and effective processes for ecologically sustainable strategic land use planning – coordinated across state, regional and local levels.
- Protects, values and enhances ecological integrity and services for the public good, now and in future.
- Improves the liveability of NSW communities – including a healthy and resilient environment; good public health; fair choices for transport, work and lifestyle;

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<sup>1</sup> Recent EDO NSW reports and submissions are available at [www.edonsw.org.au](http://www.edonsw.org.au). They include: *Submission to A New Planning System – Green Paper* (Sept. 2012); *Our Environment, Our Communities - Integrating environmental outcomes and community engagement in the NSW planning system*, a joint report with Nature Conservation Council of NSW (NCC) and Total Environment Centre (TEC), August 2012; *Submission to NSW Planning Review Issues Paper* (joint with NCC and TEC), March 2012; *Submission to the Review of the NSW Planning System (Stage 1)*, 4 November 2011; and *Reconnecting the Community with the Planning System – Report* (EDO NSW and TEC) 2010. There are over 50 submissions on planning law reform on the EDO NSW website.

<sup>2</sup> See EDO NSW, *Submission to the Review of the NSW Planning System (Stage 1)*, November 2011, available at: [http://www.edo.org.au/edonsw/site/pdf/subs/111104review\\_nsw\\_planning\\_stage\\_1.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/111104review_nsw_planning_stage_1.pdf).

housing affordability; and a sense of community.

- Requires accountability, integrity and transparency of all participants – including decision-makers, government agencies, development proponents and communities.
- Provides for certainty of outcomes in a way that meets and manages diverse community expectations, and provides for adaptive planning.

EDO NSW sees the current reform process as an opportunity to genuinely reform and improve planning laws and write a new Act. This means not repeating or perpetuating mistakes of the past. While the Planning Bill carries over a number of aspects of environmental assessment from the existing EP&A Act, it is difficult to find examples in the Planning Bill where environmental assessment or efficiency requirements are actually *improved*.

There are also a number of ways in which existing environmental protections would be *eroded* under the new Planning Bill. Examples include:

- Removal of ESD principles from the objects (and subsequent references in the Act);
- Lack of any environment-focused strategic planning principles;
- Removal of the requirement for all State Significant Development to have an Environmental Impact Statement, reversing positive changes from repealing Part 3A;
- Absence of cumulative impact considerations or ESD principles in the decision criteria for development assessment (contrary to indications in the White Paper); and
- Transfer of arms-length agency concurrence duties to the Planning Director-General.

Community participation rights are also limited in the draft legislation. There is a disconnect between what is promised in the White Paper and public statements by the Government, and what is actually contained in the provisions of the draft legislation. For example:

- Despite the positive adoption of a Community Participation Charter in Part 2 of the Planning Bill, Part 10 of the Bill says this and other safeguards are 'not mandatory';
- The Planning Bill (Sch. 1) contains few *minimum requirements* for public exhibition, early notification, or timely and proactive publication of documents and decisions;
- There remains a distinct imbalance in merits review and appeal rights between developers and community members, limiting public confidence and accountability.

By contrast, there are numerous examples of additional flexibility for developers, and additional consideration of economic factors in decision-making. For example:

- Objects that emphasise economic growth while weakening environmental factors;
- Strategic planning principles that prioritise growth and barely mention 'environment';
- Qualifying the public interest test for development assessment to first consider the 'public benefits' of a development;
- Strategic compatibility certificates, which give the Planning Department discretion to fast-track development ahead of local plan amendments, and limit later decisions;
- Imposing 'economic viability' tests on strategic and local plans (but no equivalent tests for maintaining or improving environmental outcomes or social viability); and
- Retaining developer rights to 'spot rezone' sites, and new appeal rights if refused.

EDO NSW acknowledges the Government's desire, through its State Plan, to grow the economy and attract investment to 'make NSW number 1'. However, this can only be one aspect of the reforms, among many important community needs for a leading practice, state-wide planning system. The Government cannot achieve its overarching economic goals fairly or sustainably, by placing enduring environmental and social values of the community at risk. Without a genuine triple bottom line focus, the result may be more unaffordable houses and

congested roads, with less local amenity and quality of life for present and future generations.

Instead of integrating economic, social and environmental factors throughout the legal decision making framework (the essence of *ecologically sustainable development*), the White Paper reforms imply a false choice – between economic prosperity on one hand, and environmental values and community rights on the other. By contrast, according to a Grattan Institute analysis of leading practice decision-making in a range of comparable international cities (*Cities: Who Decides? 2010*), communities can make sound choices on difficult issues, provided they are given the appropriate information, rights and resources and time to do so.

The current draft legislation does not strike a fair balance for communities or the environment. Under the guise of giving the community new upfront engagement rights, existing review rights are being removed, and important new obligations are being diluted as ‘not mandatory’. Furthermore, we note a significant amount of detail will be included in regulations, orders, codes, policies and plans that have not yet been drafted or made publicly available. In a new, untested and undeveloped regime it is essential to retain checks and accountability mechanisms.

We submit that a leading practice planning system needs to do more than is presented in the White Paper and the Planning Bills to foster positive development for our communities and environment. Faster development approvals that are inadequately assessed, high-risk or ecologically unsustainable, are not in the public interest. Rather, the new planning system should create incentives for development that engages and inspires the community, reduces environmental impacts, and grows the economy in a more efficient, more innovative, but less impact-intensive way.

EDO NSW believes a range of changes are needed to chart a better course for the planning laws before they enter Parliament. These are outlined in the **Summary of Recommendations** below. Very briefly, five fundamental improvements would give much greater confidence that the Government has listened to the community, and is serious about sustainable paths for environmental planning and economic development, for lasting benefit:

- Place ESD at the apex of the planning system, and apply its principles under law.
- Clarify the status of the Community Participation Charter to make it clear that it is legally binding and enforceable.
- Integrate environmental outcomes and sustainability requirements upfront in the strategic planning principles, including cumulative impact considerations and climate change readiness.
- Set and communicate clearer limits, safeguards and design incentives around code-based development assessment.
- Restore accountability by putting the community on an equitable footing for appeal, review and civil enforcement rights.

These changes would help to build a positive legacy for the new planning laws, with shared benefits for communities, businesses, governments and the environment – now and in the decades to come.

This submission assesses the nine key corresponding parts of the White Paper and draft legislation. For each part, we provide a brief overview of what is proposed, EDO NSW analysis, and makes recommendations for reform.

## Summary of EDO NSW Recommendations

### Recommendations relating to the draft Planning Bill 2013

<b>Objectives – Planning Bill, Part 1</b>	
Overarching object	<i>Recommendation 1:</i> The overarching object of the planning system should be the achievement of ecologically sustainable development (ESD) (requires amendment to clause 1.3).
Ecologically Sustainable Development principles	<i>Recommendation 2:</i> ESD should be defined according to the recognised principles in existing NSW and Australian legislation and policies, including: <ul style="list-style-type: none"> <li>• the integration of economic, social and environmental considerations in decision-making;</li> <li>• the precautionary principle;</li> <li>• intergenerational equity;</li> <li>• conservation of biological diversity and ecological integrity as a fundamental consideration;</li> <li>• improved valuation, pricing and incentive mechanisms, including the polluter pays principle (per clause 1.3(2)).</li> </ul>
Environmental protection object	<i>Recommendation 3:</i> There should be specific references to ‘the protection and conservation of native animals and plants’ and ‘the provision of land for public purposes’ in the general environmental protection objective.
Operationalising the objects	<i>Recommendation 4:</i> The legislation should clearly state that all decisions, powers and functions under the new Act and relevant subordinate instruments must be exercised consistently with the principles of ESD.
<b>Community Participation – Planning Bill, Part 2</b>	
Community Participation Charter	<i>Recommendation 5:</i> The Community Participation Charter must be enforceable, with all planning authorities required to comply with the Charter’s broad principles including in the making of Community Participation Plans.
Mandatory processes and accountability	<i>Recommendation 6:</i> The clause which states Part 2 of the Act is ‘not mandatory’, and restricts legal challenges, should be removed (clause 10.12).
Mandatory notification and consultation requirements	<i>Recommendation 7:</i> Mandatory notification and consultation requirements for strategic planning and development assessment should reflect best practice. The Act should include: <ul style="list-style-type: none"> <li>• minimum requirements at the <i>strategic planning</i> stage, including: <ul style="list-style-type: none"> <li>○ notification of the preparation of strategic plans and local plans;</li> <li>○ publicly available information (including environmental studies and sectoral strategies);</li> <li>○ decision makers must take into account submissions</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ made on draft plans;</li> <li>○ decision makers must provide reasons for decisions about strategic plans (per Part 3; and Schedule 2 Part 1);</li> <li>● minimum requirements at the <i>development application and assessment</i> stage, including: <ul style="list-style-type: none"> <li>○ notification of development applications (<b>DAs</b>);</li> <li>○ publicly available supporting information, including all information supporting a DA;</li> <li>○ decision makers must take into account submissions made on DAs;</li> <li>○ decision makers must provide reasons for decisions when determining DAs (per Part 4; and Schedule 2 Part 1).</li> </ul> </li> </ul> <p>Recommendation 7a: The provisions pertaining to copyright of documents should clearly indemnify all persons <i>including councils and community members</i> where documents are published or accessed for planning purposes, such as commenting on DAs (per Schedule 2, clause 2.24).</p>
Minimum exhibition periods	<p><i>Recommendation 8:</i> Minimum mandatory exhibition periods should be as follows:</p> <p>Strategic Planning level</p> <ul style="list-style-type: none"> <li>● 60 business days (12 weeks) for draft strategic plans (including Local Plans and their planning control provisions).</li> <li>● 60 business days (12 weeks) for draft strategic (environmental) impact assessments.</li> </ul> <p>Development Assessment level</p> <ul style="list-style-type: none"> <li>● 45 business days (9 weeks) for State Significant Development (<b>SSD</b>), State Infrastructure Development (<b>SID</b>) and Public Priority Infrastructure (<b>PPI</b>).</li> <li>● 35 business days (7 weeks) for impact assessable development proposals (other than SSD, SID or PPI).</li> </ul> <p>General procedure</p> <ul style="list-style-type: none"> <li>● All notification and exhibition periods should be expressed in business days.</li> </ul> <p><i>Recommendation 9:</i> Where a minimum exhibition period is provided, the legislation should explicitly state that members of the public (and public authorities) may make comment during these periods, and may inspect and copy any documents for that purpose.</p>
Review of Community Participation Plans	<p><i>Recommendation 10:</i> There should be express provision for the proposed independent review of Community Participation Plans, with this process to be mandatory and regular.</p>

Strategic Planning – Planning Bill, Part 3	
General	<p><i>Recommendation 11:</i> There should be a requirement that strategic plans:</p> <ul style="list-style-type: none"> <li>• are based on the best scientific information available (including baseline environmental studies, strategic environmental assessment, and environmental accounts);</li> <li>• identify and protect valuable and sensitive natural areas from development;</li> <li>• ensure cumulative impacts are properly assessed and considered in plan-making;</li> <li>• integrate national, state and regional natural resource management (<b>NRM</b>) targets and agency expertise;</li> <li>• set out rigorous and objective requirements for process, outcomes and implementation of Strategic Environmental Assessment;</li> <li>• use Strategic Environmental Assessment to complement, not replace, site-based assessment;</li> <li>• include a comprehensive range of environmental and sustainability performance indicators by which the new planning system will be assessed.</li> </ul>
Strategic Planning Principles	<p><i>Recommendation 12:</i> Balance economic, social and environmental values (through amending Principle 1 and deleting Principle 10 under clause 3.3).</p> <p><i>Recommendation 13:</i> There should be additional Strategic Planning Principles to achieve environmental and NRM outcomes, and the sustainability of natural and built environments. In particular, strategic plans should:</p> <ul style="list-style-type: none"> <li>• aim to <i>achieve ecologically sustainable development</i> when making, amending and implementing plans – including by applying relevant ESD principles in decision making;</li> <li>• aim to <i>maintain or improve environmental outcomes</i> in the area – including through the integration of national and state NRM targets, and regional Catchment Action Plan (or equivalent) targets;</li> <li>• take into account, and mitigate, the <i>cumulative impacts</i> of past, present and likely future development in the area – including by establishing the carrying capacity of the landscape (with respect to environmental qualities, waste etc);</li> <li>• take into account the likely <i>scientific impacts of climate change</i> on the area – including identifying and planning for an effective hierarchy of mitigation and adaptation responses in urban, rural and coastal areas;</li> <li>• provide for <i>urban sustainability</i> (open space, ‘green infrastructure’, public transport), <i>building efficiency</i> (water, energy, materials) and <i>social inclusion</i> (walkability, design, affordable housing) that can be tailored to local needs.</li> </ul>
Community participation	<p><i>Recommendation 14:</i> There should be specific minimum consultation, notification and information access requirements for Community Participation Plans and the Minister’s ‘gateway</p>

	determination' for Local Plans (per Part 1 of Schedule 2 and clause 3.7).
Making, amending or repealing plans	<p><i>Recommendation 15:</i> Appropriate studies (environmental, social and economic) must be completed prior to the preparation of draft strategic plans, including local plans, where not previously done or current (per Part 3).</p> <p><i>Recommendation 16:</i> Decision makers must give reasons for decisions, particularly in exercising functions to make, repeal or amend strategic plans or local plans (per Part 3). Ministerial discretion to avoid compliance with plan-making procedures to 'expedite' matters should be removed (per clauses 3.9 and 3.14).</p> <p><i>Recommendation 17:</i> NSW Planning Policies, regional and subregional plans should be subject to independent review at regular, specified intervals.</p>
NSW Planning Policies	<p><i>Recommendation 18:</i> NSW Planning Policies should:</p> <ul style="list-style-type: none"> <li>• be disallowable statutory instruments and subject to judicial review;</li> <li>• maintain or improve protections in current State Environmental Planning Policies (<b>SEPPs</b>) and set minimum environmental standards.</li> </ul> <p><i>Recommendation 19:</i> There should be specific reference to NSW Planning Policies relating to:</p> <ul style="list-style-type: none"> <li>• the integration of natural resource management (<b>NRM</b>) targets and environmental protection outcomes into the planning system;</li> <li>• urban sustainability, climate change mitigation and adaptation (through amending clause 3.4(2)).</li> </ul>
Regional Growth Plans	<p><i>Recommendation 20:</i> Regional Growth Plans should:</p> <ul style="list-style-type: none"> <li>• be called Regional Development Plans;</li> <li>• require the inclusion of more specific environmental targets (such as a 'maintain or improve environmental outcomes' test);</li> <li>• be based on NRM catchment boundaries where possible.</li> </ul>
Subregional Delivery Plans	<p><i>Recommendation 21:</i> Subregional Delivery Plans must include a range of community and environmental protections, and governance safeguards, including:</p> <ul style="list-style-type: none"> <li>• an active commitment to delivering ESD;</li> <li>• best practice consultation processes, in accordance with the Community Participation Charter;</li> <li>• transparent and evidence-based decision making;</li> <li>• integrated environmental and NRM outcomes;</li> <li>• built-in urban sustainability, design quality and climate change responses; and</li> <li>• clear membership procedures, expertise and obligations for Subregional Planning Boards (see Planning Administration Bill recommendations below).</li> </ul>

	<p><i>Recommendation 22:</i> The aim of integrating environmental targets from other laws and policies in Subregional Delivery Plans should be given clearer effect.</p> <p><i>Recommendation 23:</i> The formal status and requirements for Sectoral Strategies should be clarified.</p> <p><i>Recommendation 24:</i> The environmental data that informs Sectoral Strategies must be integrated into performance assessment of planning outcomes (including indicators in annual reports, audit reports, legislative reviews, and the annual State budget).</p> <p><i>Recommendation 25:</i> Growth Infrastructure Plans should be required to include 'green infrastructure' commitments and integrate this into broader infrastructure planning and funding.</p>
Local Plans	<p><i>Recommendation 26:</i> Spot rezoning should be limited to exceptional circumstances that maintain or improve environmental outcomes (see clause 3.25).</p> <p><i>Recommendation 27:</i> Reduction or standardisation of zones must maintain or improve existing environmental and heritage protections in current SEPPs and Local Environmental Plans.</p> <p><i>Recommendation 28:</i> There should be clear and objective criteria for the Minister in exercising functions relating to 'gateway determinations' for planning proposals (per clause 3.21).</p> <p><i>Recommendation 29:</i> There should be an additional environmental zone (or zones) to ensure there is no loss of existing E3/E4 and equivalent protections.</p> <p><i>Recommendation 30:</i> There should be more clarity around how binding planning controls will maintain or improve existing environmental and heritage protections in the new zones. For example, provisions to protect and manage special ecological attributes in residential locations should be in binding planning controls, not merely part of non-binding development guides (see clauses 3.11 and 3.27(2)).</p> <p><i>Recommendation 31:</i> Zoning revisions must be based on thorough and informed public consultation, and scientific studies that fully value environmental benefits and services.</p> <p><i>Recommendation 32:</i> There should be minimum environmental protection criteria for zones in new standard instruments (and strategic plans). Local councils should be permitted to include additional controls for environmental conservation purposes that suit local needs.</p> <p><i>Recommendation 33:</i> Enterprise zones should have limited application and be subject to mandatory environmental, urban sustainability and building efficiency requirements.</p>

	<p><i>Recommendation 34:</i> There should be clarity around how local heritage will be protected by suburban character zones.</p> <p><i>Recommendation 35:</i> Specific timeframes should be provided for reviews of Local Plans so that they cover ten years and are reviewed every four years (compared to ‘regular and periodic review’ as per clauses 3.15 and 3.9(4)).</p> <p><i>Recommendation 36:</i> Standard Instrument provisions should be developed to address climate change for coastal local government areas (including buffer zones, restrictive zoning, setbacks and other resilience measures).</p> <p><i>Recommendation 36a:</i> Planning control provisions in Local Plans should not be permitted to suspend or modify Nature Conservation Trust Agreements, private Conservation Agreements, wildlife refuges and conservation property vegetation plans without the landowner’s consent (per clause 3.26).</p>
<b>Development Assessment and approval – Planning Bill, Part 4</b>	
General – equitable rights	<p><i>Recommendation 37:</i> There should be equitable rights between developers and the community, and strict limits on development outside established strategic planning processes. This includes:</p> <ul style="list-style-type: none"> <li>• strictly limiting rights to spot rezoning and rights to vary standards to circumstances that where a proponent can clearly demonstrate that a proposed development will <i>maintain or improve environmental and social outcomes</i> based on relevant studies;</li> <li>• limiting proposals that depart from standards and require rezoning to go through a transparent and objective process, including community consultation and a right to be heard;</li> <li>• encouraging third party (community) participation in all review and appeal mechanisms proposed for developers (whether for spot rezoning or other decision review rights);</li> <li>• instead of an automatic appeal right for code-assessable development after 28 days, such rights could be triggered by requiring developers to notify council of an intention to appeal if a project is not determined within a further period (such as 14 days).</li> </ul>
Complying development	<p><i>Recommendation 38:</i> A development that does not comply with development guide provisions, should not qualify as complying development (per Division 4.3).</p> <p><i>Recommendation 39:</i> A ‘deemed approval’ of non-compliance with standards should not be permitted (per clause 4.8).</p>
Code assessment	<p><i>Recommendation 40:</i> Codes must only apply to genuinely low risk, low impact development; and code assessment should be excluded from a range of sensitive areas, such as:</p> <ul style="list-style-type: none"> <li>• environmental protection zones, or other environmentally sensitive areas (for example, where development would affect areas of high conservation value, listed threatened</li> </ul>

	<p>species, endangered ecological communities or critical habitat);</p> <ul style="list-style-type: none"> <li>• areas of Aboriginal cultural and heritage significance;</li> <li>• areas protected by existing SEPPs (such as koala habitat, littoral rainforest, wetlands, sensitive coastal areas etc).</li> </ul> <p><i>Recommendation 41:</i> Clear requirements for public consultation must apply to all code-assessable development, and the formulation and amendment of codes themselves. These requirements include:</p> <ul style="list-style-type: none"> <li>• <i>Participation</i> – the Community Participation Charter must be applied to code-making and code amendments.</li> <li>• <i>Notification</i> – the community should be consulted early on when and how code-assessable project notification and information should be provided (for example, on-site signage, direct to neighbours, online access, web-based automatic notification).</li> <li>• <i>Local, rural and regional needs</i> – If a NSW planning policy sets code standards, it must allow tailoring for local needs.</li> </ul> <p><i>Recommendation 42:</i> Objective rules and standards for code development and content should be developed. This should include:</p> <ul style="list-style-type: none"> <li>• <i>Enactment</i> – Development assessment codes should be promulgated as legislative instruments and subject to judicial review.</li> <li>• <i>Achieving ESD</i> – All codes must be consistent with an overarching aim of achieving ESD and decision makers should be required to apply ESD principles (among other criteria) when making codes.</li> <li>• <i>Low environmental impact</i> – Codes should be limited to genuinely low risk, low impact development. This threshold should be based on the relevant planning authority being satisfied (based on relevant, up-to-date studies) that development approved under the Code: <ul style="list-style-type: none"> <li>○ will have no significant adverse social or environmental impacts, <i>and</i></li> <li>○ will maintain or improve environmental values in the area the code affects.</li> </ul> </li> <li>• <i>Cumulative impacts</i> – Codes must include provisions dealing with: <ul style="list-style-type: none"> <li>○ the cumulative impacts of multiple developments (code-based or otherwise);</li> <li>○ interfaces and ‘edge effects’ across different areas and zone boundaries (for example, between built-up corridors and more sensitive areas);</li> </ul> </li> <li>• <i>Efficiency</i> – Codes must include mandatory, leading practice sustainability and efficiency requirements for residential, commercial and industrial developments, including for retrofitting existing buildings – via an updated and expanded Building Sustainability Index (<b>BASIX</b>).</li> <li>• <i>Facilitating green innovation</i> – Adopt processes and standards that facilitate, encourage and reward green innovation (for example, simpler, cheaper or faster approval of projects that demonstrate leading environmental sustainability).</li> </ul>
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	<ul style="list-style-type: none"> <li>• <i>Enforceability</i> – There should be a range of strong enforcement powers that can be exercised by councils and members of the public to ensure codes are complied with.</li> <li>• <i>Regular review</i> – There should be regular, independent review of codes to ensure processes, participation, outcomes and governance are effective.</li> </ul>
Merit assessment	<p><i>Recommendation 43:</i> Developments should either be fully code assessed or fully merit assessed if they fall outside the code.</p> <p><i>Recommendation 44:</i> There should be additional criteria for decision makers exercising merit assessment functions (per clause 4.19) including:</p> <ul style="list-style-type: none"> <li>• the suitability of the site for the development (and appropriate alternative options);</li> <li>• the cumulative impacts of past, present and likely future developments in the area;</li> <li>• climate change impacts – in particular: <ul style="list-style-type: none"> <li>○ the development’s likely <i>contributions</i> to climate change;</li> <li>○ the likely impacts of climate change <i>on the development</i>;</li> <li>○ the need for relevant conditions to address both mitigation and adaptation.</li> </ul> </li> <li>• the public interest, specifically including relevant principles of ESD that should apply.</li> </ul> <p><i>Recommendation 45:</i> The proposed ‘public benefit’ qualification to the ‘public interest’ test should be deleted (in clause 4.19(2)(d)).</p>
State Significant Development	<p><i>Recommendation 46:</i> All State Significant Development (<b>SSD</b>) should be ‘impact assessed’ development that is subject to an Environmental Impact Statement (<b>EIS</b>) and mandatory consultation during assessment.</p> <p><i>Recommendation 47:</i> Decision makers for State and Regionally Significant Developments should be required to consider the provisions of Local Plans where the development will have an impact.</p> <p><i>Recommendation 48:</i> There should be clear and objective criteria for the Minister in exercising powers to ‘call in’ development as SSD (per clause 4.29).</p> <p><i>Recommendation 49:</i> The recommendations listed above in relation to merit assessment decision-making criteria (see Recommendation 44) should also be adopted for State and Regionally Significant Developments.</p> <p><i>Recommendation 50:</i> There should be clear legislative requirements for assessing SSD, with best practice standards for public consultation, independent environmental assessment, and review.</p>

	<p><i>Recommendation 50a:</i> The Bill must not enable SSD that is partly prohibited (clause 4.30), or allow partial consents (clause 4.16) as these may circumvent clear staged assessment and rezoning processes that should require holistic environmental assessment.</p> <p><i>Recommendation 51:</i> Concurrences and referrals (including Species Impact Statements and approvals listed in Table 1 of Part 6, Division 1) must be:</p> <ul style="list-style-type: none"> <li>• reinstated for State Significant projects, and</li> <li>• retained for any proposal involving a significant environmental or heritage impact.</li> </ul>
Strategic Compatibility Certificates	<p><i>Recommendation 52:</i> Strategic Compatibility Certificates should have strictly limited application, and be subject to rigorous upfront community consultation and environmental safeguards (per Division 4.7).</p>
Environmental Impact Assessment	<p><i>Recommendation 53:</i> There should be mandatory accreditation of environmental consultants who prepare Environmental Impact Assessment (<b>EIA</b>) reports as part of a two-tiered process:</p> <ul style="list-style-type: none"> <li>• first, for code-based assessment;</li> <li>• second, for major projects (public and private), including independent appointment of accredited assessors (see Appendix).</li> </ul> <p><i>Recommendation 54:</i> EIA processes should be strengthened by:</p> <ul style="list-style-type: none"> <li>• requiring assessment of the cumulative impacts of multiple projects, the potential impacts of feasible alternatives, and climate change impacts;</li> <li>• requiring decision makers to reject reports that are unsatisfactory or incomplete;</li> <li>• replacing public authority self-assessment with an impartial, arms-length approach (see Infrastructure and EIA, Recommendation 56 below);</li> <li>• improving transparency of EIA processes as part of upfront community engagement before decisions are made;</li> <li>• adopting best practice standards for Strategic Environmental Assessment (see Strategic Planning Recommendations 8 and 11 above);</li> <li>• external peer-review and auditing of EIA reports and subsequent project outcomes;</li> <li>• requiring the Minister to report annually on the effectiveness of EIA systems;</li> <li>• ensuring that EIA is linked with comprehensive baseline data and environmental accounting systems, providing sufficient resources and time to address data gaps.</li> </ul>
Modifications	<p><i>Recommendation 55:</i> The existing checks and balances that apply to modifications (EP&amp;A Act section 96) should be carried over to the new Act (per clause 4.38). In addition to requiring the development is 'substantially the same', these legal safeguards include:</p> <ul style="list-style-type: none"> <li>• ensuring that modifications involve 'minimal environmental impact' (or further consultation with concurrence agencies),</li> </ul>

	<ul style="list-style-type: none"> <li>• satisfying consultation and notification requirements (for the public and concurrence agencies),</li> <li>• consideration of submissions, and</li> <li>• limitations on modifications that affect threatened species and critical habitat.</li> </ul>
<b>Infrastructure and environmental impact assessment – Planning Bill, Part 5</b>	
General	<p><i>Recommendation 56:</i> Assessment and approval for State development should be independent through:</p> <ul style="list-style-type: none"> <li>• including infrastructure projects in new requirements to accredit consultants who undertake EIAs in the new planning system; and/or</li> <li>• requiring assessment and approval of infrastructure projects at arms-length from the proponent (state agency), such as by a regional planning panel or other body.</li> </ul> <p><i>Recommendation 57:</i> Staged or ‘concept plan’ processes must include further public consultation and review at a later stage.</p> <p><i>Recommendation 58:</i> The Minister must only be allowed to amend strategic plans and Local Plans and to ‘expedite’ matters that give effect to infrastructure plans (as well as strategic plans and matters of State or regional significance) in strictly limited circumstances, based on objective criteria and following consultation with the relevant local community.</p>
Environmental Impact Assessment for infrastructure projects	<p><i>Recommendation 59:</i> The general duty to consider environmental impacts of relevant development should be strengthened by:</p> <ul style="list-style-type: none"> <li>• a contextual reference stating that this duty arises ‘For the purposes of attaining the objects of this Act relating to achieving ESD and the protection and enhancement of the environment...’;</li> <li>• a requirement to ‘examine and take into account <i>to the fullest extent possible all matters</i> affecting or likely to affect the environment...’.</li> <li>• requiring that the ‘7-part test’ be carried out where threatened species may be in or around the site (per clause 5.3).</li> </ul> <p><i>Recommendation 60:</i> Environmental impact assessment for infrastructure should:</p> <ul style="list-style-type: none"> <li>• carry over all existing factors to be taken into account in assessing environmental impacts (see <i>Environmental Planning and Assessment Regulation 2000</i>, clause 228);</li> <li>• strengthen the consideration of new threatened species listings where relevant, in accordance with evidence based decision-making and adaptive management;</li> <li>• clarify that where the determining authority and the proponent who provides the EIS are in fact the same agency (clause in clause 5.4(1)(a)), that independent scrutiny and additional accountability requirements should apply;</li> <li>• the minimum exhibition period for an EIS should be increased from 28 days to 45 business days (per Part 1 of</li> </ul>

	<p>Schedule 2);</p> <ul style="list-style-type: none"> <li>• require the determining authority to give reasons if it disagrees with any findings or recommendations following a review by the Planning Assessment Commission or the Director-General (per clause 5.4(1)(c)-(d));</li> <li>• require the Director-General to make an examination of the EIS public 'as soon as practicable' (per clause 5.8(3)).</li> <li>• consider any effect of proposed development on wilderness areas (per Schedule 5, clause 5.4);</li> </ul> <p><i>Recommendation 61:</i> It should be clear that the meaning of 'significantly affect the environment' includes but is not limited to threatened species (per clause 5.5(1)).</p> <p><i>Recommendation 62:</i> There should be a requirement (rather than discretion) to impose conditions to reduce the adverse effects of high-impact development after an EIS if it is determined that the development will adversely affect the environment (per clause 5.6).</p> <p><i>Recommendation 63:</i> A notice provided to the proponent in writing as to the determining authority's reasons for actions should also be made public (per clause 5.6(1)).</p>
State Infrastructure Development	<p><i>Recommendation 64:</i> State Infrastructure Development (<b>SID</b>) procedures should be strengthened as follows:</p> <ul style="list-style-type: none"> <li>• the term 'infrastructure' should be defined;</li> <li>• the requirements for a SID project application should be specified (per clause 5.12);</li> <li>• the requirement that all SID projects require an environmental impact statement (<b>EIS</b>), in accordance with the Director-General's requirements and the regulations should be retained (per clause 5.13) (see also Recommendation 56);</li> <li>• the minimum exhibition period for an EIS should be increased from 28 days to 45 business days (per clause 5.14, Part 1 Sch. 2);</li> <li>• public exhibition provisions should be accompanied by explicit provisions stating that any person (including a public authority) may make a submission on the development (per clause 5.14; cf EP&amp;A Act, s 115Z(4));</li> <li>• the Director-General should be required to consider relevant issues raised in public submissions when exercising their discretion to provide copies of public submissions on an EIS to 'appropriate' public authorities (per clause 5.14(4)(c));</li> <li>• an agency/proponent's preferred SID report should be made available to the public whether or not the Director-General considers that significant changes are proposed (per clause 5.14(6));</li> <li>• the Director-General's EIA report to the Minister should include a copy or accurate summary of public submissions, and any response from the proponent to the issues raised in those submissions (per clauses 5.14(5) and 5.15(2));</li> <li>• when deciding whether or not to approve SID, the Minister should be required to consider public submissions on the</li> </ul>

	<p>proposal (per clause 5.16(2));</p> <ul style="list-style-type: none"> <li>• the Minister’s power to determine that no further EIA is required for the development, or any particular stage, should be subject to appropriate checks and balances (including an environmental impact threshold or criteria, and independent advice or recommendations) (per clause 5.19);</li> <li>• the process for requesting and granting a modification of the Minister’s SID approval should refer to the potential environmental impacts of the change (per clause 5.20(2)-(3));</li> <li>• the requirements to publish information (per clause 5.2) should be retained and strengthened as follows: <ul style="list-style-type: none"> <li>○ there should be specific timeframes or ‘as soon as practicable’ requirements to publish documents;</li> <li>○ there should be a requirement to publish submissions made on SID proposals and their EISs, including from government agencies;</li> <li>○ reasons for <i>approval</i>, not just <i>refusal</i> of SID should be published, consistent with obligations under the Community Participation Charter (see clause 2.1(1)(g)).</li> </ul> </li> </ul>
Public Priority infrastructure	<p><i>Recommendation 65:</i> The declaration of Public Priority Infrastructure (<b>PPI</b>) proposals should be limited and based on objective criteria and governance standards including:</p> <ul style="list-style-type: none"> <li>• tightening up the types of development that can be classified as PPI (compared to ‘generally of the kind’ under clause 5.23(2)(a));</li> <li>• requiring the advice of the Planning Assessment Commission prior to a declaration (per clause 5.23(2)(b)).</li> </ul> <p><i>Recommendation 66:</i> A project definition report for PPI should:</p> <ul style="list-style-type: none"> <li>○ be exhibited <i>before</i> the Minister declares a development as PPI, and for at least 45 business days (instead of 28 days);</li> <li>○ require the proponent to avoid, minimise or mitigate any adverse impacts of the development, ‘to the extent practicable’, including having regard to reasonable alternatives to the proposal, or alternative ways of constructing or operating the infrastructure;</li> <li>○ specifically address <i>cumulative impacts</i> in combination with other existing or likely future development, and <i>climate change impacts</i> including mitigation and adaptation responses (per clause 5.26).</li> </ul> <p><i>Recommendation 67:</i> PPI should not be exempt from a range of provisions, such as the Act’s objects, strategic plans, concurrence requirements and appeals (clause 5.27).</p>

## Concurrences, consultation and other legislative approvals – Planning Bill, Part 6

<p>Review of concurrences</p>	<p><i>Recommendation 68:</i> The Government's four-month review of concurrences should be extended and subject to broad consultation on the ambit and policy rationale for the concurrence reforms.</p> <p><i>Recommendation 69:</i> Existing concurrences designed to protect environmental values (such as biodiversity, heritage or pollution prevention) should be retained for any proposal involving a significant environmental or heritage impact.</p> <p><i>Recommendation 70:</i> The protection of Aboriginal cultural heritage and other heritage values should be clarified and prioritised.</p>
<p>Concurrences generally (including for major projects)</p>	<p><i>Recommendation 71:</i> Concurrence requirements for major projects (State Significant Development, State Infrastructure Development and Public Priority Infrastructure) should be reinstated (per Division 6.1) for at least native vegetation, aquifer interference approvals and heritage impacts – and potentially others pending the review above.</p> <p><i>Recommendation 72:</i> There should be no bar that prevents authorities from issuing environmental protection directions, orders and notices relating to Public Priority Infrastructure breaches (through removing clause 6.4).</p> <p><i>Recommendation 73:</i> Specific concurrence protections for threatened species should be retained and improved (including for major project assessment). These protections should include:</p> <ul style="list-style-type: none"> <li>• the need to obtain concurrence from the Environment Minister or delegate when a development is likely to significantly affect threatened species;</li> <li>• application of the current 7-part test, setting out the factors which determine whether a project will significantly affect threatened species etc;</li> <li>• a comprehensive list of factors to determine the basis of consultation about threatened species, or whether concurrence should be given (see Part 6, Division 6.2 generally), including:             <ul style="list-style-type: none"> <li>○ the principles of ESD</li> <li>○ submissions received on the development application</li> <li>○ species conservation statements.</li> </ul> </li> </ul> <p><i>Recommendation 74:</i> The Minister's broad discretion to dispense with concurrence and consultation requirements that protect environmental values (under Part 6 of the Bill, other Acts and Local Plans) should be removed (per clause 6.9).</p> <p><i>Recommendation 75:</i> Restore the Environment Department's expert role for threatened species concurrences, along with other concurrence agencies appointed in a Local Plan.</p>

One stop shop	<i>Recommendation 76:</i> The Director-General's powers and discretions to determine matters (as a one stop shop) should be removed, and a unit should be established (within an independent Planning Assessment Commission) to work on concurrences, which draws on external agencies for personnel and is still bound to make decisions according to their respective legislative frameworks.
<b>Infrastructure and Biodiversity contributions – Planning Bill, Part 7</b>	
Growth Infrastructure Plans	<i>Recommendation 77:</i> There should be increased consultation period for draft Growth Infrastructure Plans, particularly if the 28 days may overlap with consideration of other plans.  <i>Recommendation 78:</i> Growth Infrastructure Plans should be required to include climate change risk assessment, mitigation and adaptation responses – embedded in long-term infrastructure planning.
Biodiversity offset contributions	<i>Recommendation 79:</i> There should be a distinction between direct biodiversity offset contributions and indirect biodiversity contributions.  <i>Recommendation 80:</i> There should be rigorous legal criteria for offsetting including: <ul style="list-style-type: none"> <li>• a scientific assessment approach that maintains or improves biodiversity outcomes;</li> <li>• a like-for-like approach to offset impacts on specific species and communities;</li> <li>• a bar on their use in 'red-flag' areas that are too valuable to be destroyed and offset;</li> <li>• legal protection for offset areas in perpetuity.</li> </ul> <i>Recommendation 81:</i> Consideration should be given to making the BioBanking Scheme mandatory for certain developments.
Planning Agreements	<i>Recommendation 82:</i> There should be third party merit appeal rights in relation to development that is the subject of voluntary planning agreements (through amending Division 7.4 and Part 9).
Green Infrastructure	<i>Recommendation 83:</i> Infrastructure planning needs to properly value 'green infrastructure' and integrate this into broader infrastructure planning and funding at all levels.
<b>Building and subdivision – Planning Bill, Part 8</b>	
Sustainability targets	<i>Recommendation 84:</i> There should be <i>mandatory</i> urban sustainability goals at strategic and local planning levels applying to areas such as energy and water use, construction, transport, waste reduction, biodiversity and bushland protection.  <i>Recommendation 85:</i> There should be a timetable for meeting specific sustainability targets; with monitoring, auditing and reporting processes to apply to all types of built development (including industrial, commercial and residential) to achieve goals and targets.

Update BASIX	<p><i>Recommendation 86:</i> The Building Sustainability Index (<b>BASIX</b>) should be immediately updated and expanded, and linked with code assessment. In particular:</p> <ul style="list-style-type: none"> <li>• strengthen minimum requirements of BASIX to reflect technological advances;</li> <li>• extend its operation to commercial and industrial sites;</li> <li>• raise standards for multi-unit dwellings that are currently subject to lesser targets;</li> <li>• establish mandatory sustainability requirements in law for retrofitting existing buildings (in particular commercial and industrial); and</li> <li>• set minimum baselines, but remove the prohibition on councils and other consent authorities from imposing more stringent water and energy use limits.</li> </ul>
<b>Merits review, appeals and enforcement – Planning Bill, Parts 9-10</b>	
Merit review and appeal rights	<p><i>Recommendation 87:</i> There should be more equitable review rights for third parties (community members). Third party merits appeal categories should be expanded as follows (per Division 9.3):</p> <ul style="list-style-type: none"> <li>• where development controls are exceeded (for example, if development is approved that exceeds code-based standards);</li> <li>• in relation to major projects, whether or not the Planning Assessment Commission holds a public hearing (per clause 9.6(3)(a));</li> <li>• decisions to approve development modifications; and</li> <li>• to provide more equitable time periods for objectors to bring merits appeals.</li> </ul> <p><i>Recommendation 88:</i> There should be an explicit, expanded role for the public in conciliation, arbitration, and review processes (per Division 9.2).</p> <p><i>Recommendation 89:</i> Remove review rights for developers where rezoning applications are refused (otherwise, equitable third party review rights should be provided in these circumstances).</p> <p><i>Recommendation 89a:</i> Require SSD consents to be deferred pending any appeals (clause 9.13).</p>
Open standing	<p><i>Recommendation 90:</i> The general privative clause which states that various parts of the Act are ‘not mandatory’, and restricts legal challenges, should be removed (clause 10.12).</p>
Enforcement	<p><i>Recommendation 91:</i> Compliance and enforcement policies and statistics should be published in a consistent and comparable form.</p> <p><i>Recommendation 92:</i> Leading practice innovative compliance and enforcement tools and orders should be including in the new planning scheme (for example, as available under the <i>Protection of the Environment Operations Act 1997</i>).</p> <p><i>Recommendation 92a:</i> The offence for providing false or misleading</p>

	<p>information (clause 10.22) should be clarified to apply to:</p> <ul style="list-style-type: none"> <li>• ‘negligent or reckless’ inaccuracies of information provided;</li> <li>• ‘approvals’ under Part 5, Division 5.1 (development that does not require consent); and</li> <li>• information provided in the course of post-approval reporting obligations or investigations.</li> </ul>
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## Recommendations relating to the Planning Administration Bill

Planning authorities	<p><i>Recommendation 93:</i> There should be clear membership categories for Subregional Planning Boards and other planning authorities.</p> <p><i>Recommendation 94:</i> Safeguards for Subregional Planning Boards (and other planning authorities) should include:</p> <ul style="list-style-type: none"> <li>• Requirements for transparent procedures, timely notification and accessible information;</li> <li>• Local rather than State members should predominate membership;</li> <li>• State-appointed members should be drawn from particular agencies (such as Local Land Services, Planning Department, Housing, Environment and Heritage) and require community representation;</li> <li>• the requirement that Deputy Chairs be a State appointed member should be removed (per Schedule 5, clause 5.4);</li> <li>• limitations on the Minister’s ability to remove members from office to governance grounds (clause per Schedule 5, clause 5.7(1));</li> <li>• provisions making disclosures of pecuniary interests available for free and electronically (subject to appropriate safeguards);</li> <li>• prohibit or strictly limit the circumstances in which a member may deliberate or take part in a decision if they have declared a pecuniary interest (Schedule 5, clause 5.17(6)).</li> </ul>
Monitoring and environmental auditing	<p><i>Recommendation 95:</i> Require that monitoring and environmental audit reports are made public (Part 9).</p> <p><i>Recommendation 96:</i> Require objective criteria for monitoring and auditing conditions (clause 54).</p> <p><i>Recommendation 97:</i> Require independent certification of monitoring data (clause 55(c)).</p>
Planning Assessment Commission	<p><i>Recommendation 98:</i> Clarify the application of the ‘public interest’ test to justify private hearings (Schedule 2, clause 2.3(4)).</p>

## Non-legislative recommendations

Terminology	<p><i>Recommendation 99:</i> Guidance material for the community should include clear information on changes to terminology and the operation of instruments and decision makers in the new system, as compared with the current system.</p> <p><i>Recommendation 100:</i> Information and training should be provided, including as part of e-planning initiatives, to assist all members of the community in engaging with the new planning system.</p>
Targets	<p><i>Recommendation 101:</i> The setting of a target for code assessable matters – currently 80% within 5 years – should be based on an objective determination of low risk and low impact.</p> <p><i>Recommendation 102:</i> The determination of what constitutes low risk, low impact – and hence the target – should be determined as part of the first tranche of planning reforms and based on extensive community consultation (see also Recommendation 42).</p>
Resourcing	<p><i>Recommendation 103:</i> Significant additional time, resourcing, expertise, training and oversight will be essential to do best practice public engagement properly, and ensure community buy-in. This includes additional resources for effectively engaging sectors of the community who may not currently engage effectively – for example, Indigenous and culturally and linguistically diverse communities. The NSW Government needs to consult further on the detail of how this will be achieved.</p>
Parallel consultation processes	<p><i>Recommendation 104:</i> Current consultation processes on the Sydney Metropolitan and Lower Hunter regional plans should be extended, and not finalised until the Planning Bill is passed and NSW planning policies are in place.</p>

# 1. Objectives (White Paper Chapter 1, Planning Bill Part 1)

## Overview

Chapter 1 of the White Paper and Part 1 of the Planning Bill propose that the new planning system will aim to promote economic growth while balancing social and environmental factors:

*The key objective of the planning system is to promote and enable economic growth and positive development for the benefit of the entire community, while protecting the environment and enhancing people's way of life. It is about enabling development that is sustainable (p 15)*

The Planning Bill itself includes nine objects, but does not explicitly identify an overarching aim.<sup>3</sup> Many of the objects are similar to those in the current *Environmental Planning and Assessment Act 1979 (EP&A Act)*, although several include a more deliberate economic emphasis.

Objects can have a guiding role in legal interpretation, but they have limited influence unless specific provisions in an Act refer back to them, or the interpretation of a provision is unclear. A closer look at what the Planning Bill means by 'sustainable development' is needed to understand the implications for the new planning system.

## Analysis

EDO NSW and many other stakeholder submissions have argued that *ecologically sustainable development (ESD)* should be the overarching object of the new State planning system, as a framework for sound development and decision making (**Recommendation 1**).<sup>4</sup> However, the White Paper and Planning Bill replace ESD and its principles with a much weaker definition of 'sustainable development'. In addition, as the Bill adopts no overarching object, or hierarchy between objects, this leaves wide discretion for decision makers.

As noted, the nine objects for the new Act include 'economic growth and environmental and social well-being through sustainable development'. The Planning Bill also says:

*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 (clause 1.3(2)).*

Under the current EP&A Act, *promoting ecologically sustainable development* is one of 10 equally-weighted objects. The meaning of ESD in the EP&A Act incorporates five core principles, as set out in a multitude of NSW, other state and federal laws over the past two decades.<sup>5</sup> This includes for example, all key NSW planning, local government, pollution, water and coastal management laws.

It is very concerning that the White Paper and the Planning Bill remove any reference to the established concept and underlying principles of ESD. The Planning Bill objects only refer to

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<sup>3</sup> Planning Bill 2013, clause 1.3. Broadly these objects relate to: (a) Economic growth and environmental and social wellbeing through 'sustainable development'; (b) Community participation; (c) Infrastructure planning; (d) Timely delivery of business, employment and housing; (e) Environment protection and 'use' (including threatened species and built and cultural heritage); (f) Agricultural and water resource management; (g) Building safety and design; (h) Timely and proportionate development assessment (relative to impacts); (i) Shared responsibility for planning and growth management between levels of government.

<sup>4</sup> NSW Department of Planning & Infrastructure, *Green Paper Feedback Summary* (Dec. 2012), p 44.

<sup>5</sup> See, for example, *Protection of the Environment Administration Act 1991 (NSW) (POEA Act)*, section 6(2); *Environmental Planning and Assessment Act 1979 (NSW)* sections 4, 5; *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* section 3A; *Sustainable Planning Act 2009 (QLD)*, sections 3-5; *Planning and Development Act 2007 (ACT)*.

two relevant principles (and even then only in vague terms). These are the 'integration' of economic, social, environmental factors, and consideration of 'present and future needs'. At the same time, the Bill removes reference to three fundamental principles that underpin ESD as enshrined in Australian law:

- the precautionary principle;<sup>6</sup>
- biodiversity and ecological integrity as a fundamental consideration; and
- improved valuation, pricing and incentive mechanisms (including the *polluter pays* principle).

These well-established principles are enshrined in the *Intergovernmental Agreement on the Environment* and the *National Strategy for Ecologically Sustainable Development*, which NSW and all Australian governments have adopted since 1992.<sup>7</sup> While one of the NSW Government's informal reasons for moving away from ESD is that it unduly emphasises environmental factors, it is important to note that the National Strategy for ESD explicitly includes social and economic, alongside environmental factors.<sup>8</sup> Any suggestion that the existing NSW planning system unduly prioritises environmental factors is also misconceived.

The proposed change is not simply a change of terminology ('ESD' to sustainable development), but is the deliberate removal of fundamental principles so that they will no longer apply to decision making. The White Paper itself notes the international adoption of sustainable development in 1987:

*as development that 'meets the needs of the present without compromising the future generations to meet their own needs'. Since then, the term has evolved into a core set of principles and values to guide development and change.*<sup>9</sup>

As proposed, the Planning Bill's narrow definition of *sustainable development* would be a significant step backwards for environmental protection in plan-making and development decisions. We submit that a leading practice planning system needs to prioritise and implement *ecologically* sustainable development and its principles, not a watered-down concept of integrated decision-making (**Recommendations 2 and 4**). This is consistent with the NSW Government's commitments under the *Intergovernmental Agreement on the Environment* and the *National Strategy for ESD* (1992).

Finally, EDO NSW welcomes the retention of a general 'environmental protection' object in the Planning Bill. However, the broad commitments to environmental and social considerations under the objects of the Bill are not emphasised or operationalised in the body of the Bill itself, in the way that economic factors are. This sets up a fundamental imbalance between the 'triple bottom line' factors that, according to the White Paper, are to be integrated (p 63). This imbalance is exacerbated by the introduction of additional economic considerations (such as 'economic viability' tests for strategic plans) throughout the White Paper. As an initial step, we recommend reinstating specific references to: 'the protection and conservation of native animals and plants'; and 'the provision of land for public purposes' in the general environmental protection objective (**Recommendation 3**). These amendments reflect existing phrases under section 5 of the EP&A Act.

**See Recommendations 1-4 on Objectives**

<sup>6</sup> See *POEA Act* section 6(2)(a). In brief the precautionary principle is triggered if there is a risk of serious or irreversible harm to the environment, and there is scientific uncertainty as to whether that harm will occur. In such cases, the precautionary principle requires the developer or proponent to demonstrate its activities are sufficiently safe.

<sup>7</sup> See Australian Government Department of Sustainability, Environment, Water, Population and Communities, <http://www.environment.gov.au/about/esd/index.html#nseesd>.

<sup>8</sup> See Australian Government Department of Sustainability, *National Strategy for ESD – Goal, core objectives and guiding principles*: <http://www.environment.gov.au/about/esd/publications/strategy/intro.html#GoalsEtc>.

<sup>9</sup> White Paper, p 16.

## 2. Community Participation (White Paper Chapter 4, Planning Bill Part 2)

### Overview

Chapter 4 of the White Paper and Part 2 of the Planning Bill 2013 outline the Government's approach to renew public engagement in the planning system. The proposed reforms focus on a new *Community Participation Charter*, early community involvement in strategic planning and greater use of information technology.

The *Community Participation Charter* (**Charter**) is the centrepiece of the White Paper's approach to community participation. The Charter will apply to a broad range of planning authorities (bodies which make decisions on strategic plans and development applications), from the Planning Minister down to local councils and other consent authorities (Planning Bill, clause 2.2).<sup>10</sup>

The Charter sets out seven high-level principles under the Planning Bill (clause 2.1). In brief, these relate to *Partnership* (opportunities to participate), *Accessibility* (to understandable information), *Early involvement* (participation in strategic planning 'as soon as possible before decisions are made'), *Right to be informed* (about planning decisions that affect the community), *Proportionate* (participation in decisions is proportionate to a development's significance and impact), *Inclusiveness* (representative, inclusive and appropriate consultation methods) and *Transparency* (open and transparent decision-making, reasons for decisions and feedback on the influence of community views).

The Charter is to be given practical effect via Community Participation Plans (**CP Plans**) prepared in consultation with the community. Each planning authority (other than the Minister<sup>11</sup>) is 'required to prepare' a CP Plan that 'provides guidance on how it will undertake community participation' for functions that the Charter applies to (clause 2.4(2)). The Planning Department will also prepare Community Participation Guidelines to assist planning authorities to develop their CP Plans.

The emphasis is clearly on upfront, strategic-level consultation:

*Once the community has participated in the development of the strategic plan for the area, planning authorities can streamline most development assessment without the need to further consult with communities unless proposals significantly depart from standards in the Local Plan (White Paper, p 125).*

For example, complying or code-assessable development that meets the standards in Local Plans 'will only be notified for information. Community views will not be sought on individual applications' (White Paper, p 47).

The key legislative requirement under Schedule 2 of the Planning Bill (ancillary provisions) relates to proposed minimum exhibition periods of 28 days – for draft Strategic Plans, draft Infrastructure Plans and draft Community Participation Plans.

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<sup>10</sup> Including the Minister and Director-General of the Planning Department (and committees or panels they establish), the Planning Assessment Commission (PAC), Regional Planning Panels, Subregional Planning Boards, Local Councils, and decision makers on strategic planning and development consents (Parts 3, 4, 5.1).

<sup>11</sup> These planning authorities are to prepare community participation plans (Planning Bill, clause 2.4): the Director-General of the Planning Department, the Planning Assessment Commission (PAC), Regional Planning Panels, Subregional Planning Boards, Local Councils, and any public authorities prescribed in regulations.

An additional provision in Schedule 2 (clause 2.24) carries over the EP&A Act arrangements relating to copyright indemnification for documents used for planning purposes (s 158A). However, in our experience, confusion remains around these arrangements (in particular, whether councils and the public are indemnified in relation to documents, such as EIS reports, that are important for public comment on draft plans or development applications).

## **Analysis**

While early community engagement is entirely appropriate at the strategic planning phase, the trade-off proposed in the White Paper is unnecessarily 'absolute'. As the White Paper notes above, in exchange for upfront opportunities, communities will lose their consultation rights on most individual development proposals. Several aspects of this shift to upfront community participation are problematic for a number of reasons, explored in detail below.

First, specific community consultation requirements are not guaranteed, and are largely left to future Community Participation Plans. Despite contrary indications in the White Paper, the Bill indicates that these CP Plans are 'not mandatory' (clause 10.12), and cannot be challenged if they do not comply with the Charter or other procedures in the Bill.

Second, there is a real danger of overburdening the community with the sheer number of upfront consultations, with the trade-off of losing existing rights. To date, the general public are only energised to engage with planning when they hear about actual local projects, not hypothetical future developments. The proposed timeframes for delivering the new system foreshadow the potential for multiple concurrent consultations on state, regional, sub-regional, local plans and various detailed codes.

Third, this shift has been accompanied by a removal of checks and balances. For example, community rights to be consulted, or to object to decisions, will be significantly reduced once strategic planning is complete, while developer rights will be increased. We note that *community* is broadly defined to include industry, businesses, residents, interest groups and organisations (Planning Bill clause 2.1(2)). This is a shift in the ordinary use of this term, and is not consistently reflected in the White Paper's language given that developers, industry and business will have additional rights throughout planning processes.

Fourth, consultation on strategic planning is already proceeding on an ad hoc basis, before the Community Participation Charter or Community Participation Plans are finalised.

Finally, the White Paper and Planning Bill do not always use consistent terminology, or explain connections (and implications) between existing and new terms in the system.

## **Community participation requirements are not mandatory under the Bill**

EDO NSW strongly supports a legislative basis for community consultation in the Planning Bill, including a Community Participation Charter. As noted in previous submissions, the practical influence and effectiveness of a charter will greatly depend on how it is implemented and whether compliance is mandatory.

The White Paper states that 'All planning authorities will be required to act consistently with this [Charter] when undertaking strategic planning and development assessment' (p 44, see also p 47). However, this intention is not properly reflected in the draft Planning Bill. As drafted, the Charter will be difficult if not impossible to legally enforce – even where a planning authority, a CP plan or a strategic plan clearly fails to comply with the broad obligations in the Charter.

In particular, the Planning Bill states that ‘A planning authority is, *subject to the planning legislation*, to act consistently with’ the Charter when exercising planning functions.<sup>12</sup> This qualification would include clause 10.12(2) of the Planning Bill, which states that the Community Participation provisions in Part 2 of the Bill ‘are not mandatory...’. Accordingly, enforcement proceedings cannot be brought to invalidate plans or decisions that breach the Community Participation provisions.

Furthermore, the White Paper says the Director-General of Planning will establish an independent panel to review CP Plans (p 49), but this is not required in the Bill. The only actual *mandatory or enforceable* community participation requirements are in ‘Part 1 of Schedule 2’ of the Planning Bill. This currently refers only to the 28-day minimum consultation period for draft plans, not the Charter under Part 2.

EDO NSW recommends that all planning authorities must be required to comply with the Community Participation Charter’s high-level principles (**Recommendation 5**). This could be achieved with limited amendments to the Planning Bill. Clause 10.12(2) should be deleted to ensure decision making is rigorous and accountable, and to restore public trust in the planning system (**Recommendation 6**). The independent committee process for reviewing Community Participation Plans should also be enacted in the planning legislation, rather than relying on policy statements (**Recommendation 10**).

### **Danger of overburdening the community upfront – with fewer, inequitable rights later**

As the Grattan Institute has observed, ‘The NSW government has set itself a monumental challenge. It is proposing a process of community engagement on a scale not yet seen in Australia.’<sup>13</sup> We make five points in relation to this challenge.

First, while the White Paper sets out a range of positive examples of early community involvement (4.2), the specifics of consultation requirements are left to future Community Participation Plans. As noted above, the Planning Bill is minimalist and uncertain on basic requirements. While we accept the need for councils and other planning authorities to consult the community and tailor the specifics of consultation to local needs, this leaves much detail for a future time, and provides little certainty for communities at the outset. The absence of legal requirements to independently review CP Plans reinforces this uncertainty.

Second, an effective Charter must support (not replace) prescriptive legislative standards for notification and consultation, and inform the ways in which legal protections are implemented. Accordingly, the new planning system must establish leading practice mandatory notification, consultation and accessibility requirements for *both* strategic planning and development assessment (**Recommendations 7 and 8**). For example, ICAC has recommended ‘That the standard consultation requirements for drafting local environmental plans be given statutory backing.’<sup>14</sup> We support this proposal. By contrast, the Planning Bill leaves this process open to Ministerial discretion at the ‘gateway’ stage (Schedule 2, Part 1, clause 2.5).

Third, it is difficult to expect general members of the public to be involved in a series of individual consultation processes on state, regional, sub-regional, local plans and detailed code development – in order to have a say upfront on hypothetical future development. If this approach proceeds, significant additional time (months and years), resourcing,

<sup>12</sup> Planning Bill 2013, clause 2.3 (‘Applying the Charter in the exercise of planning functions’), emphasis added.

<sup>13</sup> J.-F. Kelly, ‘Vision splendid for Sydney needs community input’, *Sydney Morning Herald*, 17/4/2013.

<sup>14</sup> Independent Commission Against Corruption (ICAC), *Anti-corruption safeguards and the NSW planning system* (February 2012), recommendation 14, available at [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au).

expertise, oversight, and community review and appeal rights will be essential (**Recommendation 103**).

Fourth, as EDO NSW and others (including ICAC) have previously argued, the current proposals set up an inherent inequity between developers and the broader community. On one hand, the community is expected to engage in upfront strategic-level rule-making, and accept the results in order to deliver ‘certainty’. On the other hand, once strategic plans are in place, developers will have an expanded range of rights to ‘push the envelope’ beyond locally agreed rules and standards. This flexibility for developers contradicts the intended focus on strategic planning. (This is discussed further under Strategic Planning: Local Plans).

It has not been explained why general community members should be content with upfront rules, while developers will have numerous opportunities to change them. This inequity is unlikely to reduce cynicism or fortify community trust in the new system. Further, ICAC has noted that ‘the introduction of increased flexibility into a system will create a corruption risk...’ (Green Paper submission, September 2012, p 2). As explored in relation to Local Plans below, the Planning Bill must be amended to deliver the fairness and certainty for communities and industries that the Government seeks.

Fifth and finally, to encourage community engagement in decision making and ensure access to information, the Planning Act must explicitly note that anyone can make a submission during exhibition periods; and can receive electronic or hard copies of any relevant documents (**Recommendation 9**). Relatedly, provisions pertaining to copyright should clearly indemnify all persons *including councils and community members* who give or receive access to documents for planning purposes (per Schedule 2, clause 2.24) (**Recommendation 7A**). We note the Minister’s recent endeavours to encourage councils to make all relevant documents publicly available to the community (under s 158A, *Environmental Planning and Assessment Amendment Act 2012*). However, we are aware of circumstances where councils and the Planning Department continue to read down this provision as limiting the indemnity to internal council use and copying, not public access.

## **Current ad hoc consultations continue, and do not reflect the Charter commitments**

The White Paper refers to ‘early community involvement’ in plan-making at every level, and says that such consultation will be required to comply with the Charter. However, in practice, consultation is proceeding in an *ad hoc* manner, before the Charter is finalised and before Community Participation Plans are in place. For example:

- There is no public information available yet on the specific content of NSW Planning Policies (plans at the top of the new hierarchy). The Government intends to develop these before the legislation enters Parliament, but timeframes and opportunities for consultation remain unclear.
- While the top tiers remain outstanding, the Government is already consulting on the second tier – Regional Growth Plans. This includes the Draft Sydney Metropolitan Strategy and a Lower Hunter 20-year regional discussion paper. Public submissions on the Sydney strategy were extended (but are due the same date as White Paper submissions) and consultation on the Lower Hunter paper closed at the end of May.

Such consultation processes should be extended, and only finalised once the planning legislation, Charter and NSW Planning Principles are in place (**Recommendation 104**).

The International Association of Public Participation (**IAP2**) has developed a Public Participation Spectrum which outlines five categories in increasing order of public engagement: *Inform, Consult, Involve, Collaborate* and *Empower*. Generally the White Paper's approach and Charter principles span the first three categories only. The only legislative requirement, for exhibition of draft plans, potentially sits in the *Consult* category. IAP2 has previously warned against a traditional 'Decide-Announce-Defend' model for the new planning system.<sup>15</sup> Unfortunately, despite the Government's appeals for a new level of community involvement and ownership of the new system, many of the key issues raised by the 875 community submissions on the Green Paper remain unresolved in the White Paper. This includes a Sydney-focused, growth-centric approach to planning, that does not reflect the sophistication, sustainability and diversity needed for a new state-wide system.

## Terminology and public understanding

EDO NSW welcomes the inclusion of a glossary in the White Paper. However, community members may be confused by the new terminology, and how these concepts differ from existing practice. For the purposes of engaging the general public, the Department needs to better explain the connections between old and new terminology (such as *development control plans* versus *development guides*; and *development standards* versus *building envelopes*). The Department and councils also need to more clearly explain the implications of different categories (such as *planning controls* versus *development guides* in Local Plans; and *performance criteria* versus *acceptable solutions* in code assessment). Finally, some terms used in the White Paper (such as *spot rezoning*) are expressed differently in the Planning Bill (see clause 3.25 and Division 4.7<sup>16</sup>). These concepts will need further clarification and explanation, as their practical effects are not always clear from the White Paper alone.

Similar explanatory material will be needed to assist e-planning. EDO NSW strongly supports the e-planning concept and the provision of accurate and comprehensive information for free. However, the proposed e-planning assumes a level of planning literacy that does not currently exist in large parts of the community. Capacity to understand terminology, read maps and understand constraints and overlays will need to be greatly increased as part of the e-planning proposal (**Recommendation 99**).

**See Recommendations 5 - 10 on Community Participation and  
99 - 104 on Non-legislative recommendations**

<sup>15</sup> International Association for Public Participation (IAP2) Australasia, *Response to the NSW Government Green Paper: A New Planning System for NSW* (Sept. 2012), p 2, available at [http://www.planning.nsw.gov.au/Portals/0/PolicyAndLegislation/GreenPaperSubmissions/IAP2\\_Australasia.pdf](http://www.planning.nsw.gov.au/Portals/0/PolicyAndLegislation/GreenPaperSubmissions/IAP2_Australasia.pdf).

<sup>16</sup> Clause 3.25: 'Concurrent planning control amendments and applications for development consent'; Division 4.7: 'Strategic compatibility certificates – development not permissible under local plan'.

### 3. Strategic Planning (White Paper Chapter 5, Planning Bill Part 3)

Chapter 5 of the White Paper and Part 3 of the Planning Bill set out the proposed hierarchy of strategic plans, to be informed by a set of guiding principles. The White Paper and Bill also provide further detail on the proposed four-level hierarchy of strategic planning instruments: *NSW Planning Policies*, *Regional Growth Plans*, *Subregional Delivery Plans* and *Local Plans*. Below we comment on the general requirements for these Plans, followed by specific recommendations for each type of Plan.

This part of the submission considers the following issues:

- Strategic planning principles and plan making
- NSW Planning Policies
- Regional Growth Plans
- Subregional Delivery Plans
- Local Plans

#### Strategic planning principles and plan making

##### Overview

The Planning Bill (Division 3.1) proposes 10 draft principles to inform strategic planning.<sup>17</sup> Division 3.2 of the Bill sets out a range of requirements for strategic plans (Local Plans are dealt with in further detail at Divisions 3.3-3.4). For example, each type of plan will have a minimum 28-day public exhibition period;<sup>18</sup> generally have a common structure;<sup>19</sup> and are to be consistent with (or 'give effect to') those plans above it.<sup>20</sup>

##### Analysis

EDO NSW is greatly concerned that the 10 strategic planning principles that 'are to guide the preparation of strategic plans' (clause 3.3) make no reference to maintaining or improving environmental or natural resource management (**NRM**) outcomes; cumulative impact assessment; climate change preparedness; or urban sustainability targets.

Several of the Bill's draft principles deal with appropriate outcomes, processes and governance measures (for example, see principles 2 and 4-9). These include infrastructure integration; early community participation; government agency collaboration; easy access to plans; monitoring and reporting; and evidence based plans, targets, and triple bottom line considerations.

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<sup>17</sup> Planning Bill 2013, clause 3.3. In brief, the 10 draft strategic planning principles relate to:

- 1) Sustainable development (to promote the State economy and productivity)
- 2) Integrated infrastructure
- 3) Streamlined development assessment (strategic plans to guide all decisions by planning authorities)
- 4) Early community participation opportunities
- 5) Government agency collaboration (consent authorities and state agency co-operation)
- 6) Top down 'line of sight' (consistency from NSW Planning Policies down to Local Plans)
- 7) Accessibility (strategic plans to be standardised, easy to use, available online)
- 8) Monitoring and reporting
- 9) Evidence based plans, realistic targets, and triple bottom line considerations.
- 10) Simple controls, consistency and economic facilitation (facilitate development consistent with agreed outcomes, avoid complexity and onerous controls that affect financial viability).

<sup>18</sup> Planning Bill 2013, Part 1 of Schedule 2

<sup>19</sup> See Planning Bill 2013, clauses 3.4-3.6, 3.11.

<sup>20</sup> See Planning Bill 2013, clause 3.8.

However, draft principles 1, 3 and 10 prioritise economic growth considerations at the expense of social and environmental outcomes. In particular:

- *Principle 1* aims to promote a wide range of economic activity while ‘having regard to’ environmental and social considerations. This is a weak legal test that is very easy for decision-makers to discharge, and in practice, disregard. The principle is vague and imbalanced, even in comparison to the weak references and new definition of sustainable development under the Bill’s draft objects.
- *Principle 3* requires strategic plans to ‘allow for streamlined development assessment’. This contrasts poorly with the draft object of the Bill, to promote assessment that is ‘proportionate to the likely impacts’ (clause 1.3(1(h))).
- *Principle 10* states that Local Plans ‘...should not contain overly complex or onerous controls that may adversely impact on the financial viability of proposed development.’ This inclusion is unnecessary and gratuitous, favouring economic considerations of the development industry regardless of the merits of development.

By contrast, EDO NSW called for the White Paper to set out a comprehensive legal framework for state, regional and subregional strategic planning (**Recommendation 12**). To reiterate, EDO NSW recommends that the proposed strategic planning process should include requirements to:

- describe how the goal of ecologically sustainable development will be put in practice;
- undertake independent baseline studies of catchments’ environmental qualities;<sup>21</sup>
- collate and publish data to promote accurate, transparent, evidence-based decisions;
- identify competing land uses and ‘triple bottom line’ values across regions;
- take account of potential cumulative impacts of development over time;
- integrate NRM goals into the planning process;
- identify sensitive areas of NSW where certain kinds of development is prohibited;<sup>22</sup>
- provide for comprehensive rights of public participation, and support to engage;
- promote resilience to climate change for communities and their environments;
- consider and integrate infrastructure needs upfront (including all forms of public transport); and
- prioritise the value of ‘green infrastructure’ (parks, waterways, wildlife corridors etc).

The draft Principles also ignore similar strategic planning objectives recommended by the Independent Planning Review Panel.<sup>23</sup> The Panel proposed these principles, among others:

- *Identify sensitive areas containing (or likely to contain) factors that will limit or prevent development taking place...<sup>24</sup>*
- *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.*
- *Identify areas where competing and potentially conflicting land use [is likely];*
- *Identify past and present human activity constraints with broader than localised impacts; and*
- *...consideration of potential cumulative impacts, including not only those arising from within the area for which the strategic plan is being developed, but also those that may be imported from elsewhere.*

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<sup>21</sup> Including for water, soil, vegetation, biodiversity, and air quality.

<sup>22</sup> For example, based on environmental, water supply, social and agricultural value criteria.

<sup>23</sup> See Independent Review Panel Report, Vol 1, recommendation 8. See further pp 42-43 and 48.

<sup>24</sup> Including: ‘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.’ See Independent Review Panel, recommendation 19. See also Review Panel discussion, ‘Identification of the areas where development might be inappropriate’, Vol. 1, p 50.

## *Clearer integration of NRM and environmental outcomes*

A key focus for EDO NSW is the integration of natural resource management<sup>25</sup> and environmental outcomes in the new planning system. This is essential to good strategic planning. EDO NSW therefore welcomes the White Paper's statement that: 'The hierarchy of plans will also address other key state policies including *NSW 2021* [State Plan], Regional Action Plans, Catchment Action Plans and Community Strategic Plans.' (p 67)

We submit that Part 3 of the Planning Bill translates this intention too vaguely. For example, the Bill only requires Regional Growth Plans to include 'environmental targets' (among others), and that Subregional Delivery Plans explain how these targets 'are to be achieved' (clauses 3.5-3.6). We recommend that the Bill and regulations be amended to require more specific integration of planning and NRM outcomes (**Recommendation 11**). In this regard, the Planning Bill could also link in with the proposed *Local Land Services Bill 2013* (currently before Parliament), which could commence in January 2014 if passed.

The White Paper also appears to have stepped back from the previous commitment that 'natural resource management will be integrated with land use planning through: A clear *NSW Planning Policy* focused on the achievement of natural resource outcomes'; to be 'put into action' by lower-level plans (Green Paper, p 37). EDO NSW reiterates its strong support for a NSW Planning Policy to integrate NRM outcomes (**Recommendation 19**).

EDO NSW has outlined a range of proposals for the practical integration of NRM and environmental protection into strategic planning and the planning system more generally.<sup>26</sup>

In particular, we recommend that the Planning Bill should be amended to require that strategic plans (**Recommendation 11**):

- are based on the **best scientific information** available (including baseline environmental studies, strategic environmental assessment, and environmental accounts<sup>27</sup>);
- identify and protect valuable and **sensitive natural areas** from development (consistent with the Independent Review Panel's recommendation 19);
- ensure **cumulative impacts** are properly assessed and considered in plan-making (the Green Paper supported the Independent Review Panel recommendations to identify and consider present and future cumulative impacts, but this has not translated to the Planning Bill)<sup>28</sup>

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<sup>25</sup> As an example of the potential scope of 'NRM', the *Natural Resources Commission Act 2003* (NSW) defines 'natural resource management' as relating to the management of: water, native vegetation, salinity, soil, biodiversity, coastal protection, marine environment and forestry (s 5).

<sup>26</sup> EDO NSW, Submission to Planning Review Stage 1 (November 2011), Guiding principles – 'Ensuring integration with other environmental legislation' and 'Applying a meaningful "maintain or improve" test to key developments'; NCC, EDO and TEC Joint submission to the Planning Review Issues Paper (March 2012), see pp 11-12; and NCC NSW, EDO and TEC, *Our Environment, Our Communities* report (August 2012).

<sup>27</sup> See ABS, 4655.0.55.002 - *Information Paper: Towards the Australian Environmental-Economic Accounts*, 2013 at [www.abs.gov.au](http://www.abs.gov.au). See further Wentworth Group of Concerned Scientists, *Accounting for Nature: a Model for Building the National Environmental Accounts for Australia*, (2008); and National Plan for Environmental Information (<http://www.environment.gov.au/npei/index.html>).

<sup>28</sup> See Independent Review Panel report, Vol. 1 pp 48- 49 (see also Green Paper, p 34):

12. *Strategic planning processes are to investigate the cumulative impacts of presently operating and approved development, both within and outside the footprint of the strategic planning area, which are contributing directly to impacts within the strategic planning area.*

13. *In the designation of areas for future development, the processes are to take into account the potential to add to the existing and likely future cumulative impacts within that strategic planning footprint. See also recommendation 73.*

- integrate national, state and regional **NRM targets**, Catchment Action Plans (**CAPs**) and agency expertise (the NSW Government has adopted thirteen state-wide NRM targets,<sup>29</sup> while CAPs – which may soon be replaced – draw on these targets for local and regional NRM purposes<sup>30</sup>);
- use **Strategic Environmental Assessment** to complement, not replace, site-based assessment (the new *Planning Act* must set out rigorous and objective requirements for process, outcomes and implementation of Strategic Assessment).
- include a comprehensive range of environmental and sustainability **performance indicators** by which the new planning system will be assessed.

Some of these requirements are discussed with reference to particular Plans below.

### *Plan-making provisions must require further consultation & limit discretion*

We reiterate our recommendation, under Part 2 above, that the Planning Act (or regulations) should include more specific *minimum consultation, notification and information access requirements* – rather than leaving this entirely to the discretion of Community Participation Plans (or the Minister’s ‘gateway determination’ for planning control provisions in Local Plans<sup>31</sup>). Further requirements could be included in Part 1 of Schedule 2, alongside minimum exhibition periods, and cross-referenced in clause 3.7 on plan making.<sup>32</sup>

EDO NSW supports a longer minimum exhibition period than 28 days for draft strategic plans – given their long-term significance (from 10 to 20 years) and the need for communities to understand and analyse detailed information. For example, 60 days would be a more reasonable period to allow for genuine community input on a draft plan. We note the Better Planning Network has suggested 12 weeks. While the Bill does not prevent a greater consultation period (at a consent authority’s discretion), the proposed minimum of 28 days is likely to become the default (**Recommendations 7 and 8**).

EDO NSW submits that additional safeguards should qualify the Minister’s discretion to make strategic plans and policies ‘with such modifications as the Minister considers appropriate.’<sup>33</sup> For example, where a Minister disagrees with the recommended content of a plan, the Minister should be required to publish clear reasons – preferably in advance of a final decision – to enable community discussion and transparency (**Recommendation 16**). We note that ICAC has made a similar recommendation for a transparency protocol ‘where the minister disagrees with a departmental recommendation concerning a planning matter.’<sup>34</sup>

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This must include assessment of cumulative impacts on biodiversity, air, soil and water quality, native vegetation and catchment health, and the impacts of greenhouse emissions. See NCC, EDO NSW and TEC (March 2012), pp 12 and 19.

<sup>29</sup> Adopted on the advice of the NSW Natural Resources Commission. See targets at <http://www.nrc.nsw.gov.au/content/documents/Standard%20and%20targets%20-%20The%20Standard%20and%20targets.pdf>

<sup>30</sup> CMAs and CAPs are proposed to be replaced with Local Land Services in 2014, pursuant to the Local Land Services Bill 2013 (introduced to Parliament May 2013). Established under the *Catchment Management Authorities Act 2003* (NSW), the current CAPs are made by Catchment Management Authorities (CMAs) in partnership with local communities. CAPs are intended to facilitate community action and government investment in natural resource management and to prescribe on-the-ground actions for preserving natural resources in partnership with local communities and private landholders. CMAs and CAPs are proposed to be replaced with Local Land Services in 2014, pursuant to the Local Land Services Bill 2013 (introduced to Parliament May 2013).

<sup>31</sup> Planning Bill 2013, Division 3.4, see clauses 3.21(2)(c) and 3.22(3).

<sup>32</sup> Planning Bill clause 3.7: *Making of NSW planning policies, regional growth plans and subregional delivery plans.*

<sup>33</sup> Clause 3.7 of the retains the current broad discretion

<sup>34</sup> ICAC, *Anti-corruption safeguards and the NSW planning system* (February 2012), recommendation 8, available at [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au).

Similarly, EDO NSW is concerned at the breadth of proposed discretion for the Minister to 'make or amend a strategic plan without compliance with' the normal preparation and content requirements under Division 3.2 in certain circumstances (Planning Bill, clause 3.9). In particular, a Minister should not be able to suspend normal procedures to make or amend plans 'to deal in an expeditious manner with matters that give effect to strategic or infrastructure plans or [matters] that are of State, regional or subregional significance.'<sup>35</sup> Such a broad power has the potential to undermine community goodwill generated during consultation processes (**Recommendations 15 and 16**).

### *Climate change readiness – mitigation and adaptation*

The White Paper does not discuss climate change, despite the Government's commitment to comprehensive, evidence-based strategic planning and integrated NRM outcomes. The current EP&A Act's inadequacies in this area are well-documented,<sup>36</sup> as are the likely impacts of how climate change will affect NSW.<sup>37</sup> Furthermore, the Government's State Plan commits to 'minimise impacts of climate change in local communities'.<sup>38</sup>

EDO NSW recommends the Planning Bill be amended to clarify how the new planning system will engage with and manage these risks in the coming decades – via mandatory mitigation and adaptive management mechanisms, and adaptation policies. This should begin at the strategic level with all relevant NSW Planning Policies, including as part of a broader 'Sustainability' Policy.

Consistent with our previous recommendations, EDO NSW recommends the new Act must:

- make the direct and indirect impacts of climate change a mandatory consideration in strategic planning, as proposed by the Independent Review Panel;<sup>39</sup>
  - establish an effective hierarchy of mitigation and adaptation responses in urban, rural and coastal areas;<sup>40</sup>
  - adopt a comprehensive assessment framework for the climate change implications of development, particularly major projects (mitigation and adaptation); and
  - include Standard Instrument provisions for relevant local government areas that address buffer zones, restrictive zoning, setbacks and resilience measures.<sup>41</sup>
- (Recommendations 13, 36 and 44).**

<sup>35</sup> Planning Bill 2013, clause 3.9(3)(c).

<sup>36</sup> See outline of issues in NCC NSW, EDO NSW and TEC joint submission to the Planning Review Issues Paper (March 2012), pp 24-26;

<sup>37</sup> The *State of Environment Report 2009* details the projected impacts of climate change on NSW. These impacts of climate change will affect the NSW economy, public health, and the natural and built environment. NSW Government, *State of Environment Report 2009*, Chapter 7, sections 2.1 and 2.3, available at: [http://www.environment.nsw.gov.au/soe/soe2009/chapter7/chp\\_7.2.htm#7.2.13](http://www.environment.nsw.gov.au/soe/soe2009/chapter7/chp_7.2.htm#7.2.13). Impacts will include increased weather variability, storm surges and sea level rise; bushfire threat; the urban 'heat island effect'; exacerbated pressures on native species and habitat; and greater drought exposure for agricultural land and water supply.

<sup>38</sup> See NSW State Plan targets, [www.2021.nsw.gov.au](http://www.2021.nsw.gov.au).

<sup>39</sup> The Panel proposes that one of the strategic planning objects is to: *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.* Independent Review Panel Report, Vol. 1, recommendation 8 (pp 42-43). See also recommendation 19 on local land use plan objectives, which include to 'Provide controls for any anticipated specific impacts of climate change within the local government area.'

<sup>40</sup> See EDO NSW coastal planning law reform submissions available at [www.edo.org.au/edonsw](http://www.edo.org.au/edonsw).

<sup>41</sup> See further NCC NSW, EDO NSW and TEC (March 2012), p 26, recommendations 28-30; EDO NSW, *The State of Planning in NSW* (2010); R. Ghanem and K. Ruddock, 'Are New South Wales' planning laws climate-change ready?' (2011) 28, *Environmental and Planning Law Journal* 17.

## NSW Planning Policies

### Overview

According to the White Paper (at 5.3), eight to 12 NSW Planning Policies will be developed for key policy areas<sup>42</sup> in time for the planning laws to enter Parliament. These Policies will:

- set objectives and direction to guide land use, development and strategic planning state-wide;
- be endorsed through Cabinet and made by the Planning Minister;
- be 'certified' as consistent with the new Act's objects and principles (although this requirement is not clear in the Bill);
- give effect to strategic aims of existing State Environmental Planning Policies (SEPPs), Strategic Regional Land Use Plans and Section 117 Directions; and
- be implemented via regional, subregional and local plans.

### Analysis

NSW Planning Policies will set critical standards for lower-level strategic plans. However, the White Paper includes no concrete details on the content of these policies beyond illustrative themes. As noted above, it is unclear whether a dedicated Policy will focus on NRM issues. Nevertheless, we strongly welcome the inclusion of a State policy on 'environment conservation'.<sup>43</sup> We make six key comments.

First, EDO NSW reiterates that public input and scrutiny of NSW Planning Policies will be crucial to the legitimacy and community ownership of the system, given the proposed 'line-of-sight' for consistency. The process of making these Policies must therefore align with the recommendations on 'Community participation' above.

Second, we note that these important Policies are not proposed to be disallowable statutory instruments (therefore not subject to parliamentary scrutiny) nor subject to judicial review (see Planning Bill, clause 10.12). In our view, the absence of such checks and balances will decrease community confidence in the system. We submit that the process for making NSW Planning Policies should be made more accountable and transparent, including that these policies be statutory instruments and subject to independent procedural oversight by the Courts<sup>44</sup> (**Recommendation 18**).

Third, consistent with ESD principles, NSW Planning Policies must adequately protect the environment and foster social outcomes (in addition to the White Paper's economic focus). Otherwise, subsequent strategic plans will be 'locked in' to growth-driven and ultimately unsustainable policies, rather than a balanced and integrated approach. For example, clause 3.4(2) of the Planning Bill requires that draft NSW Planning Policies are to contain

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<sup>42</sup> The White Paper (p 69) gives an 'indicative list' of potential policy topics: housing supply and affordability, employment and economic growth, environment and conservation, agricultural and rural resources, energy and resources, 'hazards' (including bushfire, flooding and coastal hazards), and infrastructure. Unlike the Green Paper (p 35), the White Paper does not refer to a NSW Planning Policy 'focused on the achievement of natural resource management outcomes'.

<sup>43</sup> '...including biodiversity, water quality, air quality and waste pollution'.

<sup>44</sup> See for example EDO NSW, *NSW Planning System's Sustainability Failures* (February 2012), at [http://www.edo.org.au/edonsw/site/pdf/misc/120209planning\\_law\\_reform\\_cases.pdf](http://www.edo.org.au/edonsw/site/pdf/misc/120209planning_law_reform_cases.pdf). The 2011 *Huntlee* decision shows the difficulties that communities face in holding the Minister for Planning accountable for the making of SEPPs (*Huntlee Pty Ltd v Sweetwater Action Group Inc; Minister for Planning and Infrastructure v Sweetwater Action Group Inc* [2011] NSWCA 378). In *Huntlee*, the Court of Appeal found that the Minister in Cabinet and the Governor exercise executive power when making a SEPP, and therefore any SEPP is effectively beyond challenge.

principles and policies in relation to certain matters (currently infrastructure, development assessment and 'other planning related matters'). Two further categories should be included here. One should require the integration of NRM and environmental outcomes into planning. In addition, a NSW Planning Policy on *Sustainability* should require minimum standards for energy and water efficiency (updating BASIX<sup>45</sup>), climate change mitigation and adaptation, other building design standards, and measures to encourage clean industry<sup>46</sup> (**Recommendation 19**).

Fourth, NSW Planning Principles should prescribe minimum, not maximum standards for environmental and social outcomes. That is, the Planning Bill should *prevent* strategic plans and policies from lowering existing levels of environmental protection. Meanwhile, line-of-sight requirements should *allow* regional and local plans to improve on environmental protection, public participation or social inclusion prescribed at the State policy level. This would promote best practice environmental management to redress the deterioration of environmental quality in NSW.<sup>47</sup> It would also increase public confidence in a balanced, outcomes-focused system that promotes development while maintaining or improving the environment.

Fifth, the White Paper and Bill do not clarify how competing objectives or conflicts between NSW Planning Policies will be prioritised; or how consistency of lower-level plans will be measured and certified. Historically, SEPPs to promote development such as mining have had a stronger (sometimes overriding) effect compared with other state and local plans, policies and provisions that protect the environment. NSW Planning Policies must not entrench this approach. An overarching object to achieve ESD would provide some assistance to decision makers in applying and prioritising competing objectives, for the benefit of the people of NSW (**Recommendation 1**).

On consistency and certification, ICAC has observed that vague strategic planning provisions may allow for excess discretion, leading to 'any number of possible outcomes', and may create corruption risks.<sup>48</sup> The White Paper (p 66) states: 'the relevant planning authority will be required to certify that plans have been prepared in accordance with statutory requirements. This will include that the plans have met the objects and principles of the Act.' However this requirement is not clear in the Part 3 of the Planning Bill. Furthermore, clause 10.12(2)(b) states that many of these statutory requirements are 'not mandatory'.

Finally, we welcome the attempt to ensure strategic plans 'continue to achieve the objects of this Act' and remain responsive to 'changing circumstances' (Planning Bill, clause 3.9(4)). However, the Planning Bill does not prescribe clear or specific periods for the regular review of each type of strategic plan. Instead it continues the current approach of 'regular and

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<sup>45</sup> *State Environmental Planning Policy (BASIX: Building Sustainability Index) 2004*. The BASIX SEPP has advantages as an objective tool that promotes minimum standards and consistent requirements. However, this also has a potential 'chilling effect' on sustainability improvements – because Local Environmental Plans are explicitly prohibited from imposing higher standards, and the BASIX energy and water efficiency standards themselves have not been updated in the last five years (since 2006).

<sup>46</sup> See for example, Ernst & Young, *Business opportunities in a low carbon economy* (September 2010), report for Industry and Investment NSW. Available at: <http://www.business.nsw.gov.au/innovation-and-research/innovation-in-nsw/innovation-resources-and-publications/cross-sectoral-analyses>.

<sup>47</sup> For example, an additional 35 species were listed as threatened in NSW between 2009-2012, and 'the condition of most [native] vegetation has deteriorated' over the past six years. Habitat destruction, including clearing, is one of two 'greatest threats to biodiversity in NSW.' See NSW Government and Environment Protection Authority, *State of the Environment Report 2012*, p 4 ('Summary - Biodiversity') and chapter 5.1, available at [www.epa.nsw.gov.au/soe](http://www.epa.nsw.gov.au/soe). See also, Australian Government, *State of the Environment Report 2011*, Headlines: 'Our unique biodiversity is in decline, and new approaches will be needed to prevent accelerating decline in many species.' Available at: [www.environment.gov.au/soe/2011/summary/headlines.html](http://www.environment.gov.au/soe/2011/summary/headlines.html).

<sup>48</sup> ICAC, Submission to NSW Department of Planning Green Paper (September 2012), para 13.

periodic review' which has proven unreliable.<sup>49</sup> The Bill should set *specific* review periods appropriate to the significance and duration of each class of strategic plan (**Recommendation 17**).

In summary, we submit that the Planning Bill be amended to include effective community, environmental and governance safeguards for NSW Planning Policies (**Recommendation 18**). These include:

- making these Policies disallowable statutory instruments, and subject to judicial review (as distinct from State Environmental Planning Policies<sup>50</sup>);
- requiring policies maintain or improve protections in current SEPPs and set minimum environmental standards;
- prescribe minimum timeframes for regular, independent review of strategic planning instruments appropriate to the significance and intended period of application.

## Regional Growth Plans

### Overview

According to the White Paper (at 5.4), Regional Growth Plans outline strategic objectives, policies and actions for regional or metropolitan planning over a 20-year period. They will:

- apply to all areas of NSW (with added detail where there is no subregional plan);
- deal with vision, spatial planning, housing, employment, environment and natural resources, infrastructure, subregional outcomes, and monitoring and reporting;
- incorporate 'relevant aspects' of existing regional plans and strategies;
- be led by the Planning Department and a new Chief Executive Officers Group;
- involve 'significant' community, state agency and local council collaboration; and
- be 'underpinned by a detailed evidence base'.

### Analysis

As EDO NSW submitted in response to the Green Paper, the aims of regional and subregional plans should be healthy lifestyles, environmental benefits and socially inclusive communities – as well as economic development – supported by relevant triple bottom line indicators. This should be properly supported through the new Planning Act, consistent with an overarching aim to achieve ESD (**Recommendation 1**).

The proposed strategic planning regime is very much focused on Sydney and future growth areas. The strategic planning framework and mechanisms in the Bill need to look more broadly beyond the sandstone curtain, and provide for adaptive planning for a range of regional scenarios that may not include significant growth. EDO NSW therefore submits that Regional Growth Plans should be called 'Regional Development Plans' (**Recommendation 20**).

EDO NSW welcomes the inclusion of 'Environmental and Natural Resources' as a proposed section of Regional Growth Plans (**RGPs**) (White Paper p 75), but further detail is required. For example, the White Paper says these plans 'may include established environmental

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<sup>49</sup> The EP&A Act 1979 requires authorities to ensure SEPPs, LEPs and DCPs are kept 'under regular and periodic review'. For example, former clause 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 repealed by the *SEPP (State and Regional Development) 2011*, which does not contain a mandatory review clause.

<sup>50</sup> As noted, the 2011 *Huntlee* decision shows the difficulties that communities face in holding the Minister for Planning accountable for the making of SEPPs.

targets for a region'.<sup>51</sup> The Planning Bill goes a little further (clause 3.5(2)(d)). It states that a draft RGP 'is to identify... targets for achieving the planning outcomes for the region (including housing, employment and environmental targets).' Beyond this, the Bill leaves wide discretion for how environmental targets may be integrated. This is of concern because RGPs will:

- be informed by the Strategic Planning Principles (which propose to downplay environmental considerations – see above and clause 3.3);
- aim to achieve the objects of the Act (which, as currently proposed, prioritise economic considerations and weakly define 'sustainable development'); and
- implement NSW Planning Policies (which are yet to be seen or consulted on).

As noted above for strategic planning generally, the Bill should be amended to link RGPs' environmental targets directly with statutory environmental policies and reporting. This is consistent with the aim of integrating economic, social and environmental considerations. Effective strategic planning needs to integrate the aims and targets of relevant national, state and regional environmental policies on water quality, energy and water efficiency, biodiversity strategies, native vegetation targets and pollution limits (**Recommendations 11 and 13**).

NSW Government agencies and local councils have already invested in preparing and implementing such targets. For example, in:

- State standards and targets recommended by the Natural Resources Commission;<sup>52</sup>
- State of the Environment reporting;<sup>53</sup>
- regional Catchment Action Plans (likely to become 'local strategic plans');<sup>54</sup> and
- local councils' biodiversity, coastal management and other NRM strategies.

To date, poor strategic planning has failed to capitalise on these investments and link planning with NRM and environmental outcomes. The Government's commitment to 'evidence based, whole of government strategic planning' in the new planning system (White Paper, p 7) is a unique opportunity to remedy this.

EDO NSW further recommends that regional strategic planning should be based on environmental catchment boundaries (**Recommendation 20**). The White Paper has instead proposed to base RGP boundaries on population and 'economic catchments' (p 74).

Finally, as noted above, EDO NSW is concerned that community members may be unaware of parallel consultations that have already commenced on regional planning documents that will become, or inform, RGPs under the new planning system (such as the *Draft Metropolitan Strategy for Sydney* and the *Lower Hunter over the next 20 years – Discussion Paper*).<sup>55</sup> We recommend better coordination and timing for these processes (**Recommendation 104**).

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<sup>51</sup> '(...for example air pollution targets), agreed areas of conservation and policies relating to state significant resources.' See White Paper, p 77, 'Regional Growth Plans – Environment and natural resources'.

<sup>52</sup> See *Natural Resources Commission Act 2003* (NSW), section 13; and see targets at <http://www.nrc.nsw.gov.au/content/documents/Standard%20and%20targets%20-%20The%20Standard%20and%20targets.pdf>.

<sup>53</sup> See Environment Protection Authority, *State of the Environment* reports: [www.environment.nsw.gov.au/soe/](http://www.environment.nsw.gov.au/soe/).

<sup>54</sup> Established under the *Catchment Management Authorities Act 2003* (NSW), CAPs are made by Catchment Management Authorities (CMAs) in partnership with local communities. CMAs and CAPs are proposed to be replaced with Local Land Services in 2014, pursuant to the Local Land Services Bill 2013 (introduced to NSW Parliament in May 2013).

<sup>55</sup> Available at <http://strategies.planning.nsw.gov.au/>, accessed 30 May 2013.

## Subregional Delivery Plans

### Overview

According to the White Paper, Subregional Delivery Plans 'provide the delivery framework for Regional Growth Plans' (at 5.5). They will:

- identify (and rezone) 'precincts', and areas of State or subregional significance;
- set development parameters and building envelopes in nominated subregions;
- integrate infrastructure and land use planning via 'Growth Infrastructure Plans';
- be prepared by Subregional Planning Boards (**Boards**) – but be endorsed by whole of government and made by the Planning Minister, 'with advice' from the Boards;
- involve 'strong community participation' (to be outlined in the Boards' Community Participation Plans) and state agency collaboration;
- be completed after RGPs, within two years of the new legislation commencing; and
- be underpinned by evidence from 'sectoral strategies' and 'tested with respect to their economic viability' (such as for housing and jobs).

### Analysis

As noted, Subregional Delivery Plans (**SDPs**) are to be 'the new transformative delivery tool' that translate state policies and regional plans 'into actions' (White Paper p 81). To do so fairly and effectively, SDPs must include the range of community and environmental protections, and governance safeguards, outlined in this submission. These include (**Recommendation 21**):

- an active commitment to delivering ecologically sustainable development;
- best practice consultation processes, in accordance with the Community Participation Charter and specific mandatory requirements to be clarified in the Bill;
- transparent and evidence-based decision making;
- integrated environmental and natural resource management outcomes;
- built-in urban sustainability, design quality and climate change responses; and
- clear membership procedures, expertise and obligations for the Boards.

We welcome the White Paper's references to SDPs including sections on 'environment and natural resources' (p 86):

*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 Action Plans, where appropriate, and the identification of conservation areas.*

As with RGPs, we recommend the aim of integrating environmental targets from other laws and policies be given clearer effect, by more specific requirements in the Bill and regulations (**Recommendation 22**).

### Subregional Planning Boards

There is a significant level of State ministerial control in shaping Subregional Delivery Plans. This includes appointing Subregional Planning Board members (alongside local council representatives), and the Minister's role in making SDPs after whole-of-government approval, with 'advice' from the Boards. With the addition of Cabinet endorsed NSW Planning Policies and state and regional growth targets, the level of local control and community influence over subregional strategic planning remains unclear.

If Subregional Planning Boards are adopted, we recommend the new planning legislation (**Recommendation 94**):

- requires Boards and their members to exercise their powers and functions in order to achieve the overarching object of ESD;
- set out clearer membership categories for such Boards (see below);
- include transparency requirements for Board procedures (potentially in the Planning Administration regulations), for example that all meeting minutes and Board reports be made public (including any meetings with development proponents).

In terms of Board membership and control, EDO NSW welcomes the intention to legally separate Boards from Ministerial control.<sup>56</sup> Nevertheless, the Minister will be able to appoint up to four 'State members'; plus a chairperson agreed to by the Local Government Association of NSW. Each local council will appoint a further representative. The balance between State and locally appointed Board members will not be clear until the size of subregions is publicised.<sup>57</sup>

We note and welcome the requirement for Board members to have 'relevant skills and knowledge' across a range of specified areas.<sup>58</sup> According to the Department's *Green Paper Feedback Summary*, a key concern raised in community submissions was the potential that 'Regional Planning Boards with developer participation will likely result in inappropriate rezonings being imposed on local communities.'<sup>59</sup> However, the draft legislation does not rule out the appointment of industry representatives to subregional Boards.

Overall, amendments to the Planning Administration Bill may increase public trust in Subregional Planning Boards and other planning bodies by:

- ensuring that local rather than State members predominate Board membership;
- specifying particular agencies from which State-appointed members should be drawn (such as Local Land Services, Planning Department, Housing, Environment and Heritage), requiring representation from the general public, or otherwise addressing public concern or perceptions about potential 'developer participation' on Boards;
- removing the requirement that Deputy Chairs be a State member (Schedule 5, clause 5.4);
- further limiting the Minister's ability to remove members from office (clause 5.7(1));
- making disclosures of pecuniary interests electronically available for free (subject to appropriate safeguards, for example only releasing on request) (clause 5.17(5));
- prohibiting or strictly limiting the circumstances in which a member may deliberate or take part in a decision if they have declared a pecuniary interest (clause 5.17(6)); and
- removing or qualifying provisions that validate Board decisions even if pecuniary interest requirements are contravened (clause 5.17(8); and EP&A Act, Schedule 5B, 9(6)).

### *Sectoral Strategies and Growth Infrastructure Plans*

EDO NSW reiterates the need for a balanced, triple bottom line focus in 'Sectoral Strategies' and 'Growth Infrastructure Plans' that will form part of subregional strategic planning. The precise form and content of Sectoral Strategies remains unclear, despite being the

<sup>56</sup> Planning Administration Bill, clause 23(4)). This is consistent with the operation of the Planning Assessment Commission and Regional Planning Panels (Planning Administration Bill, clauses 12(2) and 18(2)).

<sup>57</sup> To be confirmed by Ministerial order, under Schedule 5 of the Planning Administration Bill 2013.

<sup>58</sup> Planning Administration Bill, clause 24(2).

<sup>59</sup> NSW Department of Planning & Infrastructure, *Green Paper Feedback Summary* (Dec. 2012), p 44.

centrepiece for evidence-based strategic planning in the White Paper (p 88). The White Paper also refers to the use of 'Strategic Impact Analysis' within Sectoral Strategies, which will include the consideration of 'cumulative impacts' of planning scenarios (p 88).

While these tools are welcomed, none of these terms are referred to in the Planning Bill. This means evidence-based Sectoral Strategies, Strategic Impact Analysis and cumulative impact assessment are not legally required before a strategic plan is made. We recommend clarifying the formal status and requirements for Sectoral Strategies, preferably in the Planning Act itself (**Recommendations 7 and 23**). The aim here is to ensure that strategic plans are underpinned by robust research and data, in order to maintain and improve environmental outcomes and promote appropriate development.

EDO NSW noted a range of best practices for Strategic Impact Analysis (or Strategic Environmental Assessment) in our Green Paper submission. These remain relevant here.<sup>60</sup> The International Association of Impact Assessment also has a series of performance criteria for good-quality Strategic Environmental Assessment. They are broadly summarised as *Integrated, Sustainability-led, Focused, Accountable, Participative* and *Iterative*.<sup>61</sup>

We also recommend that the environmental data that informs Sectoral Strategies must be integrated into performance assessment of planning outcomes (**Recommendation 24**). This should include indicators in annual reports, audit reports, legislative reviews, and the annual State budget. Without this integration, the planning system will continue to prioritise an incomplete series of economic indicators at the expense of qualitative and quantitative environmental and social indicators.<sup>62</sup>

'Growth Infrastructure Plans' are also relevant to subregional planning (discussed further under Part 7 of the Planning Bill below). Unlike Sectoral Strategies, these Plans are embedded in the draft legislation (clause 7.20). EDO NSW supports the need to plan upfront for a range of *regional infrastructure* requirements (including 'regional open space' – although this term could be further defined).<sup>63</sup>

As discussed below, we recommend that Growth Infrastructure Plans place more focus and value on *green infrastructure*,<sup>64</sup> and integrate this into broader infrastructure planning and funding (**Recommendation 25**). Integrating green infrastructure is crucial to growth areas,

<sup>60</sup> EDO NSW, Submission on *A new planning system – Green Paper* (Sept. 2012), pp 31-32. In brief, SEA must:

- be underpinned by strong legislative standards and decision making criteria (such as a 'maintain or improve' environmental outcomes test), and scientific tools
- be based on comprehensive, accurate mapping and data
- be undertaken at the earliest possible stage of planning to maximise benefits
- identify and assess likely impacts of development (including cumulative impacts)
- identify and assess reasonable alternative scenarios that have been considered
- involve ground-truthing of landscape-scale assessment (not just a 'desktop' assessment)
- mandate early and iterative public consultation, and participation by bodies with environmental responsibilities (such as OEH, CMAs, NRC, local committees);
- allow community consultation on an environmental report on the strategic plan at the same time as consultation is conducted on the strategic plan itself; and
- complement, but not replace, site-level impact assessment, and
- require ongoing monitoring of the significant effects of implementing the plan.

<sup>61</sup> See 'SEA Performance Criteria', IAIA Special Publication Series 1 (2002), Available at <http://www.iaia.org/publications-resources/downloadable-publications.aspx>.

<sup>62</sup> See for example, NSW Department of Planning & Infrastructure, 'Planning and Infrastructure: The first two years' (2013), available at [www.planning.nsw.gov.au](http://www.planning.nsw.gov.au).

<sup>63</sup> See Planning Bill 2013 definition of *regional infrastructure* (clause 7.1, Definitions for Part 7). Cf, for example, references to open space, conservation and public access in EP&A Act definition of *development standards* (section 4).

<sup>64</sup> The term "green infrastructure" describes the network of natural landscape assets which underpin the economic, socio-cultural and environmental functionality of our cities and towns... See Australian Institute of Landscape Architects, 'Green Infrastructure' presentation, at <http://www.aiala.org.au/greeninfrastructure>.

where more people will be affected by the quality of the natural and built environment, services and facilities. Without a triple bottom line focus in these plans, the result may be more dwellings, but less amenity.

## Local Plans

### Overview

According to the White Paper (5.6), plain-English Local Plans will replace existing Local Environmental Plans (**LEPs**). As proposed, these will:

- be the main legal document that ‘delivers the strategic vision for a local government area’, consistent with higher-level plans;
- include 4 parts: Strategy, Planning Controls, Development Guides, Contributions;
- set out zoning in visual planning controls based on fewer zones (from 36 to 13);
- set out ‘development guides’ with more detailed standards to address impacts and intensity (which will use a ‘building envelopes’ concept rather than numerical standards, relating for example to height and floor space etc);
- guide development, and facilitate the majority of development to be assessed according to Codes, with some assessment on the merits where development does not meet Code standards; and
- identify any concurrences, and give local effect to operative parts of existing SEPPs.

### Analysis

EDO NSW recognises the need to update local land use planning. However, we have significant concerns with the White Paper’s approach to flexible development standards for developers, and the shift to broader, more flexible zoning. Our comments below relate to maintaining existing environmental protections, equitable participation and rights, clarity and certainty, and reducing potential corruption risks.

### Zoning

The White Paper’s new approach to ‘fewer, broader zones’ (p 94) and development guides requires further clarity and explanation – particularly the implications for sensitive environmental and heritage assets, and local government areas which do not ‘fit the mould’. Many councils and communities have just been through the process of consulting on and making new LEPs under the current Standard Instrument. For some councils, including in sensitive areas like the Blue Mountains and the Northern Rivers, this process is ongoing because of the inherent difficulties in ‘standardising’ unique environment and heritage issues.

This is one of the key concerns that community members have raised in EDO NSW’s 10 workshops on the White Paper. Community members and councils are very concerned about the potential loss of environmental protections in existing zones, and noted the time and resources invested to reach good faith agreements on standard LEPs to date. The White Paper gives no clarity on whether, or how, existing protections will be maintained. This needs to be clarified in the legislation (**Recommendations 26 – 34**). The Planning Bill does not deal with zoning details either, presumably leaving this to a possible new Standard Instrument (see clause 3.19).

EDO NSW is particularly concerned that:

- Land now zoned as ‘E3 Environmental Management’ could be absorbed into a broad

- Rural Zone (and potentially be exposed to land-clearing via Routine Agricultural Management Activities under the *Native Vegetation Act 2003* (NSW)); and
- Land now zoned as 'E4 Environmental Living' could be absorbed into a broad Residential Zone.

This problem can be illustrated by comparing permitted land uses in current zones, with the White Paper's broader 'indicative' zones that these would be subsumed into (p 95, Figure 24). For example, compare the prohibited and permitted uses (with and without consent) in the current standard E3 zone with potential uses in existing Rural zones (in the Standard Instrument); or uses in the current E4 zone with potential uses in existing Residential zones. Such a comparison shows significant potential for loss of environmental protections (via additional permitted uses) if Environmental-zoned land is subsumed into broader zones without additional, binding planning controls.

EDO NSW recommends:

- Any proposal to further standardise and shrink the number of zones must not compromise any existing environmental and heritage protections in LEPs. This could be supported by a requirement that strategic plans, including local plans, must maintain or improve existing environmental protections not reduce them (**Recommendation 27**).
- If the number of zones is reduced, a further broad environmental zone (or zones) is needed to retain protections on land now zoned as E3/E4 (or equivalent); and land contemplated for a new environmental protection zone that the Department exhibited in 2012 to allow local councils and communities to better protect lands for conservation purposes.<sup>65</sup> In any case, the legislation needs to clarify how binding planning controls will maintain or improve existing protections in these areas (**Recommendation 29**).
- Any zoning revisions must be based on thorough and informed community consultation, and scientific studies that fully value the economic, social and cultural benefits and services of the environment (**Recommendation 31**).
- Standardised zoning should not inhibit best practice environmental management by prohibiting Local Plans from exceeding regional standards. That is, higher-level policies and strategic plans should set *minimum*, not *maximum* standards for environmental protection and management (**Recommendation 32**).

### *Enterprise and suburban character zones*

EDO NSW does not support the proposal for 'enterprise zones' (White Paper, p 95) without significant safeguards and clear limitations on where they can apply (**Recommendation 33**). We note and welcome the White Paper's requirement that such zones 'do not result in any significant adverse environmental impacts'. This must be given effect in binding planning controls, and underpinned by environmental impact studies to meet these assurances. Among other things, if enterprise zones do proceed, they must:

- be excluded from any areas of high conservation value, threatened species or heritage and cultural significance;

<sup>65</sup> See EDO NSW, *Submission on Amendments to the Standard Instrument 2012* (May 2012), at [http://www.edo.org.au/edonsw/site/policy\\_submissions.php#4](http://www.edo.org.au/edonsw/site/policy_submissions.php#4). We recommended this zone be nested within the hierarchy of other EPZs (for example as 'E1A'); roads in the zone should be permitted only with consent; interaction of LEPs with SEPPs should be clarified to prevent inappropriate development in EPZs; the new zone should explicitly prohibit all mining; and that guidance and review of local additional objectives, uses and zoning operation is needed.

- be separated by buffer zones to minimise impacts of unconstrained development on neighbouring zones;
- have widespread public support at each strategic planning stage, including Local Plan consultations;
- adopt strict urban sustainability and building efficiency requirements (for example, regarding resource efficiency for energy, water, building materials and waste).

Sustainability and efficiency are reasonable prerequisites if ‘development guides’ with ‘limited controls’ are offered to stimulate investment in these areas. This would channel investment and jobs towards better buildings and cleaner development and industries. Short-term economic stimulus must not be a justification for unsustainable or risky development, especially if inadequate planning leads to a future public cost burden.

Further feedback from EDO NSW workshops on the White Paper process included a common concern that the legislation does not make clear how ‘suburban character’ zones will effectively protect local heritage, as there is no specific heritage zoning category proposed (**Recommendation 34**).

### *Addressing the risk of top-down determinism*

EDO NSW supports a general requirement that Local Plans be consistent with plans above (see Planning Bill, clause 3.8(1)(c)). On the other hand, given the ‘line of sight’ through cascading levels of strategic plans, the new system needs to minimise the risk of top-down determinism, where local preferences are shoe-horned into pre-set State priorities (such as the State Plan, NSW Planning Policies and Regional Growth Plans). There are numerous examples in the Planning Bill where matters will be prescribed at the State or high regional level, and cannot be overridden at the local level (such as categories of code development and other development assessment matters, regional precincts and rezoning, and a new Standard Instrument Local Plan).

While we appreciate the potentially large benefits of strategic planning in resolving land use conflicts, the risk of ‘top-down determinism’ is linked to the risk of ‘community overburden’ – by requiring multi-level engagement upfront in order to have any influence on local settings. This will require a much more sustained and detailed level of engagement for individuals and groups than the present system. Accordingly, as with Subregional Delivery Plans, the level of practical influence by communities in developing Local Plans (that is, the development settings that remain to be determined locally) remains unclear.

A final ‘top-down’ risk factor is the potential that local rules may not actually be observed if developments do not comply. On one hand, the community is expected to engage in upfront, strategic-level rule-making and accept the results. On the other hand, the proposed system sets up an expanded range of rights for developers to ‘push the envelope’ beyond locally agreed rules and standards (discussed under ‘Code assessment’ below). This added flexibility for developers contradicts the intended shift to resolving issues strategically, and threatens to undermine the fairness and certainty of the strategic planning process generally.

### *Other Local Plan issues*

#### *Special ecological attributes*

EDO NSW is concerned that ‘guidelines to protect and manage special ecological attributes in residential locations will form part of the development guides’ only (White Paper, p 96). It is understood that ‘development guides’ will take the place of Development Control Plans, not be binding or prescriptive (Planning Bill, clause 3.11), and will be subservient to

proposed 'planning controls' (clause 3.27(2)). If the intent is to 'ensure that residential and other complementary uses do not adversely impact on those values' (p 96), then these ecological protections should be in binding planning controls, not just 'guides' (**Recommendation 30**).

#### *Timeframes for plan review*

The White Paper suggests 'Local Plans will cover a timeframe of 10 years, with reviews every four years' (White Paper, p 92). The draft Planning Bill does not require default durations for Local Plans or specific timeframes for review. Instead a general clause requires 'regular and periodic review' (clause 3.9(4)), with the possibility of more specific timeframes under a staged repeal process that may be set out in regulations (clause 3.15). EDO NSW supports specific timeframes wherever practical. We support formally adopting the above periods proposed in the Bill, subject to consultation with councils and the public (**Recommendation 35**).

#### *Potential to override conservation covenants*

Clause 3.26 of the Planning Bill permits planning control provisions in Local Plans to suspend or modify covenants, agreements and instruments – to enable development in accordance with those provisions, or a development consent or approval. This restates section 28 of the EP&A Act. This clause is broad enough to suspend the operation of a range of environmental conservation agreements (with the Environment Minister's concurrence<sup>66</sup>).

EDO NSW therefore recommends that clause 3.26 be amended to exclude the suspension or modification of such agreements without the landowner's consent – in particular Nature Conservation Trust Agreements,<sup>67</sup> 'in perpetuity' private Conservation Agreements on high conservation value land,<sup>68</sup> wildlife refuges<sup>69</sup> and conservation property vegetation plans<sup>70</sup> (**Recommendation 36a**). This would provide appropriate protection of valuable conservation lands (for example, there are around 300 Conservation Agreements in NSW<sup>71</sup>). This amendment would also be consistent with the Planning Bill's object to promote the protection of the environment, including conservation of threatened species.

**See Recommendations 11 – 36a on Strategic Planning**

<sup>66</sup> Planning Bill 2013, cl 3.26(3).

<sup>67</sup> A Trust Agreement is deemed to have the status of a regulatory instrument for the purposes of the *Environmental Planning and Assessment Act 1979*. See *Nature Conservation Trust Act 2001* (NSW), section 38A.

<sup>68</sup> A Conservation Agreement is deemed to have the status of a regulatory instrument for the purposes of the EP&A Act. See *National Parks and Wildlife Act 1974* (NSW), sections 69, 69KA(1)(a).

<sup>69</sup> *National Parks and Wildlife Act 1974*, section 68.

<sup>70</sup> *Native Vegetation Act 2003* (NSW), Part 4.

<sup>71</sup> EDO NSW, *A Guide to Private Conservation in NSW* (May 2011), pp 8 and 16.

## 4. Development assessment & approval (Chapter 6, Planning Bill Part 4)

### Overview

The White Paper and Part 4 of the Planning Bill detail the proposed approach to development assessment. This approach is guided by seven principles, which emphasise strategic consistency; 'streamlined', risk-based assessment and inter-agency concurrences; and a preference for expert-based decision making (pp 118-120). The White Paper proposes five development tracks: *Exempt*, *Complying*, *Code*, *Merit* (including 'impact assessed') and *Prohibited* (p122). Code assessment is the most significant change to the assessment stage.

This part of the submission gives an overview and analysis of these tracks. We address:

- Complying development
- Code assessment
- Merit assessment and Environmental Impact Assessment
  - State Significant Development
  - Strategic Compatibility Certificates
- Additional comments on environmental impact assessment (EIA)
  - Independent and accredited environmental assessors
  - Improvements to EIA generally
  - Modifications.

### Analysis

A range of proposals for development assessment in the White Paper and Planning Bill are of potential concern from the perspective of environmental protection, information integrity and public confidence. The combined effect of broader zoning, greater code assessment (including the 80% target, 'mandatory' approvals, and compartmentalised merit assessments), and new review and appeal options for developers, will tip the balance further away from community involvement, environment protection, and local influence in decision-making. EDO NSW submits that these aspects must be recalibrated, by way of additional safeguards and amendments under Part 4, before the draft legislation enters Parliament.

## Complying development

### Overview

The complying development track is familiar from the existing system, but is proposed to be expanded (White Paper, p 127). Complying development will be identified in the planning control provisions of the Local Plan, with further 'standards or requirements' in development guide provisions.<sup>72</sup> The White Paper states that most complying developments are to be approved in 10 days (the regulations may prescribe such a period<sup>73</sup>).

The White Paper also states that 'minor variations' to development guide standards may be approved within 25 days (White Paper, p 119). The Planning Bill permits the regulations to prescribe a 'deemed approval' period for such variations, if a council has not made a decision by that time.<sup>74</sup>

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<sup>72</sup> Planning Bill, clause 4.7.

<sup>73</sup> Planning Bill 2013, clause 4.9(4).

<sup>74</sup> Planning Bill, clause 4.8(3).

## Analysis

A fundamental concern with the proposed complying development track relates to permissible variations. This defeats the logic of complying development. If a variation is required, then a proposed development application should not qualify as complying development (**Recommendation 38**).

We also submit that the regulations should not permit a 'deemed approval' of non-compliance with standards (clause 4.8(3)) (**Recommendation 39**).

## Code assessment

### Overview

Code assessment as proposed in the White Paper is new and transformative. Key features include:

- development codes for a range of residential, commercial and industrial activities;
- a mandatory target of 80% *code, exempt or complying* development within five years, with potentially significant consequences for councils who do not meet this target;<sup>75</sup>
- upfront community agreement sought on (some) code types and standards (referred to as *performance outcomes* and *acceptable solutions* to achieve those outcomes<sup>76</sup>);
- a NSW Planning Policy on Development Assessment will require certain types of development to be code assessed (limited by 'site specific factors' in some cases);<sup>77</sup>
- local councils *not* private certifiers will assess and approve code-based development;
- a 25-day time limit on code-based assessment and approval by local councils;
- no consultation rights on code-compliant development (neighbour 'notification' only);
- no ability for councils to *refuse* a code-assessable DA if it complies with code standards (or proposes an 'alternative solution' that meets performance outcomes);
- no ability for councils to 'impose conditions that are more onerous than the standards for that acceptable solution';<sup>78</sup>
- if code standards are exceeded, developers will have additional flexibility for their application to be merit assessed,<sup>79</sup> subject to discretionary public consultation (based on Community Participation Plans, not minimum legal provisions<sup>80</sup>); and
- only *non-compliant aspects* are to be merit assessed, not the whole development.<sup>81</sup>

## Analysis

The proposal to introduce code assessment as a new (and predominant) assessment track is the biggest change in the White Paper's approach to development assessment. Code assessment intentionally 'inverts' the traditional community consultation process across a range of residential, commercial and industrial projects – by requiring standards to be set upfront in the Local Plan (in part through consultation); and more controversially, removing site-by-site consultation with neighbours and the community.

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<sup>75</sup> White Paper, pp 119, 132: 'Councils that do not reach the target approval share for code and complying assessment will have the model development guides [of the Planning Department] applied to them.'

<sup>76</sup> White Paper, pp 129-133; Planning Bill clause 4.17(2).

<sup>77</sup> White Paper, p 124.

<sup>78</sup> Planning Bill, 4.18(1)(a)-(b).

<sup>79</sup> Planning Bill, clause 4.19(1)(b).

<sup>80</sup> White Paper, pp 131-132.

<sup>81</sup> See for example, Planning Bill, clause 4.3(2) and 4.19(1)(b)

## *Trade-offs for code assessment will affect communities more than developers*

EDO NSW strongly supports upfront engagement to address development standards in strategic plans, local plans and code-making (if codes are adopted). Our greater concern is that the White Paper presents a high-stakes proposal from the community's perspective – given the existing rights they will lose in exchange for upfront involvement – if government engagement processes are inadequate.

It is notable that under the new system, property developers will not face the same trade-off of existing rights. That is, proponents will be able to engage upfront in strategic planning and code development (and have the resources and existing knowledge to do so effectively). Proponents will also be able to 'bend or break' the agreed 'rules' later on, through a series of additional rights proposed at the development assessment stage.

The White Paper proposals therefore set up an inherent inequity between developers and the broader community. On one hand, the community is expected to engage in strategic level rule-making, and accept the results in order to 'improve confidence and certainty in planning' (p 61). On the other hand, once strategic and Local Plans are in place, developers will have an expanded range of rights to 'push the envelope' beyond locally agreed rules and standards. Additional developer rights once strategic planning is completed will include:

- broad rights for landowners to make site-based, 'spot rezoning' applications;
- review rights if local councils or the Department refuse a spot rezoning application;
- merit assessment of code-assessable applications that *don't* meet code standards (including that only non-compliant *aspects* will be merit assessed and consulted on);
- appeal rights if *compliant*, code-assessable applications aren't approved in 25 days;
- Strategic Compatibility Certificates for broad-brush approvals ahead of Local Plans.

Significantly, ICAC has noted the 'increasing tendency towards departures from the stated requirements' in NSW planning laws, and warned that 'wide discretion to approve projects... creates a corruption risk and community perception of lack of appropriate boundaries'.<sup>82</sup>

There is significant potential for this degree of developer flexibility in Local Plans to undermine the strategic goals for an area, as identified through a comprehensive and inclusive strategic planning process. Finally, these proposals seem inconsistent with State Plan objectives to promote 'Certainty for communities and investors' and 'Return planning powers to local communities'.<sup>83</sup>

To deliver the fairness and certainty for communities and industries that the Government seeks, the Planning Bill must be amended to address the range of inequitable rights that apply to development proponents. Any new developer rights should be mirrored with equitable community rights, other safeguards and appropriate limits. In particular, EDO NSW recommends (**Recommendation 37**):

- limiting rights to 'spot rezoning' and merit assessment of 'code exceedences' – to circumstances that will demonstrably *maintain or improve environmental and social outcomes* based on relevant studies<sup>84</sup> (otherwise community-agreed strategic planning should prevail);
- limiting departures that require a rezoning proposal to go through 'a transparent

<sup>82</sup> ICAC, *Anti-corruption safeguards and the NSW planning system* (February 2012), p 5.

<sup>83</sup> NSW Government State Plan, *NSW 2021*, 'Restore accountability to Government', p 55.

<sup>84</sup> For example, this could be done by amending the proposed discretion for relevant planning authorities (local councils) to 'require the owner [of the land] to carry out studies or provide other information' where spot rezoning is requested (Planning Bill, clause 3.13(5)). Such studies should be a pre-requisite to demonstrate clear positive outcomes and public interest in rezoning.

process, including community consultation and a right to be heard', as recommended by the Independent Review Panel.<sup>85</sup>

- encouraging third party participation in any review and appeal mechanisms for developers (whether for spot rezoning or other decision review rights – Bill Part 9);
- instead of automatic merit assessment of proposals that exceed code requirements, merit assessment could be triggered only where the proponent demonstrates:
  - that adherence to the standards would 'bring about an inappropriate planning outcome'<sup>86</sup> by contradicting the intentions of the code and Local Plan; *and*
  - that the proposal will *maintain or improve environmental and social outcomes* for the area in comparison to the required standards; *and*
  - that the project will not contribute unacceptably to cumulative impacts or adversely affect environmental values and priorities (strategic and local).
- instead of an automatic appeal right for code-assessable development after 28 days, such rights could be triggered by requiring developers to notify council of an intention to appeal if a project is not determined within a further period (such as 14 days).

Overall, EDO NSW is concerned at the inequity of these one-sided arrangements.

### *Greater public understanding, input and equity in codes, before setting targets*

EDO NSW submits that there needs to be greater community understanding and input about codes (and their limits) before setting ambitious targets, such as the White Paper's '80% within five years' proposal.

EDO NSW runs a free public advice line for environmental and planning law issues, and fields over 1200 enquiries each year. In our experience, the wider public has very limited knowledge of the planning system and their opportunities to get involved. As the Department's recent consultations on the Draft Sydney Metropolitan Strategy would also attest, it is very difficult to engage a broad section of the community in planning issues unless there is a specific development proposal that will affect their neighbourhood.

Accordingly, a very low percentage of the NSW community is likely to be aware of the proposal to introduce code assessment for the majority of NSW development applications; yet the impact of this change will be significant. As the Grattan Institute has observed:

*A strategy of local engagement to set development rules needs to be far more sophisticated, thorough and extensive than anything ever attempted before in Australia. It will take a significant investment of time and money and will only succeed if a substantial and representative share of [NSW] residents joins in the process.*<sup>87</sup>

EDO NSW is strongly supportive of upfront community engagement, but the above statement shows the size of the Government's task. It would be untenable to have a system where – say, in two years' time – there is just as much angst about the impacts of neighbouring development as there is now, but far less opportunity for affected neighbours to 'have their say' about it. If this unfortunate scenario did eventuate however, the general community would be in a much worse position than the development industry.

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<sup>85</sup> T. Moore & R. Dyer, *The Way Ahead for the NSW Planning System?* (July 2012), Vol. 2, p 64. See also Volume 1, Part C, Chapter 7 – Recommendations 40 and 41 and Volume 2, Part 6.

<sup>86</sup> See Independent Review Panel, recommendations 67-70. The Panel recommended that 'the decision maker may depart from or permit a variation to any controls [in a DCP] if, for properly enunciated reasons, there is a justified basis...' (Recommendation 68). Further, the new Act should make clear that such departure 'will be appropriate if adherence to the controls would bring about an inappropriate planning outcome.' (Recommendation 69)

<sup>87</sup> J-F Kelly, 'Vision splendid for Sydney needs community input', *Sydney Morning Herald*, 17 April 2013.

## *Codes needs clear limits and safeguards for environment and sustainability*

The assumption that 80% of developments can be code-assessed with ‘no significant impacts’ (p 31) – including cumulative environmental impacts – is given no evidentiary basis in the White Paper. The White Paper proposes a significant range of development types for code assessment (p 124). Indeed, the Planning Bill does not prevent State Significant Development (**SSD**) from being code assessable, even though SSD is a high-impact category that currently requires an environmental impact statement (**EIS**) and exhibition. We submit that any target for code assessment should be based on objective determination of what is low risk and low impact, and extensive community consultation (**Recommendations 101-102**).

The Planning Bill proposes that *development assessment codes* will be ‘set out in the development guide provisions of a local plan’ (clause 4.17). However, the Bill contains few limitations on code-making to ensure sensitive environmental areas and local amenity are protected. Clear limits and safeguards around code assessment are essential, as noted in our Green Paper submission.<sup>88</sup>

Furthermore, the Bill does not require planning authorities to be satisfied that ‘no significant impacts’ will result before approving a code, or require any verification that a code will maintain or improve environmental values in an area. EDO NSW recommends a range of measures according to three types below – baseline rules, exclusions, and public participation safeguards.

### *1) Baseline rules and standards for code-making*

First, EDO NSW submits that the Planning Bill must be amended to include objective rules and standards for code development and content. Baseline requirements should include (**Recommendation 42**):

- *Enactment* – Development assessment codes should be promulgated as legislative instruments and be subject to judicial review.
- *Achieving ESD* – All Codes must be consistent with an overarching aim of achieving ecologically sustainable development (**ESD**). Decision makers should be required to apply ESD principles (among other criteria) when making codes.
- *Low environmental impact* – Codes should be limited to genuine low risk, low impact development as intended,<sup>89</sup> otherwise proposals should be holistically merit-assessed. The Bill should require that before a Code is made, the relevant planning authority is satisfied (based on relevant, up-to-date studies) that development approved under the Code:
  - will have no significant adverse social or environmental impacts, and
  - will ‘maintain or improve’ environmental values in the area the Code affects.
- *Cumulative impacts* – Codes must include provisions dealing with:
  - the cumulative impacts of multiple developments (code-based or otherwise);
  - interfaces and ‘edge effects’ across different areas and zone boundaries (for example, between built-up corridors and more sensitive areas).
- *Efficiency* – Codes must include mandatory sustainability and efficiency requirements for residential, commercial and industrial developments, including for retrofitting existing buildings – via an updated and expanded Building Sustainability Index (**BASIX**). This is discussed in the next section, and in relation to Part 8 of the Bill.

<sup>88</sup> EDO NSW, *Submission on A New Planning System – Green Paper* (Sept. 2012), pp 41-42.

<sup>89</sup> Green Paper, p 63; White Paper p 31.

- *Encouraging green innovation* – Adopt processes and standards that facilitate and reward voluntary green innovation (for example, simpler, cheaper or faster approval of projects that demonstrate leading practice environmental sustainability).
- *Enforceability* – The Planning Bill must include a range of strong enforcement powers that can be exercised by councils and members of the public (via ‘open standing’) to ensure Codes are being complied with.
- *Regular review* – The Planning Bill should provide for regular, independent review of Codes to ensure processes, participation, outcomes and governance are effective.

## 2) *Sensitive areas for merit assessment only*

Second, code assessment should be excluded from a range of sensitive areas, such as (**Recommendation 40**):

- environmental protection zones or other environmentally sensitive areas (for example, where development would affect areas of high conservation value, listed threatened species, endangered ecological communities or critical habitat);
- areas of Aboriginal cultural and heritage significance;
- areas protected in an existing SEPPs (such as koala habitat, littoral rainforest, wetlands, sensitive coastal areas etc).

In our view, site-based merit assessment is necessary in such areas.

## 3) *Community participation requirements for code assessment*

Third, the Planning Bill and regulations should adopt a range of other safeguards to enhance community engagement in the making of code standards, and promote community confidence in the new system. These relate to (**Recommendation 41**):

- *Participation* – The Community Participation Charter must be applied to code-making and code amendments (this is not explicit or clear in the Planning Bill, clause 2.2).
- *Notification* – The community should be consulted early on when and how code-assessable project notification and information should be provided, for example: on-site signage, direct to neighbours, online access, web-based automatic notification (the Bill leaves these specifics to CP Plans and the regulations<sup>90</sup>);
- *Local, rural and regional needs* – The White Paper proposes that a NSW Planning Policy (yet to be seen) will prescribe certain development types as code assessable on a State-wide basis.<sup>91</sup>

We welcome the qualification that state-wide application of codes ‘may be limited in some cases because of site specific factors.’ (White Paper, p 123) It is important that State-wide policies respond to the diverse needs of NSW local government areas and communities. Specific consideration and consultation is needed as to the suitability of code assessable development outside Sydney.

<sup>90</sup> Planning Bill 2013, Schedule 2, Part 1, clause 2.22. According to the White Paper, ‘Council will, however, notify the community, for information only, that an application has been received.’ (p 131)

<sup>91</sup> White Paper, p 124. This may be similar to the SEPP (*Exempt and Complying Development Codes*) approach.

## *Fast-tracking 'environmentally friendly' development through codes*

There is growing industry awareness that *sustainability* of development needs to become the mainstream<sup>92</sup> – for the benefit of long-term economic prosperity, social development and environmental conservation. In recent years, governments of all persuasions have focused on the idea of fast-tracking development and economic productivity.<sup>93</sup> However, rarely do 'fast-tracking' initiatives facilitate projects on the basis of leading practice sustainability or environmental standards. The new planning system should be aiming to 'make NSW number 1' in building sustainability, through a mix of mandatory standards and voluntary incentives.

There is no doubt that code assessment will deliver faster approvals for developers. As a *quid pro quo* for streamlined assessment, EDO NSW recommends mandatory requirements for high-quality building design and nation-leading sustainability requirements. Unfortunately, while Chapter 8 of the White Paper deals with important aspects of building design, safety and certification, it includes no commitments to update or expand the BASIX tool to provide for better water, energy and material efficiency. A tool like BASIX (fully updated) could very usefully apply across a range of residential, commercial and industrial development codes.

One example of encouraging *voluntary* environmental innovation is Queensland's 'Green Door' initiative.<sup>94</sup> The policy aimed to accelerate decisions for development proposals identified as the most sustainable in Queensland. Projects had to demonstrate exceptional performance across four sustainability principles – planning excellence, ecological processes, social wellbeing and economic development.<sup>95</sup> This included early community engagement prior to lodging a development application.

NSW should develop similar incentives but on a broader scale, moving from showcase initiatives to the mainstream. Significant efficiency gains can be made through streamlined approvals for forward-looking, low-impact, efficient and climate-adapted planning proposals that suit the local community. This reflects the ESD principle of 'improved valuation, pricing and incentive mechanisms'.<sup>96</sup>

EDO NSW recommends the Planning Bill adopt processes and standards that facilitate, encourage and reward green innovation. This could include (**Recommendation 42**):

- Linking code assessable development with an updated and expanded BASIX (building sustainability) tool, to apply to a range of residential, commercial and industrial developments on a mandatory basis.
- Simpler, cheaper or faster approval of projects that demonstrate leading practices including low-impact and sustainable design, climate change readiness, economic development, community engagement and social inclusion.

We make further recommendations on sustainability and building efficiency in our discussion of Chapter 8 of the White Paper and Part 8 of the Planning Bill (**Recommendations 84-86**).

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<sup>92</sup> See, for example, Siobhan Toohill, "Embedding Sustainability at Stockland", Centre for Social Impact: [http://www.csi.edu.au/site/Knowledge\\_Centre/Asset.aspx?assetid=c9627ec3f646d127](http://www.csi.edu.au/site/Knowledge_Centre/Asset.aspx?assetid=c9627ec3f646d127).

<sup>93</sup> See for example, COAG Communique, April 2012.

<sup>94</sup> Growth Management Queensland, *Green Door Information Paper*, July 2011. In early 2012, the Green Door initiative was merged into the Major Projects Office (now Development Facilitation Services).

<sup>95</sup> The principles relate to exemplary planning processes; ecological processes (including improved potable water use; reduction in waste; increase in ecosystem quality and production of energy from renewable sources and a reduction in carbon footprint); economic development and community wellbeing.

<sup>96</sup> See *Protection of the Environment Administration Act 1991* (NSW), section 6(2)(d)(iii): '...environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.'

## Merit assessment and EIA

### Overview

Under the White Paper reforms, merit assessment is reserved for development that is not streamed into any earlier track (p 134). This includes, for example:

- proposals with 'significant adverse impacts that cannot be code assessed';
- proposals that are permissible with consent, but outside a zone's core uses;
- proposals that 'may not fully align' with strategic plans or performance criteria.

Locally-assessed development proposals in this track will be assessed against the following:

- consistency with the strategy component of the plan, and the zone objectives;
- community submissions;
- the proposal's likely impacts, including environmental, social and economic impacts;
- whether any significant adverse impacts on adjoining or adjacent land are likely;
- the public interest ('in particular whether any public benefit outweighs any adverse impact of the development') – the White Paper says the public interest will be 'assessed against sustainable development objectives (ie integrating social, environmental and economic objectives)' and cumulative impacts.

*Impact assessment* (or 'EIS-assessed' development) will replace *designated development*, for proposals with high environmental impacts, such as mining and waste management. This category 'will always be merit assessed' based on Environmental Impact Statements (**EIS**).

In addition:

- State Significant and Regionally Significant Development will continue (subject to revised decision criteria and reduced concurrences – see White Paper pp 134, 138);
- State Significant Infrastructure will be renamed 'State Infrastructure Development';
- Critical State Significant Infrastructure is replaced with 'Public Priority Infrastructure'.

Clause 4.19 of the Planning Bill is a central provision, like section 79C of the EP&A Act, for the 'merit assessment' of a range of development that needs *consent* in the new system. This includes development that:

- is not code assessable (that is, general 'merit assessed' proposals);
- *is* code assessable, but exceeds code standards in a particular aspect;<sup>97</sup>
- requires an EIS;
- relies on a Strategic Compatibility Certificate (under Division 4.7);
- requires concurrence or consultation regarding threatened species impacts (under Part 6, Division 6.2);
- 'is subject to one stop referrals and decisions' (under Part 6, Div. 6.3).

### Analysis

EDO NSW is concerned about the proposed approach to assessing code-based development that exceeds agreed standards.<sup>98</sup> As noted above, the reforms propose that

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<sup>97</sup> That is, where an 'acceptable solution' is not adopted for a relevant 'aspect' of the development (see clause 4.18).

<sup>98</sup> NB: 'exceed' in this context refers to exceeding *maximum* or 'negative' standards (such as building height or required setbacks), not *minimum* or 'positive' standards such as for energy efficiency or providing green space.

only *non-compliant* 'aspects' of the development that exceed code standards would be merit assessed by council; and only those aspects may be subject to additional (discretionary) consultation based on local Community Participation Plans.

In our view, compartmentalising the assessment of non-compliant buildings in this way is abstract and artificial. It attempts to isolate the development from its surrounds, rather than consider the overall impacts in its particular environmental and social context. The Planning Bill should be amended to require the *whole* of a 'non-compliant' code development to be merit-assessed (that is, a complete switch from 'code' to 'merit track'), or be refused via the code itself (**Recommendation 43**).

### *Clear and comprehensive decision-making criteria needed*

As noted above, subclause 4.19(2) sets out the matters for the consent authority to consider when determining a range of development applications in Part 4 (as in EP&A Act, section 79C).

EDO NSW has consistently proposed that all decision making, whether at local, regional or State level, must happen within the scope of a clear and prescriptive legislative framework that seeks to achieve ESD. Among other things, a new planning system must foster better decision making for development proposals by:

- placing clear limits on discretion;
- incorporating objective decision making criteria (such as a 'maintain or improve environmental outcomes' test); and
- requiring decision makers to give reasons for decisions.<sup>99</sup>

Similarly, ICAC has recommended 'That the NSW Government ensures that discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective.'<sup>100</sup>

EDO NSW has several concerns about the limited decision-making criteria proposed in the White Paper and the Planning Bill.

First, subclause 4.19(2) would no longer require consent authorities to consider a number of important matters now in section 79C, particularly 'the suitability of the site for the development'; as well as coastal zone management plans, planning agreements and matters in the regulations. Site suitability is an important consideration that allows development to meet the specific needs and conditions of the location, including environment, health and safety matters.

The Bill also omits a number of additional important considerations for a modern planning system, including cumulative impacts, climate change, and specific consideration of ESD principles (currently an implicit, high-level consideration as part of the 'public interest'). Many of these considerations were also recommended for inclusion by the Independent Review Panel, following community consultation, but have not been included to date.

Second, while we support the retention of the 'public interest' as a necessary consideration for decision makers, we are concerned about the Planning Bill's qualification to this general test – to consider 'in particular whether any public benefit outweighs any adverse impact of the development' (sub-clause 4.19(2)(d)). In our view, this new requirement may skew the

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<sup>99</sup> See for example, Community Participation Charter, Planning Bill clause 2.1(1), principle (g). See also EDO NSW, Submission on *A new planning system – Green Paper* (Sept. 2012), p 43.

<sup>100</sup> ICAC, *Anti-corruption safeguards and the NSW planning system* (February 2012), recommendation 1.

public interest test to favour the economic benefits of a project, rather than a more even-handed consideration of whether the proposal promotes ecologically sustainable development. Although the White Paper refers to 'sustainable development objectives' and 'cumulative impacts' as other relevant public interest considerations (p 134), these aspects are notably absent from the Bill. In any case, 'sustainable development' considerations would be limited to the weak definition proposed in the Planning Bill's objects (clause 1.3).

This example is a concerning illustration of a broader tendency in the White Paper – to suggest certain environmental and social protections will be adopted in the new planning system, but not actually require them in the draft legislation. By contrast, matters that prioritise economic development (such as channeling public interest considerations towards the 'public benefit' of the development) are given legislative effect. The same can be said about the White Paper's commitments to balancing 'economic growth and environmental and social wellbeing', by the complete lack of environmental considerations in subsequent strategic planning principles (as noted above). This tendency could potentially mislead the community's understanding of the strength of environmental protections and 'balance' in the system, as many people will rely on the White Paper rather than the draft legislation.

To address the above issues, EDO NSW recommends the Planning Bill be amended, by inserting additional provisions with clear and objective criteria for decision makers exercising their functions under clause 4.19 on merit assessment (**Recommendation 44**). The additional criteria should include:

- the suitability of the site for the development (and appropriate alternative options);
- the cumulative impacts of past, present and likely future developments in the area;
- climate change impacts – in particular:
  - the development's likely *contributions* to climate change (and mitigation);
  - the likely impacts of climate change *on the development* (and adaptation);
  - the need for relevant conditions to address both mitigation and adaptation.
- the public interest, specifically including relevant principles of ESD that should apply.

EDO NSW further recommends deleting the proposed 'public benefit' qualification to the 'public interest' test in clause 4.19(2)(d) (**Recommendation 45**).

## State Significant Development (SSD)

### Overview

The White Paper notes that State Significant Development (**SSD**) and Regionally Significant Development (**RSD**) will carry over from the current system (subject to revised decision criteria, and further exemptions from approvals under other environmental laws<sup>101</sup>). The Planning Bill sets out specific decision-making considerations for State and regionally significant development applications (subclause 4.19(3)). These reflect the general decision criteria discussed above, with a modified clause for considering strategic plans (and not Local Plans).

### Analysis

EDO NSW welcomes the requirement for advice from the Planning Assessment Commission (**PAC**) before the Minister can 'call in' a development as State Significant (clause 4.29(2)). This oversight measure would be strengthened if the Minister could only declare a project as SSD if the PAC advice agreed. EDO NSW recommends that additional provisions be

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<sup>101</sup> Planning Bill 2013, Part 6, Division 6.1; see also White Paper p 138 (which refers for example, to 'integration' of aquifer interference approvals under section 90 of the *Water Management Act*).

inserted under section 4.29 that provide clear and objective criteria for the Minister in exercising powers to ‘call in’ development as SSD (**Recommendation 48**). The recommendations listed above in relation to decision-making criteria should also be adopted for decisions on SSD and RSD (**Recommendations 44 and 49**).

### *State Significant Development should require an EIS, and consider Local Plans*

The Planning Bill as proposed would allow SSD to be code-assessed. Furthermore, the Bill is made more complex by distinguishing between SSD that is ‘EIS assessed development’ (clause 4.30) and SSD that is not (clause 4.20). EDO NSW submits that *all* SSD should be ‘impact assessed’ – that is, subject to an Environmental Impact Statement (**EIS**) and mandatory consultation during assessment (**Recommendation 46**). This would promote greater clarity, certainty, and consistency with existing safeguards – which require an EIS for all State Significant Development.<sup>102</sup>

In addition, the Planning Bill should be amended to require decision makers on SSD and RSD to consider the provisions of *Local Plans* where the development will have an impact.<sup>103</sup> While consideration of LEPs was not required under the former Part 3A, the current SSD provisions reinstated this requirement, by applying s 79C to SSD.<sup>104</sup> Local Plans should also be a required consideration for SSD and RSD in the Planning Bill.

### *Legal exemptions undermine the commitment to ‘proportionate’ and ‘risk-based’ assessment*

EDO NSW has consistently proposed that any framework for assessing State Significant Development (**SSD**) must operate within a clear and prescriptive legislative framework (**Recommendations 49 and 50**) that seeks to achieve ecologically sustainable development. Within this framework, it may be appropriate to assess SSD proposals under additional criteria to those for ‘local’ development, provided that assessment remains proportionate to potential impacts.

The principle of *proportionality* in impact assessment has been a consistent feature of the Green Paper and White Paper’s proposals.<sup>105</sup> This principle is consistent with ‘leading practice’ assessment – as long as it is consistently applied – as it enables resources to be allocated towards proposals with greater complexity, significant impacts and higher risks.<sup>106</sup> Unfortunately, another aspect of the planning reforms significantly undermines the commitment to a proportionate approach.

The Planning Bill will continue to *exempt* many of the highest-impact development proposals in the State – SSD, State Infrastructure Development and Public Priority Infrastructure – from a range of approval and concurrence requirements that would ordinarily apply by law.<sup>107</sup> Even if an SSD proposal is likely to *significantly affect* threatened species, the Planning Bill continues to exempt these proposals (which include a range of heavy industry, mining, transport and tourist facilities<sup>108</sup>) from having to include a Species Impact Statement with a development application (clause 4.42(2)). EDO NSW strongly opposes these exemptions – in the interests of transparent, evidence based decision making and adherence to the rule of law.

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<sup>102</sup> Environmental Planning and Assessment Act 1979, section 78A(8A).

<sup>103</sup> See subclause 4.19(3)(a).

<sup>104</sup> Environmental Planning and Assessment Act 1979, section 89H.

<sup>105</sup> See for example, NSW Government Green Paper, p 47; White Paper, p 120 (‘principle 7’).

<sup>106</sup> See for example, Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* research report (April 2011), Vol. 1, ‘Leading practices’, ‘Improving development assessment and rezoning criteria and processes’, xlviii.

<sup>107</sup> Planning Bill 2013, Part 6, Division 6.1.

<sup>108</sup> State Environmental Planning Policy (State and Regionally Significant Development) 2011.

Exempting the State's biggest projects from a range of environmental approvals directly contradicts the principle that assessment is proportionate to a project's risks and impacts. A genuinely *risk-based* approach would require that projects with the greatest impacts receive the greatest scrutiny, not exemptions from legal safeguards. These exemptions from normal legal requirements also fuels public perception, kindled by former Part 3A, that State governments are prepared to 'rush through' major projects at the expense of thorough, evidence-based impact assessment.

The White Paper does not refer directly to the long list of concurrence exemptions under Part 6 of the Planning Bill. Rather, it gives the examples of aquifer interference approvals and native vegetation clearing as being 'better integrated into the comprehensive and rigorous assessment of state significant developments and a separate approval will not be required.' (p 138) However, this essentially means a further shift towards discretionary, closed-door, agency-negotiated assessment requirements. As noted above, the Planning Bill does not require an EIS for all State Significant Development, or prevent SSD from being code-assessed. EDO NSW submits that the White Paper proposals for assessing SSD are a less certain, less transparent alternative to the legislative checks and balances prescribed by Parliament under environment and heritage laws.

The White Paper's proposed 'one stop shop' model for concurrences is discussed below. For present purposes, we note the Government's view that its 'one stop shop' will make approvals more efficient. If so, EDO NSW submits that the justification for *exempting* major projects from concurrences (that is, fast-tracking significant projects due to inefficient referral processes) falls away. Instead, these referrals could be reinstated for major projects, and better coordinated under a 'one stop shop' (within an independent PAC, discussed in Part 6).

Consistent with the White Paper's commitment to *risk-based and proportionate assessment*, EDO NSW recommends that concurrences and referrals, including Species Impact Statements and approvals listed in Table 1 of Part 6, Division 1, must be **(Recommendation 51)**:

- *reinstated* for State Significant projects, and
- *retained* for any proposal involving a significant environmental or heritage impact.

EDO NSW comments on concurrences and referrals generally in relation to Part 6 below.

As a final comment on SSD, there is a high degree of risk in provisions of the Planning Bill that seem to allow partial consents, and continue to allow partially prohibited development. A key problem with proposed clause 4.30 (and its predecessor section 89E of the EP&A Act) is that it effectively allows for SSD applications to rezone sites without an application for rezoning being considered. This, coupled with the Minister's broad discretion to call in projects as SSD under clause 4.29, creates a risky development assessment scheme which means that planning instruments have no effect for an undefined category of SSD. Any proponent could lobby the Minister to call in the project as SSD, thereby automatically rezoning sites as long as only part of it is permissible.

Similarly, clause 4.16 will enable approval of specified aspects of development only. It is unclear as to whether clause 4.16 is intended to allow consent authorities to issue *staged* development consents, or other partial development consents. If it is the latter, for example, part of a proposed mine could be approved in circumstances where the impacts of the partial approval have not been environmentally assessed, and no staged plan exists. Accordingly, we recommend the Bill *must not* enable SSD that is partly prohibited (clause 4.30), or allow partial consents (clause 4.16). These provisions may circumvent clearer staged assessment and rezoning processes that should require holistic EIA (**Recommendation 50a**).

## Strategic Compatibility Certificates

### Overview

Division 4.7 of the Planning Bill proposes to introduce Strategic Compatibility Certificates. These will permit development that meets strategic-level outcomes, before the Local Plan for the area has been updated, despite any local prohibition that would prevent the proposal. The conditions in a Certificate would replace local planning control provisions (clause 4.35).

### Analysis

In our Green Paper submission, EDO NSW opposed the inclusion of Strategic Compatibility Certificates in the new planning system for a range of reasons.<sup>109</sup> While the White Paper states that these certificates have been narrowed to an ‘interim approach’ (p 117), the Planning Bill provides significant discretion to the Director-General of Planning, and no upfront consultation or appeal rights on whether a certificate should be issued. Other checks and balances are limited (see clauses 4.33-34). These Certificates will also circumscribe the powers and conditions of the consent authority (such as local councils) at the development approval stage (clause 4.36). In turn, this will limit the influence of community consultation.

Due to the serious potential to undermine strategic planning and consent authorities’ independence, if Strategic Compatibility Certificates are adopted, they must have strictly limited application, and be subject to rigorous upfront community consultation and environmental safeguards (**Recommendation 52**). These safeguards should include (under clauses 4.32-36):

- that any development which receives a Certificate is automatically ‘impact assessable’ (requiring an Environmental Impact Statement and consultation);<sup>110</sup>
- that the development must have no ‘significant adverse impact’ on the *environment* (in addition to ‘likely future uses of the surrounding land’);<sup>111</sup>
- that before a Certificate can be issued:
  - a *Subregional Delivery Plan* must be in place, not merely a regional plan (thus limiting certificates to high-growth areas with more detailed strategic plans);
  - and the regional planning panel’s advice must *support* issuing the Certificate;
- that Certificates are superseded by subsequent, approved planning control provisions under a Local Plan (rather than an unqualified two-year validity period);
- deletion of cl 4.36, as it is too broad and vague (this clause prevents councils and other consent authorities from refusing a project or imposing conditions on the basis of ‘matters dealt with’ in the Certificate’s conditions);
- adding a sunset clause (for repeal), which limits the period for Strategic Compatibility Certificates, consistent with the White Paper’s intention for ‘interim’ use only (p 117).

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<sup>109</sup> Our reasons for opposing the strategic compatibility concept (Green Paper submission, Sept. 2012, p 37):

- such approval would pre-empt local community input on subregional or local plans;
- it reduces clarity and rule certainty, by bypassing conditions in existing local plans;
- strategic plans would likely be too high-level to allow project-level application;
- the proposal lacks important safeguards for local social and environmental values;
- upfront strategic compliance approvals risk repeating mistakes of the former Part 3A.

<sup>110</sup> For example, this would require amendment to the Planning Bill 2013, clause 4.32(3).

<sup>111</sup> See clause 4.33(d).

## Additional comments on environmental impact assessment

### Independent and accredited environmental assessors

The Government's previous Green Paper put forward an important proposal for improving environmental impact assessment (EIA) under the new planning system. The Green Paper proposed that 'consultants that provide Environmental Impact Statements should be':

- *chosen from an accredited panel, and*
- *required to meet certain standards regarding the impartiality and quality of their work.*<sup>112</sup>

This proposal arose partly from a NSW Treasury recommendation to improve confidence in the planning system (Green Paper, p 94). It also reflects significant community concern about the haste, inaccuracy or lack of independence and transparency of environmental assessments undertaken on behalf of development proponents. EDO NSW is frequently contacted by community members expressing such concerns.<sup>113</sup> We also acknowledge that most EIA consultants do a professional job within the limits of the current framework.

According to the *Green Paper Feedback Summary*, a number of industry submissions opposed the proposal to accredit EIA consultants, including several prominent development and mining peak bodies. We do not suggest this represents a uniform 'industry view' on the issue. Significantly, 'Other submissions from stakeholders, the community and community groups were supportive of the proposal.'<sup>114</sup>

This positive community response indicates significant demand for *accredited professionals* to undertake EIA work. Community members are also interested the *impartial appointment* of EIA consultants for major projects, in a way that separates the direct nexus of payment between proponents and assessors. The importance of thorough, transparent and independent EIA processes is central to the integrity of development assessment and approval. Ultimately, consultants' reports present the technical information which decision makers rely on to make sound and impartial decisions.

The significant benefits of an accreditation scheme include:

- development decisions that are informed by the best and most reliable information;
- increased public trust in EIA reports, and reduced perceptions or risks of corruption;
- supporting the reputation and professionalism of the consultant industry (some of whom operate under voluntary accreditation schemes which could be extended);
- contributing to a 'planning culture' that emphasises ongoing education and training;
- more reliable environmental information in EIA reports – information which can be re-used for a range of purposes, including better and more efficient strategic planning.

We are disappointed that the White Paper reforms have not progressed specific proposals for accreditation and arms-length appointment of EIS consultants, supported by the Planning Bill. Nevertheless, we note that 'The government will work with stakeholders to examine different accreditation models and alternatives to address the issues raised.'

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<sup>112</sup> Green Paper, p 58.

<sup>113</sup> See for example, EDO NSW, *Ticking the Box – Flaws in the Environmental Assessment of Coal Seam Gas Exploration Activities* (November 2011), available at [www.edo.org.au/edonsw/site/pdf/pubs/ticking\\_the\\_box.pdf](http://www.edo.org.au/edonsw/site/pdf/pubs/ticking_the_box.pdf). This report contains a number of case studies highlighting inadequacies in the current Review of Environmental Factors (REFs) process.

<sup>114</sup> NSW Department of Planning and Infrastructure, *Green Paper Feedback Summary*, December 2012, p 26.

EDO NSW remains strongly supportive of mandatory accreditation of environmental consultants who prepare Environmental Impact Assessment reports. We recommend that this reform be progressed as a matter of priority. We submit that accreditation is likely to work best as a two-tiered process (**Recommendation 53**):

- first, for code-based assessment under the Planning Bill;
- second, for major projects (private and public), including independent appointment of accredited assessors.

Overall, a mandatory accreditation scheme is consistent with the Government's commitment to data integrity and evidence-based decision making; and its commitment to restore trust in the planning system, given significant community support for accredited EIA processes. Several models already exist, including the contaminated lands site auditor scheme, and voluntary industry schemes that could be built on through mandatory requirements. We look forward to further engagement with the Government on this issue in the coming months. To assist the Government in the meantime, the **Appendix** to this submission outlines further details of possible accreditation models.

## Improvements to EIA generally

Consistent with our previous submissions, EDO NSW also recommends a range of additional improvements to EIA processes – to ensure that decision makers have the best information available, and to support community confidence in development assessment integrity, and to ensure assessment and scrutiny is proportionate to potential impacts, particularly for major private and public projects with significant environmental impacts. The new planning system must now introduce further measures to (**Recommendation 54**):

- expand EIA provisions to require assessment of the cumulative impacts of multiple projects, the potential impacts of feasible alternatives, and climate change impacts;
- require decision makers to reject reports that are unsatisfactory or incomplete;
- replace public authority self-assessment with an impartial, arms-length approach;
- improve transparency of EIA processes as part of upfront community engagement;<sup>115</sup>
- adopt best practice standards for Strategic Environmental Assessment;<sup>116</sup>
- external peer-review and auditing of EIA reports and subsequent project outcomes;
- require the Planning Minister to report annually on the effectiveness of EIA systems;
- link EIA processes with comprehensive baseline data and environmental accounting systems, providing sufficient resources and time to address data gaps.

## Modifications

Division 4.8 of the Planning Bill permits modification of development consents under Part 4. These provisions omit certain safeguards from existing provisions (EP&A Act, sections 96-96A). EDO NSW recommends the existing checks and balances that apply to modifications under s 96 should be carried over to the new Act (per clause 4.38) (**Recommendation 55**). In addition to requiring a development is 'substantially the same', these safeguards include:

- ensuring that modifications involve 'minimal environmental impact' (or further consultation with concurrence agencies);
- satisfying consultation and notification requirements (for the public and agencies);
- consideration of submissions; and
- limitations on modifications that affect threatened species and critical habitat.

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<sup>115</sup> See for example, EDO NSW, *Ticking the Box – Flaws in the Environmental Assessment of Coal Seam Gas Exploration Activities* (November 2011), available at [www.edonsw.org.au](http://www.edonsw.org.au).

<sup>116</sup> See above, 'Sectoral Strategies and Growth Infrastructure Plans'.

***See Recommendations 37 – 55 on Development Assessment***

## 5. Infrastructure and environmental impact assessment (White Paper Chapter 7, Planning Bill Part 5)

### Overview

This part of the submission focuses on Part 5 of the Planning Bill, which deals with three categories of infrastructure and related development (including some private projects):

- Environmental impact assessment (**EIA**) of proposals that do not need consent;
- State Infrastructure Development (**SID**) (replacing State Significant Infrastructure);
- Public Priority Infrastructure (**PPI**) (replacing Critical State Significant Infrastructure).

Other key aspects of the White Paper's approach to infrastructure (and infrastructure contributions) are discussed further below in relation to Part 7 of the Bill.

Part 5, Division 5.1 of the Bill sets out EIA requirements for development (**Part 5 development**) that does not require consent under Part 4 of the Bill, and is neither SID nor PPI (discussed below). Division 5.1 will therefore re-enact or replace provisions in Part 5 of the existing EP&A Act. Part 5 development includes proposals that are 'self-assessed', approved, and carried out by (or on behalf of) state agencies. It also includes private development that does not require consent (such as some mineral and CSG exploration under the *Mining SEPP 2007*), which still requires EIA by the determining authority.

### Analysis

#### *Replace agency self-assessment of impacts with an arms-length approach*

EDO NSW recommends a more independent form of assessment and approval for State development than self-assessment and determination (**Recommendation 56**). This would be consistent with the White Paper's preference for expert-based approvals, which is a guiding principle for development assessment (p 120).

The aim of this recommendation is two-fold, while acknowledging the genuine importance of local infrastructure to communities. First, increased accountability of assessment of Part 5 projects is necessary to ensure infrastructure is built and operated with the minimum impact on the environment practicable; and second, to ensure public confidence in the planning, assessment and approval of infrastructure. Many calls to the EDO NSW public enquiries line are from individuals and community groups concerned about the assessment, consultation or workmanship of 'Part 5' development in their neighbourhoods. These projects may relate to electricity, pipelines, forestry and education works for example. They may (sometimes necessarily) involve destruction or interference with environmental values such as trees, waterways or public space. The combination of agency self-assessment under Part 5 of the EP&A Act, and the overriding application of the current *Infrastructure SEPP*, often leaves community members feeling powerless to have input on the way infrastructure is built.

To address these problems, EDO NSW submits that (**Recommendation 56**):

- infrastructure projects be included in new requirements to accredit consultants who undertake EIAs in the new planning system; and/or
- assessment and approval of infrastructure projects be done at arms-length from the proponent (state agency), such as by a regional planning panel or other body.

This recommendation would affect the operation of Part 5 generally. However, below we analyse and comment on the specifics of Part 5 as they appear in the Planning Bill. The following comments are therefore subject to this overarching recommendation for greater independent assessment of state agency proposed development.

### *Duties to consider environmental impacts and obtain EIS and SIS reports*

The substantive clauses of Division 5.1 of the Planning Bill (clauses 5.3-5.9) set out the environmental assessment requirements and procedures for state agencies as the proponent and/or 'determining authority' of Part 5 development.

#### *'General duty to consider environmental impact of relevant development'*

Clause 5.3 broadly corresponds to section 111 of the EP&A Act. However, EDO NSW recommends incorporating two aspects of the current s 111, to maintain existing protections:

- a contextual reference stating that this duty arises 'For the purposes of attaining the objects of this Act relating to the protection and enhancement of the environment...'; and
- a requirement to 'examine and take into account *to the fullest extent possible all matters* affecting or likely to affect the environment...'.<sup>117</sup>

Noting the recent comments of Justice Pepper in the *Fullerton Cove* case,<sup>117</sup> EDO NSW recommends further strengthening clause 5.3 – by requiring that the '7-part test' be carried out (with more than 'general regard') where threatened species may be in or around the site (**Recommendation 59**).

#### *Particular matters to which determining authorities to have regard for purposes of Part 5 environmental impact assessment (EIA) – and supporting regulations*

Schedule 5 of the Planning Bill (at clause 5.4) sets out the matters that a determining authority 'is to have regard to' for the purposes of Part 5 EIA (as per clause 5.3 of the main Bill).

Schedule 5 omits an existing requirement to consider the effect on any local wilderness areas under the *Wilderness Act 1987* (NSW).<sup>118</sup> This may be inadvertent, as *wilderness area* is defined in Schedule 1 (Dictionary), but is not otherwise mentioned in the Planning Bill. The regulations may make further provisions for Part 5 EIA (see Schedule 5, clause 5.5, including a guiding list of issues). This includes providing for the effect of amendments to the list of threatened species (etc) during a Part 5 EIA.<sup>119</sup>

EDO NSW recommends the following amendments in relation to Part 5 EIA factors (**Recommendation 60**):

- adding a note to relevant provisions of Part 5 that refers to Schedule 5;
- reinstating specific requirements for a Part 5 EIA to consider any effect of proposed development on wilderness areas (Schedule 5, clause 5.4).
- that, at a minimum, the new regulations (or the Planning Bill itself) carry over all existing factors to be taken into account in assessing environmental impacts under

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<sup>117</sup> *Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd (No 2)* [2013] NSWLEC 38.

<sup>118</sup> See EP&A Act 1979, section 111(3).

<sup>119</sup> Planning Bill, Schedule 5, clause 5.5(d).

Part 5 (*EP&A Regulation 2000*, clause 228).<sup>120</sup>

- that the regulations maximise the consideration of new threatened species listings where relevant, in accordance with evidence based decision-making and adaptive management.

*'Determining authority to obtain and consider EIS for relevant development likely to significantly affect the environment'*

Clauses 5.4-5.8 of the Planning Bill broadly correspond to sections 112-114 of the EP&A Act. However, EDO NSW recommends the following amendments to the Planning Bill clause 5.4 (and 5.8) (**Recommendation 60**):

- In the absence of more independent EIA process for State agency development, the Bill should clarify that the 'determining authority' and the 'proponent' who provides the EIS in clause 5.4(1)(a) may in fact be the same agency (clarify by a note or redrafting).
- That the minimum exhibition period for an EIS be *increased* to 45 days, from the current 30 days (EP&A Act, s 113), instead of *decreased* to 28 days (Planning Bill, Part 1 of Schedule 2).
- That the determining authority be required to give reasons if it disagrees with any findings or recommendations following a review by the Planning Assessment Commission or the Director-General of Planning (under clause 5.4(1)(c)-(d)).
- Insert specific timeframes or 'as soon as practicable' requirements on all obligations under the Planning Bill to publish (or 'make public') documents, such as clause 5.8(3).<sup>121</sup>

EDO NSW recommends the following amendments to clause 5.5 (**Recommendation 61**):

- clarify that subclause (1), beginning 'For the purposes of this Division...' does not *limit* the circumstances in which development is 'likely to affect the environment';
- include a note (under 5.5) referring to clause 1.12 of the Bill, which sets out the meaning for when 'development is *likely to significantly affect threatened species*'.

EDO NSW recommends the following amendments to clause 5.6 (**Recommendation 62**):

- If an EIS shows that Part 5 development 'will adversely affect the environment', imposing conditions or modifications should not be left to the *complete discretion* of the determining authority (who is frequently the proponent).
- That is, instead of stating that determining authorities *may* impose conditions to reduce the adverse effects of high-impact development after an EIS (as in section 112(4), EP&A Act), clause 5.6 should state that determining authorities *must* (the following is retained from draft clause 5.6): 'impose such conditions or require such modifications as will in its opinion eliminate or reduce the adverse effect of the development on the environment' (or must refuse the development). This amendment would *require* such conditions, with flexibility for the authority to determine what conditions are suitable.
- Any notice provided to the proponent in writing as to the determining authority's

<sup>120</sup> Clause 228 sets out the meaning of 'likely to affect the environment' for the purposes of existing section 111 of the *EP&A Act* (see Planning Bill, clause 5.3). Clause 228 includes (among other things) 'cumulative environmental effects.'

<sup>121</sup> Clause 5.8(3) requires the Director-General of Planning to publish its report after it examines an environmental impact statement (EIS) obtained (or prepared) by a determining authority under clause 5.8. While clause 5.8(3) requires the Director-General to forward its report to the determining authority 'as soon as practicable', there is no equivalent requirement or timeframe for the Director-General to 'make the report public.'

reasons for actions under clause 5.6 should also be made public, in the interests of transparency, and community and industry understanding of decision-making (**Recommendation 63**).

## State Infrastructure Development

### Overview

Division 5.2 of the Planning Bill deals with State Infrastructure Development (**SID**). This replaces the existing category of State Significant Infrastructure (**SSI**) under Part 5.1 of the EP&A Act, and similarly appoints the Planning Minister as the approval authority.<sup>122</sup> The Bill permits SID to be declared in a Local Plan (planning controls) or by Ministerial order.<sup>123</sup>

### Analysis

#### *Accountability of public infrastructure assessment and approval*

This is a critical issue where the new Act must not simply repeat the mistakes of the past.

Public infrastructure projects can have significant environmental and social impacts, just as private projects do. Despite the previous pitfalls of Part 3A, the Planning Bill seeks to declare provisions of Division 5.2 relating to the approval of SID 'not mandatory'. It thereby seeks to prevent a range of civil enforcement orders (under Part 10), pollution cases and judicial review challenges against SID in the Land and Environment Court (clause 10.12(2)(d)). As discussed further below, EDO NSW strongly opposes these limitations on accountability.

The Planning Bill permits 'staged' concept plan approvals for SID at clause 5.17. Without additional safeguards, problems are likely to arise in relation to 'concept stage' approval as they did under former Part 3A. Notably, clause 5.18 (which reflects EP&A Act section 115ZE) appears to reinforce the application of the privative clause 10.12(2) to staged SID approvals.

In addition to the ambiguity about what Part 5 provisions are and are not 'mandatory', the Bill must clarify and limit the Minister's ability to approve future stages of 'staged SID' on the basis of 'requisite details' (clause 5.17(2)(b)). This is too broad and vague to assure the community that social and environmental impacts will be properly considered and minimised to the extent practicable.

EDO NSW is also concerned that the Planning Bill (clause 5.19) reinstates broad discretion for the Minister to pre-ordain EIA requirements for future stages of a concept plan (equivalent to s 75P of former Part 3A). This includes the ability to 'determine that no further environmental impact assessment is required for the development or any particular stage...', without any checks and balances (such as environmental impact thresholds or criteria, independent advice or recommendations). As noted, concept approvals based on scarce information, and resulting in reduced review rights, have been a primary cause of community alienation under the existing EP&A Act. We recommend that staged or 'concept plan' processes must not preclude further public consultation or review at a later stage (**Recommendation 57**).

Another example of potential risks to public trust is the proposal to allow the Minister to amend strategic plans and Local Plans, *without* following proper procedure, to 'expedite'

<sup>122</sup> Planning Bill 2013, clauses 1.16, 5.11 and 5.16.

<sup>123</sup> Planning Bill, clause 5.10.

matters that give effect to infrastructure plans (as well as strategic plans and matters of State or regional significance).<sup>124</sup> As noted under Part 3 above, we do not support these broad discretions, as distinct from correcting procedural errors etc (**Recommendations 16 and 58**).

EDO NSW makes the following further recommendations regarding SID procedures (**Recommendation 64**):

- Clause 5.12 of the Bill could codify the requirements for an SID project application. (The Bill contains few specific requirements, similar to SSI now: EP&A Act, s 115X.)
- Nevertheless, we welcome the ongoing requirement that all SID projects require an EIS, in accordance with the Director-General's EIA requirements and the regulations (clause 5.13).
- Define or limit the term 'infrastructure' in the Planning Bill. (The EP&A Act adopts an inclusive definition of 'infrastructure' in the context of SSI.<sup>125</sup>)
- Add a note to clause 5.13(4) referring to clause 5.22 (obligation to publish EIA requirements);
- That the minimum exhibition period for an EIS be *increased* to 45 days (from the current 30 days: EP&A Act, s 115Z), not *decreased* to 28 days (Bill, clause 5.14, Part 1 Sch. 2).
- Wherever the Planning Bill requires public exhibition, the Bill should reinstate explicit provisions stating that any person (including a public authority) may make a submission on the plan or development. These clauses must be added throughout the Bill to encourage public understanding and engagement (clause 5.14; cf EP&A Act, section 115Z(4)).
- To guide the discretion to provide copies of public submissions on an EIS to 'appropriate' public authorities, clause 5.14(4)(c) should explicitly require the Director-General to consider relevant issues raised in public submissions.
- Consistent with a commitment to transparency (State Plan, Goal 32), an agency/ proponent's preferred SID report should be made 'available to the public' whether or not 'the Director-General considers that significant changes are proposed' (clause 5.14(6))
- In addition to the inclusions at clause 5.15(2), the Director-General's EIA report to the Minister should include a copy or accurate summary of public submissions, and any response from the proponent (clause 5.14(5)) to the issues raised in submissions.
- In addition to the requirements at clause 5.16(2), when deciding whether or not to approve SID, the Minister should be required to consider public submissions on the proposal.
- The process for requesting and granting a modification of the Minister's SID approval (clause 5.20(2)-(3)) should refer to the potential environmental impacts of the change.
- EDO NSW welcomes the retention of requirements to publish information in clause 5.22 ('Miscellaneous provisions...').
  - For easier reference, this clause should be renamed to reflect its contents.
  - Clause 5.22 should also include specific timeframes or 'as soon as practicable' requirements to publish documents.
  - Clause 5.22 should be amended to require publication of public submissions on SID proposals and their EISs, including from government agencies.
  - Reasons for *approval*, not just *refusal* of SID should be published, consistent with obligations under the Community Participation Charter (Planning Bill, clause 2.1(1)(g)).

<sup>124</sup> Planning Bill, clauses 3.9(3)(c) and 3.14(d).

<sup>125</sup> EP&A Act Part 5, Division 5.1, section 115T.

## Public Priority Infrastructure

### Overview

The White Paper (at 7.5) signals an expedited approval process for some of the State's biggest infrastructure projects. What is now 'Critical State Significant Infrastructure' will be called 'Public Priority Infrastructure' (**PPI**), under Part 5 Division 5.3 of the Planning Bill. This category will be *approved by Ministerial declaration* – accompanied by reasons for the decision. PPI can be declared if:

- the type of development is identified in Regional, Subregional or Growth Infrastructure Plans as a priority for the area; or
- Another NSW Minister applies for the project to be declared, and the Planning Minister believes the project is 'essential for the economic, environmental or social well-being of the State'.

Further assessment of PPI projects – including a 28 day minimum public exhibition period (Part 1 of Schedule 2) – will focus on *how* rather than *whether* the project will proceed.

The Planning Bill also limits the ability to challenge the merits or legal errors in decision-making about PPI (unless the Minister gives permission) (clause 10.12(1)). Furthermore, the Bill prevents legal directions and orders that may interfere with PPI (clause 6.4). These provisions are similar to current limitations in the EP&A Act and former Part 3A. This is discussed further in relation to Part 6 below.

### Analysis

NSW faces significant infrastructure challenges now and into the coming decades. It is crucial to address these challenges in ways that promote community engagement and wellbeing, and that maintain and improve environment values. PPI's scale and long-term nature also increases the need to factor in climate change risks.

On the introduction of the Part 3A repeal bill in 2011, the Planning Minister stated that 'future critical infrastructure declarations [now PPI] will be far more restrictive and will apply only to certain major public infrastructure projects that are not State significant developments.'<sup>126</sup> This statement was responding to the community's concern about the scope of projects that may be declared critical infrastructure, or what the White Paper reforms now call PPI.

As noted above, the Planning Bill does not define or limit what is 'infrastructure'. Nevertheless, EDO NSW welcomes a number of safeguards proposed in the Bill:

- A PPI project must be 'generally of the kind' identified in a strategic (infrastructure) plan (clause 5.23(2)(a)) – this and a second PPI declaration pathway are discussed below.
- The Minister must make public the reasons for declaring a project as PPI.
- A project definition report is to set out 'the measures that the proponent will take to avoid, minimise or mitigate any adverse impacts of the development', as well as 'monitoring, auditing and reporting' of environmental impacts during construction and operation (clause 5.26(b)-(c)).

EDO NSW recommends that additional criteria and governance safeguards be applied to

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<sup>126</sup> The Hon Brad Hazzard, agreement in principle speech (bill introduction), Environmental Planning and Assessment Act Amendment (Part 3A Repeal) Bill 2011, NSW Legislative Assembly, 16 June 2011.

limit the declaration of PPI proposals, and demonstrate how they will ‘avoid compromising community and environmental outcomes’<sup>127</sup> as occurred under Part 3A (**Recommendation 65**):

- We submit that the phrase ‘generally of the kind’ (clause 5.23(2)(a)) should be more specific, not yet having had the benefit of seeing how such plans are drafted in detail.
- The Minister’s ability to declare PPI at the request of another Minister, where the Planning Minister believes the project is ‘essential for the economic, social or environmental well-being of the State’ (clause 5.23(2)(b)), could further require the advice of the Planning Assessment Commission (as applies for SSD) before a declaration is made.
- A project definition report (clause 5.26) should (**Recommendation 66**):
  - be exhibited *before* the Minister declares a development as PPI for at least 45 business days, if the White Paper’s commitment to community participation ‘as a key input into the conceptual design process’ (p 171) is to be made meaningful.
  - require the proponent to avoid, minimise or mitigate any adverse impacts of the development, ‘to the extent practicable’, including having regard to reasonable alternatives to the proposal, or alternative ways of constructing or operating the infrastructure.
  - specifically include under ‘adverse impacts of the development’ (clause 5.26(2)(b)) *cumulative impacts* combined with other existing or likely future development, and *climate change impacts* (including mitigation and adaptation responses).
- The Planning Bill should *not* exempt PPI from a range of provisions in the Bill, such as the Act’s objects, strategic plans, concurrence requirements and appeals (clause 5.27) (**Recommendation 67**).

**See Recommendations 56 – 67 on Infrastructure and EIA**

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<sup>127</sup> See NSW Government, *A New Planning System for NSW – Green Paper* (July 2012).

## 6. Concurrence, consultation and other legislative approvals (White Paper 5.7, Planning Bill Part 6)

### Overview

In order to reduce assessment times, one of the White Paper's guiding principles for development assessment is to reduce the number of circumstances where consent authorities refer projects to other State agencies, to obtain concurrences and approvals before a project can be approved (**concurrences**).<sup>128</sup> Concurrences are usually imposed to ensure related laws are complied with, including laws for the protection of the environment or cultural heritage. The White Paper outlines a three-stage approach to 'Simplifying interactions with the NSW Government in development assessment' in this regard. In brief:

- a four-month, internal government review of concurrences;
- remove or replace unnecessary or straightforward referrals, concurrences, approvals (this includes continuing to *exempt major projects* from a range of concurrences);
- establish a 'one stop shop' within the Planning Department for remaining referrals.

### Internal Government review of concurrences

The Government's aim to reduce the number of concurrences prior to development approvals is carried over from the Green Paper. The White Paper notes the Government's intention to *internally* 'Review all referral, concurrence and other planning related approvals jointly with relevant agencies and local government.' (pp 105-106) This review is proposed to be completed within four months of the White Paper's release (that is, by mid-August).

### Analysis

In its Green Paper submission, EDO NSW noted the need for 'a *full and transparent* consideration of concurrence requirements to determine:

- the various causes of delay (including, for example, inadequate project information provided by the proponent);
- which requirements can be dealt with strategically; and
- which need to be retained at project level (such as threatened species, pollution licensing, Aboriginal cultural heritage and non-Aboriginal heritage considerations).'

EDO NSW therefore encourages a more transparent approach to reform of concurrences. We would also welcome community and expert engagement on a potential 'alternative, risk based methodology' for assessing threatened species impacts by the Office of Environment and Heritage (White Paper, p 106). This would be consistent with the Government's new commitments to community engagement, transparent and evidence based decision-making.

The White Paper includes some detail on the nature and number of most frequently used concurrences (pp 104-105). It notes almost 14,000 concurrences were sought from almost 7000 development applications in 2011-12. Around 1200 applications included multiple referrals, although no data is given on the scale, value or nature of these projects (noting that SSD projects are already exempt). About one-third of all referrals were to the Rural Fire Service, and a further one-third went to the Mine Subsidence Board. Road works were the next most frequent referrals.

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<sup>128</sup> White Paper, p 120, '6. Simplifying interactions with the NSW Government in development assessment...'

This basic data suggests that the number of referrals for environment and heritage issues (such as threatened species concurrence, native vegetation clearing approvals and Aboriginal cultural heritage permits) are a much smaller proportion of referrals and concurrences than might be assumed (although the White Paper gives no comparative data on these kinds of referrals). Indeed, the White Paper lacks any real detail about how Aboriginal cultural heritage and other heritage values will be protected under the new planning system.

EDO NSW also notes and supports the White Paper's statement (p 106) that some seemingly 'underused referral and concurrence provisions' in SEPPs, deemed SEPPs and LEPs may act as efficient deterrents and effective safeguards against inappropriate development, including in sensitive environmental areas. These concurrences should not be removed on account of limited 'activation'.

EDO NSW recommends that:

- The Government's review of concurrences should be extended and involve public consultation, full transparency and clear reasoning for the removal or replacement of any existing concurrences (**Recommendation 68**).
- The Planning Bill and relevant strategic plans, policies and instruments should *retain existing concurrences designed to protect environmental values* (for example, biodiversity, heritage or pollution prevention) for any proposal involving a significant environmental or heritage impact (alone, or cumulatively – with other existing and likely future developments) (**Recommendation 69**).
- The Planning Bill should be revised to clarify and prioritise the protection of *Aboriginal cultural heritage and other heritage values* under the new planning system (**Recommendation 70**).

## Exemptions and limited concurrence requirements for major projects

### Overview

Significantly – as well as reducing inter-agency consultation and agreement generally – major projects under the new system (namely Public Priority Infrastructure (**PPI**), State Infrastructure Development (**SID**) and State Significant Development (**SSD**)) are still exempted from many approvals normally needed under threatened species, heritage and NRM laws.<sup>129</sup> As now for major projects, other authorisations from environment agencies (such as pollution licences from the EPA) must be issued *consistently* with the Planning Department's terms of approval of the major project.

Specifically, Part 6 of the Planning Bill deals with 'Concurrences, consultation and other legislative approvals.' Division 6.1 of the Bill removes or modifies concurrence requirements for major projects (PPI, SID and SSD). This carries over and expands the list of exemptions under the current EP&A Act.<sup>130</sup> Table 1 in the Bill outlines a long list of approvals that *do not apply* to PPI, SID and SSD projects. Table 2 issues a list of approvals which *must be issued consistently* with the terms and conditions of the Planning Department's (or other relevant authority's) development approval.

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<sup>129</sup> (such as heritage permits, coastal protection, land clearing and water use approvals

<sup>130</sup> *Environmental Planning and Assessment Act 1979*, sections 89J-K (SSD) and sections 115ZG-H (SS Infrastructure).

## Analysis

The replication and expansion of such significant exemptions in the Planning Bill is concerning to EDO NSW, particularly considering that the Government:

- strongly opposed – then repealed – Part 3A, which itself included these exemptions;
- has an explicit State Plan goal to restore trust and integrity to the planning system;
- has recently been talking about ‘giving the EPA back its bite’ and independence in related contexts, such as regulating pollution incidents and coal seam gas (CSG) (whereas, if a CSG project is ‘State Significant Development’, the EPA must grant a pollution licence that is consistent with the Planning Department’s own approval).

EDO NSW has several concerns about the approach to removing and limiting concurrences. Several provisions in Part 6 directly conflict with the Government’s commitment to proportionate, transparent and evidence-based assessment.

First, as discussed in relation to SSD above, EDO NSW does not support exempting the largest projects in the State from general concurrence requirements (Division 6.1, Table 1), or the Planning Department’s ability to override expert agencies’ ability to issue independent, evidence-based approvals (Table 2).

Second, in relation to new exemptions, the Bill would exempt SSD projects from needing aquifer interference approvals under the *Water Management Act 2000* (NSW). EDO NSW opposes this expansion. This would undermine the original policy intent of these approvals, introduced in 2012 in part to deal with the impacts of mining and CSG – activities that the Planning Bill is now exempting. (Most mining, and most CSG exploration and production, would qualify as SSD.) Indeed, following community feedback, the Government corrected its initial Bill that introduced aquifer interference approvals, to ensure SSD mining projects were bound by those approvals, noting this ‘has always been the Government’s intention’.<sup>131</sup> The Planning Bill reverses this requirement, and now exempts mining and other State significant development and infrastructure from aquifer interference approvals.<sup>132</sup>

Third, EDO NSW opposes the Bill’s provisions that exempt PPI projects from a range of ‘directions, orders or notices’ ordinarily available to protect the environment in the event of a breach (Planning Bill, clause 6.4). The practical effect of these provisions is to remove powers of independent regulatory authorities such as the Environment Protection Authority (EPA), the Director-General of the Environment Department, the Heritage Council (or Minister) and local councils to issue orders – where a major infrastructure project causes damage to the environment, threatened species or heritage (including Aboriginal cultural heritage). As noted, there are few checks and balances on when the Minister (including at the request of another Minister) can declare a development as PPI (clause 5.23). This means that the bar on orders and enforcement notices in clause 6.4 could apply to a potentially broad range of infrastructure projects, reducing the incentives for compliance with approval conditions and licences.

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<sup>131</sup> The Hon Greg Pearce MLC, Environmental Planning and Assessment Amendment (Part 3A Repeal) Bill 2011, second reading speech, Legislative Council, 20 June 2011:

*It has always been the Government’s intention that State significant development and State significant infrastructure approvals require an approval under the new aquifer interference legislation being introduced by the Government, where relevant. This is consistent with the strategic regional land use policy announced in opposition and now being delivered by the Government.*

<http://www.parliament.nsw.gov.au/prod/parliament/nswbills.nsf/0/C7B5B1F688AE244CCA2578AF00216E54>.

<sup>132</sup> Planning Bill, clause 6.2, Table 1.

We note that Critical State Significant Infrastructure is exempt from a range of orders under the existing Act.<sup>133</sup> Continuing these exemptions under the new Act directly conflicts with the Government's commitments to proportionate assessment, greater certainty and simplicity, and State Plan Goal 29 to restore public confidence and integrity in the planning system. It also contradicts the Premier's statements that the Government is 'giv[ing] the EPA back its bite' in other contexts.<sup>134</sup> The Deputy Premier has also noted that 'In 2011 we re-established the EPA as an independent environment regulator', emphasising that 'The EPA is a respected and trusted independent watchdog'.<sup>135</sup> By contrast, the Planning Bill (clause 6.4) proposes to strip the EPA of its standard powers to enforce pollution licences (powers that are designed to avoid formal prosecution) to deal with breaches of conditions by major infrastructure projects.

It is unclear whether 'carrying out of' PPI in clause 6.4 is limited to the planning and construction phase; or if the exemption from orders would also apply to the *operational* stage of major infrastructure projects. There is also no explicit time limit on these exemptions. It would be of even greater concern if clause 6.4 intends to exempt major infrastructure from a range of orders throughout the project's life. For example, such a broad interpretation could mean a new, 'PPI-declared' power station is exempt from environment protection notices (normally issued by the EPA<sup>136</sup>) for 30 years or more. This approach would undermine the whole purpose of issuing pollution licences in the first place (that is, 'environment protection licences' in the *Protection of the Environment Operations Act 1997*), and remove any incentive to comply. These concerns are heightened by the broad privative clause, at 10.12 of the Bill, which seeks to exclude a wide range of legal proceedings normally available to anyone (regulators and community members) to enforce the law (discussed below).

EDO NSW recommends that Part 6 of the Planning Bill 2013 be amended to:

- remove Division 6.1 that exempts major projects from various concurrences; or at least reinstate concurrence requirements for native vegetation clearing, aquifer interference approvals and heritage impacts, as well as independent EPA issuing of pollution licences (further scope for reinstating concurrences may follow the general review)<sup>137</sup> (**Recommendation 71**);
- remove clause 6.4 that prevents authorities from issuing environmental protection directions, orders and notices relating to Public Priority Infrastructure breaches (**Recommendation 72**).

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<sup>133</sup> EP&A Act, s 115ZK.

<sup>134</sup> See NSW Government media releases, 'Tough new pollution laws: O'Reilly report accepted in full', 5/10/2011; 'Tough new rules for coal seam gas activity', 19/2/2013. Indeed, as the *Green Paper Feedback Summary* (p 35) notes, one CSG company submitted that PPI 'should be extended to include natural gas supply pipelines'. Nothing in the Act explicitly prevents such as broad interpretation (although we strongly oppose it). In this context, clause 6.4 would deprive the EPA of the enforcement powers the Government says it has reinforced.

<sup>135</sup> See NSW Government media release, 'Tough new rules for coal seam gas activity', 19/2/2013.

<sup>136</sup> Environment protection notices include clean-up notices, prevention notices and prohibition notices (POEO Act, section 90). See *Protection of the Environment Operations Act 1997* (NSW), Chapter 4.

<sup>137</sup> Planning Bill, Division 6.1, clauses 6.2, Tables 1; and 6.3, Table 2 respectively.

## Concurrences for threatened species, critical habitat etc

### Overview

Part 6, Division 6.2 of the Planning Bill deals with 'Concurrences, consultation and other legislative approvals – general provisions'. In brief, clause 6.5 requires the Planning Minister (as the consent authority for development) to *consult* with the Minister responsible for the *Threatened Species Conservation Act 1995* (NSW) (**Environment Minister**) where a development is likely to significantly affect threatened species. Clause 6.6 requires the Environment Minister's *concurrence* before another consent authority (other than the Minister) can approve a development that may significantly affect threatened species.

These requirements apply to development that needs consent under Part 4, or an EIS under Part 5 of the Bill (clauses 6.5(1), 6.6(1)). Importantly, the Bill later appears to include a major qualification to these requirements (by appointing the Director-General to act in place of the Environment Minister or Department). This issue is discussed in relation to 'one stop shop' provisions below.

### Analysis

While the Planning Minister will continue to be the consent authority for SSD,<sup>138</sup> the above requirements for the Planning Minister to consult with the Environment Minister specifically exempt SSD proposals (clause 6.5(1)(a)). This perpetuates an existing exemption (EP&A Act, section 79B(2A)).

EDO NSW is also concerned at the breadth of the Planning Minister's power to amend Local Plans to remove concurrence requirements that protect environmental values, in order to facilitate 'any particular development' or 'kind of development' (clause 6.9). This could include, for example, removal of threatened species assessment requirements in Division 6.2; removal of so-called 'one stop shop' concurrences in Division 6.3, Table 3; or removal of statutory requirements in other Acts. In addition, subclause 6.9(3) appears to remove checks and balances requiring the approval of other Ministers to amend planning control provisions.

EDO NSW strongly supports the following aspects of Part 6, Division 2:

- continuation of requirements for a consent authority to seek concurrence from the NSW Environment Minister or Department if a development proposal (that requires consent) 'is likely to significantly affect threatened species'.<sup>139</sup> This is defined to include threatened populations, ecological communities and their habitats (including development proposed to be 'carried out in critical habitat').<sup>140</sup>
- retention of the '7-part test' under the existing EP&A Act, which sets out the factors which a decision maker must consider in determining whether a project will 'significantly affect' threatened species (etc).<sup>141</sup>

To improve threatened species protection, EDO NSW recommends the following amendments to the Planning Bill:

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<sup>138</sup> Planning Bill 2013, clauses 1.13(d), 4.5(b) and 4.30. Note the current Planning Minister has delegated his authority to determine SSD projects to the Planning Assessment Commission or senior departmental officials.

<sup>139</sup> Planning Bill, clauses 6.5-6.6.

<sup>140</sup> Planning Bill 2013, clause 1.12.

<sup>141</sup> Planning Bill, Schedule 1, clause 1.5 ('Determination of whether proposed development likely to significantly affect threatened species'. See also *EP&A Act 1979*, section 5A.

- In relation to the matters which the Department head or Minister must consider in determining whether to give a concurrence (clause 6.6(5)) (**Recommendation 73**):
  - That the Department head or Minister must also consider:
    - the principles of *ecologically sustainable development* (as required now under s 79B of the EP&A Act), including the precautionary principle and the conservation of biodiversity and ecological integrity as a fundamental consideration;
    - *submissions received on the development application* (as required now under s 79B the EP&A Act, not only submissions received on a *species impact assessment* (clause 6.6(5)(a));
    - *species' conservation statements* in addition to recovery plans and threat abatement plans.
  - These matters should apply to the 'Division' (6.2) not just the 'section' (6.6) – so that the Department head must have regard to the same matters (at a minimum) in giving their advice, when the Planning Minister *consults* with the Environment Minister under clause 6.5.
- For greater clarity and accessibility as to when developments may 'significantly affect' threatened species (**Recommendation 73**):
  - insert a note in Division 6.2 cross-referencing clause 1.12 ('Development likely to significantly affect threatened species');
  - move the mandatory '7-part test' considerations from Schedule 1, clause 1.5 into the body of the Planning Bill (Division 6.2); or alternatively,
  - insert a note in Division 6.2 to the effect that the mandatory '7-part test' considerations are located in Schedule 1, clause 1.5 (as in note to clause 1.12)
  - insert a note to Schedule 1, clause 1.5(1) clarifying that development carried out on significant habitat is automatically defined as *likely to significantly affect threatened species* (pursuant to Planning Bill, clause 1.12);<sup>142</sup>
- Remove or limit the Minister's discretion (clause 6.9) to remove concurrence requirements in Local Plans that protect environmental values (in particular, threatened species assessment requirements in Division 6.2, and requirements in Division 6.3, Table 3) (**Recommendation 74**).

## One stop shop model for remaining concurrences

### Overview

The Planning Bill provides that a 'one stop referral' process will apply to development applications that require concurrences, referrals and approvals (**concurrences**) under the Planning Bill, other Acts or a Local Plan (Part 6, Division 6.3). The White Paper describes the 'one stop shop' process as providing a single point of contact for proponents, with the Planning Department to 'project manage, facilitate and monitor' remaining concurrences, and provide a consistent, whole of government approach to resolve conflicts (p 103).

More significantly, the White Paper later notes, 'The one stop shop will issue a single general terms of approval or provide advice or recommendations *as if it were the agency whose advice or concurrence was needed.*' (p 107) This is given effect in the Planning Bill,

<sup>142</sup> That is, Schedule 1, clause 1.5(1) lists factors to be taken into account in determining whether development is *likely to significantly affect threatened species*, '...unless it is carried out in critical habitat'. As indicated, this proviso is presumably a reference to the fact that development in critical habitat is automatically *likely to significantly affect threatened species* (Planning Bill, clause 1.12), and further consideration is not necessary. However, the role of the proviso '...unless it is carried out in critical habitat' should be made clear in clause 1.5(1).

using similar language.<sup>143</sup> Table 3 in Division 6.3 includes a list of ‘One stop referrals and decisions for legislative approvals’ where the Director-General of Planning is to take the place of the relevant expert agency. These include heritage approvals, mining and petroleum production leases, land-clearing (native vegetation) approvals, pollution licences, various water management approvals and more. However, the Planning Bill also appears to appoint the Director-General in place of threatened species experts in Division 6.2 (see clause 6.10(1)).

The White Paper (p 107) does not clearly set out the new proposed concurrence procedures or the Director-General’s powers. Generally, this is how we understand the procedure:

1. The consent authority (for example, local council or regional planning panel) refers ‘one stop referrals development’ application to Director-General (clause 6.11(1)).
2. Director-General (*not* the arms-length approval body) determines whether approval should be given, and issues ‘general terms of approval’ (clause 6.12(1)).
3. Consent authority gives (or refuses) development consent. Consent may include conditions. Any consent is to be consistent with the general terms of approval (and is only to be given if the Director-General does issue general terms of approval) (clause 6.12(2)-(3)).
4. Approval body must give the approval under the relevant Act if the proponent applies for the approval within three years of development consent. The approval may include conditions, but must be ‘substantially consistent’ with the general terms of approval and ‘not inconsistent’ with the development consent (clause 6.12(4)-(5)).

## Analysis

Improved coordination of the assessment of major projects is supported. However, EDO NSW has strong concerns about the breadth and operational details of the proposed one stop shop.

The proposed approach to ‘one stop referrals’ set out in Division 6.3 undermines the independence of regulatory authorities, and the rigour of concurrences under the Planning Act and other NSW laws. These changes contradict the White Paper’s principle of ‘promoting independent expert decision making’ in other development assessment contexts (p 120), and the Government’s recent assurances of regulators’ powers and independence in the context of mining and CSG.

In principle, EDO NSW does not oppose the establishment of a central unit, overseen by the Planning Assessment Commission, to coordinate and facilitate concurrences. However, this arrangement should not concentrate decision-making discretion in the office of the Director-General, particularly while trying to restore public trust in planning and government decision-making.

EDO NSW has significant concerns that the proposed ‘one-stop-shop’ model will:

- further centralise power within the Planning Department, by transferring decision-making control to the Director-General, instead of NSW agencies and regulators like the EPA, Office of Environment, Heritage Council and Office of Water; and
- focus on speed of approval – rather than whole-of-government expertise, risk-based concurrence decisions, and evidence-based approval conditions.

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<sup>143</sup> See, for example, clause 6.12(1), 6.13(2). ‘...the Director-General acts [or is to consider and provide any relevant advice] in the place of (and as if he or she were) the approval body that would otherwise give that approval [or would otherwise be consulted by the consent authority].’

EDO NSW is also concerned at the breadth of application of Division 6.3. The initial implication is that 'one stop referral' is tied to the limited (but nonetheless significant) list of concurrence requirements in Table 3 to the Division (White Paper, p 103). However, the Planning Bill further states that Division 6.3 also applies to 'Part 4' development that requires consultation or concurrence under Division 6.2.<sup>144</sup> This appears to mean that the Director-General of Planning would *take the place of the Minister or Department head responsible for threatened species legislation* – in advising the Minister or deciding whether or not a concurrence should be issued – where development would *significantly affect* threatened species, populations, communities or their habitat (clauses 6.5-6.6).

A reader of Division 6.2 of the Planning Bill would have the impression that threatened species consultation and concurrence is (rightly) controlled by the Department head or Environment Minister. This is the case now under the EP&A Act (s 79B). However, if the above interpretation is correct (that the Director-General of Planning now takes on this role), then clause 6.10(1)(b) entirely undermines the operation of Division 6.2, and the independent concurrence safeguards that are otherwise carried over from the EP&A Act. EDO NSW strongly opposes giving the Director-General of Planning the discretion to issue threatened species concurrences. We also oppose the Director-General subsuming other concurrence roles under Local Plans.

Specifically, EDO NSW recommends that Division 6.3 be significantly amended to reduce the concentration of power and discretion in the Director-General of Planning, instead of arms-length experts in other NSW agencies and regulatory authorities (noted above). In particular, we recommend deleting clause 6.10(1)(b) and clause 6.13 to restore the Environment Department's expert role for threatened species concurrences, along with other concurrence agencies appointed in a Local Plan (**Recommendation 75**). These draft clauses may mislead readers as to how Division 6.2 is applied.

EDO NSW recommends the Director-General's powers and discretions to determine matters (as a one stop shop) should be removed, and a unit should be established (within an independent Planning Assessment Commission) to work on concurrences. This unit would draw on external agencies for personnel and still be bound to make decisions according to their respective legislative frameworks (**Recommendation 76**).

EDO NSW submits that a 'one stop shop' should be about improved coordination of concurrences and referrals, and not a process for exempting concurrences and referrals for the largest projects with the largest potential impacts. Concurrences and referrals should be restored and more efficiently coordinated for SSD, SID and PPI; rather than exempted altogether.

**See Recommendations 68 – 76 on Concurrences and other approvals**

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<sup>144</sup> See clause 6.10(1)(b) and definition of 'one stop referrals development' under clause 6.10(2).

## 7. Infrastructure and biodiversity contributions (White Paper Chapter 7, Planning Bill 7)

### Overview

Chapter 7 of the White Paper outlines the Government's proposed approach to infrastructure provision and contributions, to be given effect under Part 7 of the Planning Bill. The Government's aim is to ensure infrastructure will be better integrated, planned and prioritised in a way that coordinates with community growth and State needs.

This part of the submission comments on certain aspects of the Bill, relating to:

- Growth Infrastructure Plans
- 'Biodiversity offset contributions' and
- Planning agreements.

We also comment on the need to provide for, and properly value, what the White Paper calls regional and local 'open space' – or to use a more functional term, 'green infrastructure'.

### Growth Infrastructure Plans

#### Overview

Growth Infrastructure Plans will be prepared by the Director-General (Planning Bill, clause 7.20) and fit under Subregional Delivery Plans (White Paper, p 155). They will be supported by Local Infrastructure Plans housed under Local Plans (clause 7.11). The Planning Bill proposes that both types of infrastructure plans require a minimum of 28 days exhibition (see clauses 7.11, 7.20 and Schedule 2, Part 1).

#### Analysis

We welcome the intention that the Public Participation Charter will apply to the development of Growth Infrastructure Plans and Local Infrastructure Plans under Part 7 of the Bill (see clause 2.2(2)(f)). As noted above, substantive compliance with this Charter needs to be mandatory (**Recommendation 5**).

As part of this process, local communities must be provided with clear visual information, evidence supporting the need for proposed projects, and alternative scenarios to consider for the future of their town, city or region. There is a need to clearly explain complex interactions, so the community can develop informed opinions and provide feedback. There must also be better consideration of how existing infrastructure will meet the needs of higher-density development, and commitment of funding to infrastructure (including diverse forms of public transport and 'green infrastructure') before new sites can be developed.

EDO NSW recommends an increased consultation period for draft infrastructure plans, particularly if this period is likely to overlap with consideration of a draft Local, Subregional or Regional Growth Plan (**Recommendation 77**). We are concerned that 28 days will not give the community sufficient opportunity to review and engage with multiple, potentially complex and interrelated documents.

Finally, EDO NSW recommends that long-term infrastructure planning include consideration of climate change risk assessment, mitigation and adaptation responses (**Recommendation 78**). For example, a recent Productivity Commission report notes a range of tools that could

be used in NSW:<sup>145</sup>

- *Council of Australian Governments requirements that state and territory government have strategic plans (including infrastructure needs) for capital cities. These plans must cover a range of criteria, including climate change adaptation. ...*
- *Standards Australia (2011) released a draft standard on considering climate change adaptation for infrastructure and buildings. ...*
- *The Australian Green Infrastructure Council issued guidelines on managing climate change risks for infrastructure (AGIC 2011). ...*
- *Finally, the Australian Government has a strategy in place for managing risks to critical infrastructure, including those posed by climate change...*

Despite these requirements and standards, there is no reference to planning for climate change in the White Paper or Bill, either in the context of infrastructure or building regulation. This is a serious omission from an 'evidence based' planning system.

## Biodiversity offset contributions

### Overview

Division 7.4 of the Planning Bill proposes to create a legislative framework for developer contributions 'towards the conservation or enhancement of the natural environment of the State.' (clause 7.22(1)).

### Analysis

EDO NSW supports the ability of developers to be able to contribute to environmental values and improve community wellbeing, appreciation of the natural environment, and resilience to climate change. However, if the current proposal is adopted in the Planning Act, EDO NSW recommends that the Bill should distinguish more clearly between general 'biodiversity contributions' and specific 'biodiversity offset contributions' (**Recommendation 79**).

EDO NSW has done extensive analysis on the development and application of biodiversity offset schemes, both federally under the EPBC Act and at state level in relation to native vegetation, BioBanking and biocertification.<sup>146</sup>

Based on our experience, where contributions are specifically used to offset particular biodiversity impacts, a credible approach to biodiversity offsetting must adopt rigorous legal criteria, including (**Recommendation 80**):

- a scientific assessment approach that 'maintains or improves biodiversity outcomes';
- adopt a like-for-like approach to 'offset' impacts on specific species and communities;
- not be used in 'red-flag' areas that are too valuable to be destroyed and 'offset'.
- ensure that offsets are protected 'in perpetuity' (such as from future development).

The Bill needs to explicitly include key principles and parameters around legitimate offsetting, and more clearly require *links between impacts and offsets* for the purpose of direct offsets.

Frameworks that do not meet the offset criteria may be more accurately described as

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<sup>145</sup> Productivity Commission, *Barriers to Effective Climate Change Adaptation*, Inquiry Report No. 59, September 2012, p 224.

<sup>146</sup> For example, EDO NSW was a member of the Ministerial reference group on Biobanking for a number of years. Our submissions on offsetting can be found at: [http://www.edo.org.au/edonsw/site/policy\\_submissions.php#2](http://www.edo.org.au/edonsw/site/policy_submissions.php#2).

biodiversity funding mechanisms, but do not necessarily offset actual impacts. Further principles should be developed to guide the use of general biodiversity contributions.

If 'biodiversity contributions' are adopted under the planning reforms, there is a need to clarify the distinction, but also the interaction with, the existing BioBanking Scheme under Part 7A of the *Threatened Species Conservation Act 1995*.

EDO NSW would also support further investigations and discussions as to whether the BioBanking Scheme could be mandatorily applied in certain circumstances (**Recommendation 81**). One of the biggest hindrances to this scheme under the current planning system to date has been the availability of an alternative, 'negotiated' path to biodiversity offsetting. This discretionary approach conflicts with the transparent and more scientifically rigorous BioBanking scheme.

## Planning Agreements

### Overview

Division 7.5 of the Planning Bill sets out a framework for planning agreements (currently known as 'voluntary planning agreements'). These agreements, between public authorities and a developer, require the developer 'to dedicate land free of cost, pay money, or to carry out public or other works' for the purpose of infrastructure, affordable housing or the environment (clause 7.28(1)). They can be made where the developer seeks to change or revoke planning control provisions, or in relation to a development application (clause 7.28(2)).

### Analysis

This submission does not undertake a comprehensive analysis of planning agreements under the Planning Bill. However, we note that ICAC has previously identified voluntary planning agreements as an area of corruption risk. To address this risk, ICAC has suggested that *additional third party merits appeal rights* should apply to development that is the subject of voluntary planning agreements (amongst other categories of private sector development).<sup>147</sup>

EDO NSW supports this recommendation. Division 7.4 and Part 9 of the Planning Bill should be amended to provide for third party merit appeal rights in relation to development that is the subject of planning agreements (**Recommendation 82**). Under Division 7.4 of the Bill, the only reference to appeals (clause 7.36) explicitly removes appeals to the Land and Environment Court against the terms of a planning agreement (or a public authority's failure to enter into one).

## Recognising the value of 'green infrastructure'

### Overview

The White Paper and Bills do not refer to the concept of 'green infrastructure'.<sup>148</sup>

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<sup>147</sup> ICAC, *Anti-corruption safeguards and the NSW planning system* (February 2012), recommendation 15. See further NSW Independent Planning Review Panel, 'NSW Planning System Review Response', Vol. 2, p 66.

<sup>148</sup> The Australian Institute of Landscape Architects (AILA) notes: "The term 'green infrastructure' describes the network of natural landscape assets which underpin the economic, socio-cultural and environmental functionality of our cities and towns...". See AILA, 'Green Infrastructure' presentation, at <http://www.aila.org.au/greeninfrastructure>.

## Analysis

EDO NSW recommends that the focus on infrastructure integration in the new planning system should more prominently recognise the value of 'green infrastructure'.

Green infrastructure includes the parks, gardens, waterways, trees, cycleways and biodiversity corridors that make our communities more liveable, valuable, healthy, connected and climate change-ready. There is growing evidence that 'urban green spaces have positive effects on people's health, stimulate a city's economy, raise community spirit and further social integration.'<sup>149</sup>

Strategic planning needs to properly value green infrastructure and integrate it into broader infrastructure planning and funding (**Recommendation 83**). This includes the State Infrastructure Strategy, Regional Growth Plans, Growth Infrastructure Plans and Local Plans. For example, the *Landscape Principles* of the Australian Institute of Landscape Architects provide a practical focus on green infrastructure to increase the liveability of our cities and towns.<sup>150</sup>

**See Recommendations 77 – 83 on Infrastructure and biodiversity contributions**

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<sup>149</sup> See, for example, Husqvarna Group and Kairos Future, *Global Garden Report 2012*, at <http://www.kairosfuture.com/en/news/global-garden-report-2012>; A. Schaffler, M. Swilling, 'Valuing green infrastructure in an urban environment under pressure — The Johannesburg case', article in press, *Ecological Economics* (2012); Toyota and Planet Ark, *Planting Trees: Just what the doctor ordered* (2012), at <http://treeday.planetark.org/about/health-benefits.cfm>.

<sup>150</sup> See AILA, *Landscape Principles*, at <http://www.aila.org.au/landscapeprinciples>.

## 8. Building and subdivision (White Paper Chapter 8, Planning Bill Part 8)

### Overview

EDO NSW welcomes the intention of the planning reforms to improve building certification and compliance. However, we are concerned at the lack of urban sustainability and building efficiency considerations, which closely relate to this aspect of the reforms.

### Analysis

#### Urban sustainability goals and standards (including BASIX updates)

Sustainable cities that reduce our ecological impacts should be an integral part of 'making NSW number one'.<sup>151</sup> As our previous submissions have noted, cities consume vast amounts of energy, water and materials. Urban sustainability is therefore a critical part of achieving ESD and 'triple bottom line' outcomes. However, sustainability standards have not been 'mainstreamed' beyond the development of the Building Sustainability Index (**BASIX**).

BASIX has been positive in setting minimum standards since its inception – but without regular updates, limitations in the BASIX SEPP also hinder incremental improvements.<sup>152</sup> The official feedback summary from the Sydney Metropolitan Strategy discussion paper (2012) found that almost every submission that mentioned BASIX emphasised the need to update it.<sup>153</sup>

We recommend the Planning Act and NSW Planning Policies apply *mandatory* urban sustainability goals at strategic and local planning levels (**Recommendation 84**). These should apply to areas such as energy and water use, construction, transport, waste reduction, biodiversity and bushland protection.<sup>154</sup>

To achieve these goals, the new system should also contain a short-term timetable for the rapid adoption of specific targets, monitoring, auditing and reporting processes that would apply to all types of built development (**Recommendation 85**). This includes industrial, commercial and residential (especially higher density) buildings. Infrastructure should similarly be required to meet sustainability targets, given its pervasive nature, embodied energy and long lifespan.

There is already considerable local council activity in encouraging sustainable cities.<sup>155</sup> The 2011 National Urban Policy also includes *Sustainability* as a primary goal.<sup>156</sup>

<sup>151</sup> NSW State Plan: A plan to make NSW number one, [www.2021.nsw.gov.au](http://www.2021.nsw.gov.au).

<sup>152</sup> The BASIX SEPP overrides any environmental planning instrument that is inconsistent with it. See *SEPP (Building Sustainability Index: BASIX) 2004*, cl 7.

<sup>153</sup> See Department of Planning & Infrastructure, [www.planning.nsw.gov.au/sydney-over-the-next-20-years](http://www.planning.nsw.gov.au/sydney-over-the-next-20-years).

<sup>154</sup> For example, see: *Discussion paper on cool roofs regulation in South Australia* (Dec. 2010), [www.sa.gov.au](http://www.sa.gov.au) [http://www.sa.gov.au/upload/franchise/Water,%20energy%20and%20environment/climate\\_change/documents/cool\\_roofs/Cool\\_roofs\\_discussion\\_paper.pdf](http://www.sa.gov.au/upload/franchise/Water,%20energy%20and%20environment/climate_change/documents/cool_roofs/Cool_roofs_discussion_paper.pdf)

<sup>155</sup> See, for example, City of Sydney Council, *Sydney 2030 – Green/Global/Connected*, at [www.sydney2030.com.au](http://www.sydney2030.com.au).

<sup>156</sup> That is: 'to advance the sustainability of Australia's natural and built environment, including through better resource and risk management' and corresponding objectives. See Australian Government Department of Infrastructure and Transport, Major Cities Unit, *National Urban Policy* (2011), at: <http://www.infrastructure.gov.au/infrastructure/mcu/urbanpolicy/index.aspx>. Objectives include:

4. *Protect and sustain our natural and built environments;*
5. *Reduce greenhouse gas emissions and improve air quality;*
6. *Manage our resources sustainably;*
7. *Increase resilience to climate change, emergency events and natural hazards.*

The Planning Bill and NSW Planning Policies need to set out in detail how the planning system will achieve these broad national objectives across NSW. This should include a cascading hierarchy of binding urban sustainability targets.

As an immediate demonstration of its commitment to sustainable development, the NSW Government should commit to overhauling BASIX, to mandate leading practice building sustainability and efficiency standards.<sup>157</sup> This could be integrated into a new NSW Planning Policy on *Sustainability* and given effect through development codes and Local Plans.

EDO NSW recommends the Government update and expand BASIX in time for the new planning system to take effect, and link BASIX with code assessment. In particular (**Recommendation 86**):

- strengthen minimum requirements of BASIX to reflect technological advances;<sup>158</sup>
- extend its operation to commercial and industrial sites (not dwellings only);
- raise standards for multi-unit dwellings that are currently subject to lesser targets;<sup>159</sup>
- establish mandatory sustainability requirements in law for retrofitting existing buildings (in particular commercial and industrial); and
- set minimum baselines, but removing the prohibition on councils and other consent authorities from imposing more stringent water and energy use limits.

**See Recommendations 84 – 86 on Building and Subdivision**

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<sup>157</sup> The *State Environmental Planning Policy (Building Sustainability Index – BASIX) 2004* is the principal building regulation relating to sustainability.

<sup>158</sup> At their most stringent, the BASIX energy and water efficiency targets require energy and water use reductions of 40% over existing dwellings. The targets are set by comparison to average NSW water consumption and greenhouse gas emissions as at 2002-03.

<sup>159</sup> Under BASIX, multi-unit residential developments of over 6 storeys are only required to meet reduction targets of 20%. Note also the proliferation of multi-unit dwellings in Sydney, described in the Government's Metro Strategy discussion paper, *Sydney over the next 20 years* (p 13): 'Over the last 20 years, most new homes have been multi-unit dwellings. In recent years... the proportion of new dwellings that are multi-unit types [has gone] above 80 per cent – a marked difference to other cities.'

## 9. Merits Review, Appeals and Enforcement (Planning Bill, Parts 9-10)

Parts 9 and 10 of the Planning Bill deal with merits review and appeals, and enforcement.

### Merit review and appeal rights

#### Overview

The White Paper states that ‘Applicant and objector appeal and review rights will remain unchanged’ in the new system (p 143). Under the Planning Bill, objectors will continue to have *merit appeal* rights against ‘EIS-assessed’ development approvals (as for ‘designated development’ now). These rights must be exercised within 28 days (clauses 9.8 and 9.10(2)). However, merit appeal rights will continue to be removed for State Significant Development where the Planning Assessment Commission holds a formal public hearing (clause 9.6(3)(a)).

On the other hand, development proponents will retain *new* (non-judicial) review rights against a decision to refuse spot rezoning (first enacted in November 2012). Proponents will also have court appeal rights against a Council’s failure to approve code-assessed development within 25 days. In addition, there will be a new ‘very fast track’ for small-scale housing appeals, and an expanded range of appeals will now be streamed into mandatory conciliation-arbitration. According to the White Paper, this will include ‘all appeals on development that is code assessed’.<sup>160</sup>

#### Analysis

EDO NSW strongly emphasises the need to *improve existing merit appeal rights* for the community (third parties) in the Land and Environment Court, to be on a more equitable footing with developers (**Recommendation 87**). The ongoing imbalance of merit appeal and review rights in the Planning Bill will continue to undermine community confidence. This contrasts with the Government’s central commitment to ‘restore confidence and integrity in the planning system’.<sup>161</sup> In addition, developers will have less incentive to genuinely engage in strategic planning if they know they can ‘push the envelope’ through review and appeals – without corresponding rights for later community involvement.

As EDO NSW has noted throughout this planning review, third party merit appeal rights are a fundamental access to justice issue, and provide an essential check and balance on decision-making.<sup>162</sup> Contrary to opposing claims, experience has shown that third party review rights clearly do *not* result in a deluge of unmeritorious cases coming before the court.<sup>163</sup> Good strategic planning should in fact reduce the need for third parties to exercise appeal rights. Furthermore, the benefits of increased public scrutiny, to aid and improve

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<sup>160</sup> White Paper, pp 143-145, 149.

<sup>161</sup> NSW Government State Plan, *NSW 2021*, goal 29. Available at [www.nsw2021.nsw.gov.au](http://www.nsw2021.nsw.gov.au).

<sup>162</sup> See for example, EDO NSW, *Submission to A New Planning System – Green Paper* (Sept. 2012), pp 51-52; N Hammond-Deakin and E Johnson, ‘Merits appeal rights in NSW: Improving environmental outcomes, *IMPACT!* 92 (2012), 6-10; EDO NSW, *NSW Planning System’s Sustainability Failures* (February 2012), at [http://www.edo.org.au/edonsw/site/pdf/misc/120209planning\\_law\\_reform\\_cases.pdf](http://www.edo.org.au/edonsw/site/pdf/misc/120209planning_law_reform_cases.pdf).

<sup>163</sup> In 2010-11, there were 378 developer appeals and only four objector appeals. See Department of Planning & Infrastructure, *Local Development Performance Monitoring 2010-11*, pp 80-81. Appeal rights on either side are exercised in very few cases (0.57% (indicative) as a proportion of development determinations. See Department of Planning, *Local Development Performance Monitoring 2010-11*, p 80, Table 6-1, at [www.planning.nsw.gov.au](http://www.planning.nsw.gov.au). However, developer appeals make up the vast majority of merit appeals to the LEC..

decision-making and to minimise risks of corruption, extend far beyond the very few cases where these rights are exercised.<sup>164</sup>

Both the Independent Planning Review Panel and ICAC recommended additional third party appeal rights be enshrined in the new system to improve public confidence and reduce corruption risks. The Panel recommended that objectors should have (notifiable) merit appeal rights where they are directly affected by a project that exceeds local standards.<sup>165</sup> Similarly, ICAC has suggested that additional third party merits appeal rights should apply to private sector development that:

- is significant and controversial (for example, large residential flat developments);
- represents a significant departure from existing development standards; or
- is the subject of voluntary planning agreements.<sup>166</sup>

In relation to developer rights for *non-judicial* review of decisions, EDO NSW opposes the retention of new review rights where rezoning applications are refused.<sup>167</sup> General spot rezoning rights *and* review rights for developers are inappropriate, given the new emphasis on upfront strategic planning and 'community agreement'. We note these developer review rights would apply *in addition to* more flexible development standards under new codes and broader zones. This further tips the balance away from local community input and expectations for a fairer, simpler planning system.

In relation to *conciliation-arbitration* procedures,<sup>168</sup> EDO NSW has recently raised concerns with the Planning Department regarding the exclusion of third party community members from these processes. For example, developers may amend plans during the conciliation process, and the consent authority may approve those plans, without the opportunity for local community engagement and discussion. Limited provision for third party involvement is also likely to be a problem where a developer can appeal a decision on a code-assessable development proposal.<sup>169</sup>

EDO NSW understands that the Planning Department has recently adopted a policy in response to the concerns raised about third party engagement in conciliation. This policy will require notification of submitters, and opportunity to comment before an agreement is finalised, where a development is significantly amended during conciliation. While EDO NSW supports the intention of this policy, we submit that it should be given proper effect in law during the current reforms, by way of amendments to the *Land and Environment Court Act 1979* and/or the Planning Bill (as necessary).

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<sup>164</sup> See for example, The Hon Justice Peter McClellan, 'Access to justice in environmental law: An Australian perspective', Commonwealth Law Conference 2005, London, 11-15 Sept. 2005. See also ICAC, *Anti-corruption safeguards and the NSW planning system* (2012), p 22:

*The limited availability of third party appeal rights under the EP&A Act means that an important check on executive government is absent. [These] rights have the potential to deter corrupt approaches by minimising the chance that any favouritism sought will succeed. The absence of third party appeals creates an opportunity for corrupt conduct to occur...*

<sup>165</sup> Independent Review Panel, recommendations 25-26:

25. *The establishment of a new right of third party appeal to be confined to a person or entity who lodged an objection to the proposed dispensation and who, on appeal, can demonstrate a direct adverse effect by the granting of the dispensation.*

26. *All objectors must be advised of any approval granting dispensation from compliance with a development standard and of the limited scope of permitted third party appeal rights against the granted dispensation.*

<sup>166</sup> ICAC, *Anti-corruption safeguards and the NSW planning system* (February 2012), recommendation 15. See further Independent Review Panel, 'NSW Planning System Review Response', Vol. 2, p 66.

<sup>167</sup> See White Paper, p 145.

<sup>168</sup> See *Land and Environment Court Act 1979* (NSW), s 34-34AA.

<sup>169</sup> See White Paper, pp 144, 149.

Finally, the Planning Bill (clause 9.13) carries over provisions of the current EP&A Act (section 83(2)-(5)) which effectively suspend a development consent until the Court determines any appeal. However, the Bill also carries over an anachronism which *exempts* State Significant Development consents from this clause (EP&A Act, section 83(4A)). EDO NSW submits that it is inappropriate to exempt development that is more likely to have significant impacts on the environment and community from a 'stay' on consent. The exemption for SSD should be removed for greater simplicity, consistency and proportionality.

In order to address the range of issues discussed above, EDO NSW makes a number of recommendations in relation to merits review and appeal rights.

First, consistent with previous comprehensive submissions,<sup>170</sup> Division 9.3 of the Planning Bill should be amended to expand third party merits appeal categories (and rights to be notified). In particular (see Planning Bill, clause 4.19) (**Recommendation 87**):

- where development controls are exceeded (for example, if development is approved that exceeds code-based standards, without reducing environmental/social impacts);
- where development relies on a strategic compatibility certificate (if they are retained);
- in relation to major projects (State Significant Development, State Infrastructure Development and Public Priority Infrastructure) – whether or not the Planning Assessment Commission (**PAC**) holds a public hearing (clause 9.6(3)(a));
- decisions to approve development modifications; and
- a more equitable period (3 months) for objectors to bring merits appeals (clause 9.10(2)).

Given the clear commitments to restore public trust, and strong support for additional community merit appeal rights from the Government's independent review panel, the State anti-corruption watchdog and a wide range of community groups and members, the new planning system should provide for such additional rights.

Second, EDO NSW recommends the removal of developers' rights to review (of pre-gateway and gateway decisions) where rezoning applications are refused by a local council or the Planning Department<sup>171</sup> If developer review rights are not removed in these circumstances, then equitable third party review rights should be provided (**Recommendation 89**).

Third, Division 9.2 of the Planning Bill (and the *Land and Environment Court Act 1979* as necessary) should provide an explicit, expanded role for the public (third parties) in court conciliation, arbitration, and review processes. At the very least, the community should have a right to comment on amended development plans, and third party objectors should have a right to attend relevant conciliation conferences or arbitration hearings. The consent authority alone cannot be deemed to represent the community in such proceedings<sup>172</sup> (**Recommendation 88**).

Finally, the Planning Bill (clause 9.13) should be amended so that the effect of a consent for State Significant Development (**SSD**) is deferred until any appeal has been determined (consistent with appeal procedures for other development) (**Recommendation 89a**).

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<sup>170</sup> See joint submission (March 2012), from p 75, response to Issues Paper Part E.

<sup>171</sup> See White Paper, p 145. See also [www.planning.nsw.gov.au/gateway-process](http://www.planning.nsw.gov.au/gateway-process); Planning Circular PS12-006.

<sup>172</sup> See for example, A Tuor, Commissioner of the Land and Environment Court, 'The keys to effective pre-trial and hearing preparation and presentation of merit appeals - Section 34 Conciliation Conferences', Environment and Planning Law Association Conference, Byron Bay, 18/10/2008, available at [www.lec.lawlink.nsw.gov.au/agdbasev7wr/\\_assets/lec/m4203011716852/tuor\\_epla2008.pdf](http://www.lec.lawlink.nsw.gov.au/agdbasev7wr/_assets/lec/m4203011716852/tuor_epla2008.pdf), para 7:

*While the concerns of residents are a relevant consideration they are not a party to the appeal. It is important that council has authority to enter into an agreement if its contentions are resolved, despite the concerns of residents not being satisfied.*

## Open standing and enforcement

### Overview

The 'iconic' open standing rights to bring civil enforcement proceedings under the NSW planning system have been nominally retained in the Planning Bill (clause 10.9; White Paper, p 147). However, contrary to the White Paper's expressed intention, open standing could be seriously undermined by provisions in Part 10 of the Bill. Indeed, this is one of the most fundamental concerns EDO NSW has with the Planning Bill.

As noted throughout this submission, clause 10.12 of the Planning Bill appears to significantly restrict the community's 'open standing' to challenge a range of plans and decisions, including legal errors of decision makers, in the Land and Environment Court. This includes in fundamental areas such as community participation, strategic plans, Public Priority Infrastructure (**PPI**), State Significant Development (**SSD**) and State Infrastructure Development (**SID**) approvals.

Specifically, clause 10.12(1) prevents various civil enforcement orders (under Division 10.3), third-party environmental appeals (by community members under NSW pollution laws<sup>173</sup>) and judicial review proceedings (against legal errors) from challenging PPI projects.<sup>174</sup> Similar to section 115ZK of the current EP&A Act, the Bill proposes to only allow such proceedings if the Planning Minister (who is responsible for declaring and 'approving' PPI in the first place) gives prior permission.<sup>175</sup>

Clause 10.12(2) is particularly far-reaching. It firstly states that entire Parts of the Planning Act, and other provisions, are 'not mandatory'. These include:

- Part 2 of the Act (Community participation);
- Part 3 of the Act (Strategic planning);
- Part 4 of the Act in relation to SSD consents;
- Part 5 of the Act in relation to SID approvals.

By prescribing these provisions as 'not mandatory', the Act then attempts to *prevent* a wide range of legal proceedings that would 'invalidate an instrument or decision' made under these parts of the Act. Similar to PPI above, clause 10.12(2) seeks to exclude civil enforcement orders under the Planning Act,<sup>176</sup> certain third-party environmental appeals under pollution laws, and judicial review proceedings in relation to community participation requirements, strategic planning, and approvals for SSD and SID.

### Analysis

This wide-ranging 'privative' clause first restates, and then goes beyond, existing exemptions from legal challenges under the EP&A Act. It is of great concern that the Planning Bill

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<sup>173</sup> The Bill defines *third-party environmental appeals* to mean civil enforcement proceedings under the *Protection of the Environment Operations Act 1997* (NSW) – specifically sections 252 (Remedy or restraint of breaches of this Act or regulations) and s 253 (Restraint of breaches of an Act or statutory rules that harm the environment).

<sup>174</sup> EP&A Act section 115ZK: Excluded proceedings include those relating to:

- The declaration of PPI (or an amendment or revocation of the declaration)
- A breach of any part of the new Act's division that deals with PPI (Division 5.3)
- A breach of the Planning Act, *or any other Act*, 'arising in respect of the giving of an approval' for a mining lease, CSG or petroleum production lease, pipeline licence or pollution licence, among other things (under Table 2 to section 6.3).

<sup>175</sup> Planning Bill 2013, clause 10.12(1).

<sup>176</sup> Specifically, orders under Division 10.3 of the Planning Bill 2013.

attempts to restrict access to justice and the jurisdiction of the Courts in this way, particularly as the Courts have determined not to give effect to such attempts to oust judicial oversight of executive power.<sup>177</sup>

The proposal to reduce judicial scrutiny and accountability of decision-makers in clause 10.12 goes to the very heart of public accountability and the restoration of integrity in the planning system. Community confidence in the system will be significantly undermined by the removal of rights to challenge inadequate or unlawful strategic plans and consultation processes; and a range of other decisions relating to major projects with potentially significant environmental and social impacts. The restriction of community rights to challenge the legality of such decisions contradicts the language of the White Paper, which cites the importance of transparency, accountability, proportionality and community engagement.

EDO NSW has sought specific clarification from the Planning Department of the intended scope of clause 10.12. However, at the time of writing, EDO NSW had not received an explanation. The justification that the clause is simply a continuation of current restrictions is incorrect – the proposed privative clause is broader. We reiterate that this reform process presents an opportunity to write a new Planning Act, and not simply to perpetuate and expand upon exclusionary elements of the current system.

EDO NSW recommends the removal of clause 10.12(1), and particularly the removal of clause 10.12(2) from the Planning Bill (including the statement that various parts of the Act are ‘not mandatory’) (**Recommendation 90**).

### Enforcement generally

By contrast, a positive aspect in the White Paper reforms is the criminal enforcement model (Planning Bill Division 10.4). This includes a tiered system of criminal offences similar to current NSW pollution laws,<sup>178</sup> which will give improved guidance on offences to all parties who interact with the planning system. The White Paper lists a range of ‘new court orders for criminal enforcement’ (p 147). The Bill itself could go further and specify a range of innovative orders to send a clear deterrence message. A useful precedent is set by section 250 of the *Protection of the Environment Operations Act 1997* (**Recommendation 92**).

EDO NSW welcomes the intention to introduce stronger offences and penalties for providing false or misleading information in connection with a planning matter. This includes information relating to a development application, strategic planning proposal or an EIS (Planning Bill clause 10.22). An important addition to this offence (cf EP&A Regulation, clause 283) includes where the person ‘ought reasonably to know’ the information is false or misleading.

To further its effectiveness, EDO NSW recommends this offence must also clearly apply to (**Recommendation 92a**):

- negligent or reckless inaccuracies (see for example *EPBC Act 1999* (Cth), sections 489-90);
- ‘approvals’ under Part 5, Division 5.1 (defined in clause 5.1) and accompanying EIA reports (reviews of environmental factors), in addition to other ‘planning approvals’ (defined in clause 1.8); and

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<sup>177</sup> *Haughton v Minister for Planning and Macquarie Generation; Haughton v Minister for Planning and TRUenergy Pty Ltd* [NSWLEC] 217

<sup>178</sup> See *Protection of the Environment Operations Act 1997*(NSW).

- information provided in the course of post-approval reporting obligations (cf EP&A Act, section 122E; for example, see Part 9 of the Planning Administration Bill), or investigations (cf EP&A Act, section 118N).

Finally, EDO NSW recommends that the meaning of 'breach' and 'this Act' be clarified (clause 10.8), to give full effect to existing environmental protections in EPIs and to future strategic plans (**Recommendation 90**). This is consistent with repealing clause 10.12(2), which states strategic planning provisions are 'not mandatory'. For the purposes of civil enforcement (Division 10.3), the way that the Planning Bill defines 'breach of this Act' (clause 10.8) appears more limited than the current EP&A Act. For example, the EP&A Act includes EPIs in the definition of a breach (section 122(b)(ii)), including LEPs and SEPPs. By contrast, the Planning Bill definition does not include breaches of any 'strategic plans' made under the new Act, with the exception of the planning controls under Local Plans.

**See recommendations 87-92 on merits review, appeals and enforcement**

## Appendix: Options for Mandatory Accreditation of Environmental Consultants

Below are existing models that the Government could draw on for mandatory accreditation:

- Environmental Institute of Australia and New Zealand (**EIANZ**)<sup>179</sup>
  - The Certified Environmental Practitioner (CEnvP) is a voluntary scheme with an application process requiring five years' experience, renewal every two years, with applicants having to demonstrate suitable experience and ongoing professional development.
- Ecological Consultants Association of NSW Inc (**ECA**)<sup>180</sup>
  - Effectively a membership system that has minimum requirements of relevant qualifications, 2-year experience, referees and examples of work.
- RiskSmart (Brisbane, QLD)<sup>181</sup>
  - Upfront assessment of the competency of a consultant so that development applications submitted by that consultant are considered to be more rigorous than unaccredited consultants.
- Threatened Species Conservation Amendment (Ecological Consultant Accreditation Scheme) Bill 2011 (as proposed)
  - Proposal to establish an accreditation panel to provide advice to the Chief Executive of the NSW Office of Environment and Heritage (**OEH**) on accreditation of ecological consultants.
- Contaminated Lands Site Auditor Scheme<sup>182</sup>
  - Under the *Contaminated Lands Management Act 1997* (NSW), the accreditation panel for site auditors consists of an officer of the OEH, a representative of community environmental groups, a representative of industry and a representative of academia with tertiary qualifications in a discipline relevant to contaminated sites.
  - The Panel is responsible for oversight of the process for the appointment of Site Auditors. Appointment involves an application process including submission of a 40 page (max.) application and two examples of reports which are assessed by the committee. If applicants pass this process they are required to sit an exam before accreditation can be awarded.

Consultant accreditation is likely to work best as a two-tier process:

### *i. Code based assessment*

An appropriate model could be based on RiskSMART, but boosted by the professional development requirements of the EIANZ system (for example) and a process by which a review of accreditation could be triggered by community complaints.

Elements of such a model would include:

- Accreditation limited to code based assessments.
- A state wide system that all Councils access to minimise duplication.
- An accreditation process that is done by an independent committee with relevant expertise.

<sup>179</sup> See <http://www.eianz.org/careers/certified-environmental-professionals>.

<sup>180</sup> See <http://www.ecansw.org.au/>

<sup>181</sup> Brisbane City Council 2010, *RiskSMART – Consultant Accreditation Information Kit – An Initiative of the Brisbane City Council*.

<sup>182</sup> See <http://www.environment.nsw.gov.au/clm/auditorscheme.htm>

- Public register of accredited consultants.
- Guidelines for the public to make complaints about accredited consultants, potentially including a points system to ensure ongoing poor performance (in addition to large one-off problems) is assessed.
- The adoption of such a model may assist local councils to meet short deadlines for project assessment by increasing confidence in the quality of the work that is provided to them.

## *ii. Major projects*

An appropriate model is the Contaminated Lands Site Auditor Scheme with a subcommittee style process for addressing different areas of expertise (hydrology, ecology, traffic etc). This should be enhanced by a clear process by which a review of accreditation could be triggered by community complaints and an independent allocation of consultants to major projects.

Elements of such a model would include:

- A state wide accreditation system limited to major projects.
- An overarching accreditation panel responsible for final approvals and investigations of complaints. This could consist of an appropriate departmental officer, a community representative, a representative of industry and a representative of academia with relevant tertiary qualifications.
- A sub-committee process based around areas of environmental expertise. This sub-committee would be responsible for the assessment process with their area of expertise and also consist of an appropriate departmental officer, a community representative, a representative of industry and a representative of academia with relevant tertiary qualifications. Areas of expertise could be based on common major project DG requirements including:
  - air quality and odours;
  - noise, vibration and blasting;
  - biodiversity;
  - soil;
  - water resources;
  - traffic and transport;
  - heritage and archaeology;
  - visual impacts;
  - greenhouse gas emissions;
  - waste;
  - rehabilitation;
  - social and economic impacts;
  - hazard management and mitigation; and
  - infrastructure provision.
- Public register of accredited consultants.
- Guidelines for the public to make complaints about accredited consultants, potentially including a points system to ensure ongoing poor performance (in addition to large one off problems) is assessed. There must be clear standards of competency and independence that trigger actions such as disbaring for providing false and misleading information.
- Annual reporting requirements.
- Independent appointment of environmental assessors to major projects – This is an important aspect of community assurance and accountability. The process should operate for both initial consultant allocation and departmental peer reviews (where required).