



**Submission on *A New Planning System for NSW –  
Green Paper***

prepared by

**EDO NSW  
September 2012**

## 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 to:

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## 1. 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, and from the day we opened our doors 27 years ago, we have had a constant stream of community members seeking expert assistance on how to understand and engage with the planning system in NSW. In this context, we welcome the opportunity to comment on the NSW Government planning reform proposals set out in *A New Planning System for NSW – Green Paper* (July 2012) (**Green Paper**).

The **40** broad recommendations for establishing a best practice planning system for NSW contained in this submission are drawn from the EDO NSW's substantial body of planning law reform work in recent years.<sup>1</sup> Our recommendations are evidence-based and drawn from extensive community feedback – through workshops, seminars and our legal advice line; and from legal research and our 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 see the current reform process as a major opportunity to advance both these elements as integral parts of the planning system. In our view, community participation and environmental protection are critical to public confidence in the new system, the State's future prosperity and the wellbeing of its citizens.

The Government's commitment to improved community engagement, more comprehensive strategic planning and genuine reform is encouraging, as is the acknowledgement that considerable time, resourcing and further engagement will be necessary to finalise and achieve positive reforms that must be 'owned' by the community. Notwithstanding those positives, there is considerable work to do in a range of areas. Our recommendations focus on key issues that need to be addressed in the White Paper and draft legislation.

Much of the success and legitimacy of the new system will depend on the details – how the big picture aims are implemented in practice. A range of proposals in the Green Paper are of potential concern regarding environmental protection, sustainability and equitable rights for the community. For example, the trade-off in focusing on early community participation is the intention to give developers greater certainty (and in some ways more flexibility) to have development approved once local and regional strategies are set. The Green Paper is also light on practical measures to ensure 'triple bottom line' integration of the environment.

If the Government is to restore public trust and integrity to the planning system, the White Paper will need to ensure an equitable balance of rights and safeguards for the community and environment. The White Paper will also need to move beyond the Green Paper's economic 'growth' focus, and demonstrate the Government's commitment to ecologically sustainable development.

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<sup>1</sup> Recent EDO NSW reports and submissions include: *Our Environment, Our Communities - Integrating environmental outcomes and community engagement in the NSW planning system*, Joint report with NCC and 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 *EDO NSW & TEC Reconnecting the Community with the Planning System – Report*, 2010. In addition, there are currently over 50 submissions on planning law reform on the EDO NSW website.

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

- Places ecologically sustainable development 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.
- Improves the liveability of NSW communities – including:
  - a healthy and resilient environment;
  - good public health;
  - fair choices for transport, work and lifestyle;
  - affordability; and
  - a sense of community.
- Protects, values and enhances ecological integrity and services for public benefit, now and in future.
- 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.

In June 2012, EDO NSW in conjunction with the Australian Network of EDOs (**ANEDO**) prepared a series of best practice standards for planning and environmental regulation. These 10 standards, outlined at **Attachment A** to this submission, are a useful reference point to evaluate and shape the new planning system.

The preparation of this submission, and our engagement with the community on the Green Paper to date, has involved a detailed analysis of potential strengths and potential of the proposals. Our 40 broad recommendations are summarised in Part 2 and expanded upon in the body of the submission. We look forward to seeing these issues addressed in the forthcoming White Paper and draft legislation.

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<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).

## 2. Summary of recommendations

### Objectives

**Recommendation 1** - *Ecologically sustainable development* must be the overarching objective of the new Act.

**Recommendation 2** - All decisions, powers and functions under the new Act and relevant subordinate instruments, must be exercised consistent with ecologically sustainable development.

**Recommendation 3** - The new Act should be called the *Sustainable Development Act*.

**Recommendation 4** - All key procedural safeguards must be included in the new 'enabling' Act and not delegated to subordinate instruments.

### Community & stakeholder engagement

**Recommendation 5** - The 'Public Participation Charter' must set out a series of community rights and Government/departmental/proponent responsibilities, and be developed in consultation with the community.

**Recommendation 6** - The Public Participation Charter should be a schedule to the new Act and applied to all relevant processes including: law making and amending, all strategic planning and plan/policy making, development assessment and the development and amendment of Codes.

**Recommendation 7** - The new planning system must establish best practice mandatory notification and consultation requirements for *both* strategic planning and development assessment. Consultation at the strategic planning stage cannot preclude consultation at the project level at a later stage.

**Recommendation 8** - Independent consultants with expertise in community engagement should be contracted to run consultation processes, funded by the Government for strategic planning or law reform and by the proponent for development assessment.

**Recommendation 9** - Significant resources in terms of time and funding must be committed to do best practice public engagement properly, as demonstrated by international case studies. This includes additional resources for effectively engaging sectors of the community who may not currently engage effectively.

**Recommendation 10** - The onus is on the NSW Government to provide further detail in the White Paper and the Exposure Bill as to how consultation processes will be improved, and further detail on the methods that will be used to address current levels of consultation fatigue and scepticism.

**Recommendation 11** - The new planning system must ensure more equitable rights for review of decisions to ensure transparency and accountability.

## **Strategic Planning**

**Recommendation 12** - The Public Participation Charter must apply to the making and amending of all plans in the proposed plan hierarchy.

**Recommendation 13** - All plans must: be designed to implement the principles of ESD, have a triple bottom line focus, be based on community endorsed evidence and be subject to regular review against performance and sustainability indicators.

**Recommendation 14** - The new Act should provide that *State Planning Policies* are: disallowable statutory instruments and subject to judicial review; set minimum environmental standards (including equivalent protections in current SEPPs); prevent public authorities from self-assessing their own proposals; and are subject to regular independent review.

**Recommendation 15** - *Regional Growth Plans* should: be called 'Regional Development Plans'; incorporate existing Regional Conservation Plans; and be based on catchment boundaries where possible.

**Recommendation 16** - *Local Land Use Plans* must not allow variations or spot rezonings other than in exceptional circumstances that maintain or improve environmental outcomes. Appropriate zoning should be established by community endorsed strategic plans for an area.

**Recommendation 17** - The new Act should set minimum criteria for *zones*, but allow local areas to place additional controls for conservation purposes. Enterprise zones should have extremely limited application and be subject to sustainability requirements. There should be a new category of environmental protection zone.

**Recommendation 18** - All strategic plans should: integrate environmental outcomes and natural resource management, ensure cumulative impacts are considered, and build-in urban sustainability, design quality, and climate change adaptation where relevant.

## **Development assessment**

**Recommendation 19** - The expanded review rights for developers must be matched by equal review rights for third parties. These review rights must be set out in the new Act.

**Recommendation 20** - The new Act must include clear requirements for public consultation and apply the Public Participation Charter to all development assessments, and the development and amendment of Codes.

**Recommendation 21** - Concurrence requirements must be retained for large projects and any proposal where there is a significant environmental impact or cultural heritage issue involved.

**Recommendation 22** - Concept planning processes must not preclude further public consultation or review at a later stage.

**Recommendation 23** - Strategic compliance certificates should not be part of the new planning system due to the risk of undermining local strategic planning, unless endorsed by a local community.

**Recommendation 24** - Codes must only apply to genuine low risk low impact development. Codes must not apply to areas of high conservation value, environmental sensitivity, cultural heritage significance etc. Clear thresholds and parameters for the application of Codes must be set out in the new Act.

**Recommendation 25** - Clear legislative requirements for assessing State significant development must be set out in the new Act, with best practice standards for public consultation, independent environmental assessment, and review.

**Recommendation 26** - Consultants who undertake environmental assessment must be qualified, accredited and independently appointed to assess projects.

**Recommendation 27** - Mandatory environmental assessment criteria must be set out in the new Act.

**Recommendation 28** -The new Act should require all developments meet objective test of whether a development maintains or improves environmental outcomes.

**Recommendation 29** - Independent decision-making bodies must be established and function in accordance with clear and transparent legal requirements set out in the Act.

**Recommendation 30** - Mechanisms to fast-track innovative “green” design should be considered further in the White Paper.

**Recommendation 31** - The new Act must have an open standing provision for civil enforcement proceedings, with limited costs.

### **Infrastructure planning and coordination**

**Recommendation 32** - The Public Participation Charter must apply to the process of developing Infrastructure Growth Plans.

**Recommendation 33** - The White Paper will need to clarify what criteria and governance safeguards would be applied to public priority infrastructure proposals.

**Recommendation 34** - Strategic planning needs to properly value ‘green infrastructure’ and integrate it into broader infrastructure planning and funding, including the State Infrastructure Strategy, regional plans and Growth Infrastructure Plans.

### **Delivering a new planning system**

**Recommendation 35** - The CEO of OEH must be part of the CEOs Group.

**Recommendation 36** - Additional mechanisms for ensuring improved accountability and enforcement, including a flexible range of regulatory tools and penalties to address planning breaches, should be explicitly included in the new Act.

**Recommendation 37** – The White Paper should detail the comprehensive range of sustainability and performance indicators by which the new system will be assessed.

**Recommendation 38** - Compliance and enforcement policies and statistics should be published in a consistent and comparable form.

**Recommendation 39** -To embed a commitment to ESD, performance monitoring should include a range of sustainability indicators that are more sophisticated than the ‘area of environmental land protected’.

**Recommendation 40** - Transitional arrangements from the EP&A Act to the new system must be in place while strategic plans, codes and policies are finalised.

### 3. Objectives

Chapter 3 of the Green Paper proposes ‘an enabling Act’ and identifies a range of reform principles and purposes relevant to developing objectives for the new planning system. We welcome the statement that sustainable development will remain the main objective of the Act, and recommend that the White Paper clarifies that it is *ecologically* sustainable development that will remain the main objective.

#### Clear objectives with ecologically sustainable development at the apex

Part 3 of the Green Paper on *Objectives* can be interpreted in many different ways.<sup>3</sup> First, it refers to the planning system having an ‘overarching purpose’ relating to six distinct areas.<sup>4</sup> Second, it suggests that ‘achievement of sustainable development’ will be the ‘main objective’ of the Act. Third, a range of more procedural objectives are proposed.<sup>5</sup>

As noted, we welcome the reference to ‘achievement of sustainable development’ as the ‘main objective’, provided that the White Paper and Exposure Bill clearly state that the main objective of the new Act will be to achieve “*ecologically* sustainable development” (ESD), as currently defined in NSW legislation. We support the Independent Review Panel’s proposal to adopt the definition of ‘ESD’ in the *Protection of the Environment Administration Act 1991* (NSW), consistent with the current EP&A Act.<sup>6</sup>

A body of case law has developed around the interpretation and application of these principles both in NSW and other jurisdictions.<sup>7</sup> A wide body of international, national and state policy and principles also support decision makers to act in accordance with ESD.<sup>8</sup> Finally, there is also a growing number of established tools to effectively integrate environmental, economic and social considerations in decision making.<sup>9</sup>

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<sup>3</sup> Green Paper, pp 17-18.

<sup>4</sup> The six areas are to: *promote economic development and competitiveness; connect people and places; protect the environment; improve people’s quality of life; resolve land use trade-offs based on social, economic and environmental factors; and effectively manage growth and change.*

<sup>5</sup> To ensure the system is ‘simple’, ‘certain’, ‘transparent’, ‘efficient’, ‘effective’, ‘integrated’ and ‘responsive’. See comments above under ‘An enabling Act and procedural objects’.

<sup>6</sup> Independent Review, Vol 2, pp 80-81. The definition of ESD in section 6(2) of the *Protection of the Environment Administration Act 1991*, as adopted in EP&A Act, incorporates the key principles of ESD: the precautionary principle (to manage environmental risk), inter-generational equity (considering the needs of current and future generations), conservation of biological diversity and ecological integrity (as a *fundamental consideration*), and improved valuation, pricing and incentive mechanisms (for example, full accounting for environmental costs).

<sup>7</sup> See, for example, *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270, *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 93 LGERA 249, *Carstens v Pittwater Council* (1999) 111 LGERA 1, *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237; *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133; *Minister for Planning v Walker* [2008] NSWCA 224.

<sup>8</sup> See, for example, *Rio Declaration on Environment and Development* (1992), Australia’s *National Strategy for Ecologically Sustainable Development* (1992); Local Government and Shires Association, *Integrating Natural Resource Management into Local Government Operations*, Vol. 2 Land Use Planning (2009).

<sup>9</sup> For a recent example, see The Economics of Ecosystems and Biodiversity (TEEB) Project, *TEEB for Local and Regional Policy Makers Report*, at <http://www.teebweb.org/ForLocalandRegionalPolicy/tabid/1020/Default.aspx>.

Our previous submissions have extensively outlined the rationale for adopting ecologically sustainable development (ESD) as the overarching object of the NSW planning system.<sup>10</sup> In particular, ESD and its principles:

- provide a sound framework to integrate environmental, economic and social considerations in decision making;
- have been adopted as part of our international, national and state legal systems and jurisprudence, including in the NSW Land and Environment Court;<sup>11</sup>
- have clear present and long-term environmental, economic and social benefits; and
- have been recognised as best practice by Australian experts, who have noted that ‘there is no other credible candidate for an integrative policy framework’.<sup>12</sup>

We therefore submit that the accepted definition of ESD should be the overarching objective, rather than the wording of the Independent Panel.<sup>13</sup> This is essential to prevent double-counting of some considerations. ESD is “not a factor to be balanced against other considerations; ESD is the balance between development and environmental imperatives”.<sup>14</sup>

ESD must then be operationalized if the new Act is to overcome problems of the current legislation.<sup>15</sup> To embed ecological sustainability and achieve balanced triple bottom line outcomes, all decisions, powers and functions in the planning system must be exercised consistent with ESD, with respect to strategic planning, development assessment and the reform process as a whole.<sup>16</sup> To ensure that this is occurring, performance monitoring and reporting should include a range of sophisticated sustainability indicators beyond the ‘area of environmental land protected’.<sup>17</sup>

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<sup>10</sup> See EDO NSW, Submission to Planning Review Stage 1 (November 2011); NCC NSW, EDO NSW and TEC (March 2012), pp 5-7.

<sup>11</sup> See, for example, *Rio Declaration on Environment and Development 1992*, available at <http://www.unep.org/>; *National Strategy for Ecologically Sustainable Development (1992)*, which defines ESD as ‘using, conserving and enhancing the community’s resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased’, see <http://www.environment.gov.au/about/esd/index.html>; *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 3-3A; *Protection of the Environment Administration Act 1991* (NSW), s 6(2); The Hon Brian Preston, Chief Judge of the Land and Environment Court (speaking extra-judicially), *Judicial Implementation of the Principles of Ecologically Sustainable Development in Australia and Asia* (2006), available via [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au).

<sup>12</sup> See Hawke, A. (2009), “Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999”, October 2009. See also Dovers, S. (2008) ‘Policy and Institutional Reforms’, in D. Lindenmayer, S. Dovers, M. Harriss Olson & S. Morton (Eds.), *Ten Commitments: Reshaping the Lucky Country’s Environment*, p 216.

<sup>13</sup> The substantive part of the Panel’s proposed overarching object is: ‘to provide an ecologically, economically and socially sustainable framework for land use planning and for development proposal assessment and determination...’. Independent Review Panel, Vol. 1, p 37 (emphasis added).

<sup>14</sup> Bates, G. *Environmental Law in Australia* (5<sup>th</sup> ed. LexisNexis. 2002), para [5.19]-[5.20], cited by Farrier D, et al (2007) *Biodiversity offsets and native vegetation clearance in New South Wales; The rural/urban divide in the pursuit of ecological sustainable development* 24 EPLJ 427

<sup>15</sup> For example, under the current Act in *Minister for Planning v Walker* [2008] NSWCA 224, the Court of Appeal ruled that, although the Planning Minister must make decisions in the public interest, not having regard to ESD principles does not necessarily constitute a breach of that obligation.

<sup>16</sup> See joint EDO NSW/TEC/NCC submission, March 2012, p 4.

<sup>17</sup> Green Paper, p 87.

## An enabling Act and procedural objects

If the Green Paper's proposed model of an 'enabling act' is adopted,<sup>18</sup> it is crucial that substantive rights and obligations – including those to ensure community engagement, environmental and heritage protection, and to achieve ecologically sustainable development – be enshrined in the enabling Act and high-level agenda-setting for the planning system.

The Independent Review Panel sets out a series of procedural or 'process objects'<sup>19</sup> which are broadly reflected in the seven procedural objectives in the Green Paper.<sup>20</sup> EDO NSW supports the simplicity of the Review Panel's list, which is clearer and more value-neutral than some terms in the Green Paper (such as 'red tape').

To achieve these proper processes, we further support the Panel's proposal that the new planning Act must set out procedural safeguards relating to rights to be heard, openness of determinations, reasons for decisions and decision-makers' independence.<sup>21</sup>

EDO NSW supports the new planning Act being called the *Sustainable Planning Act* (see Independent Review Panel, recommendation 1). This is consistent with placing sustainability at the centre of the system. The Panel's proposal for a separate *Planning Commission Act* and *Spatial Information Act* is appropriate, and we look forward to details in the White Paper.

### Objectives - Summary of recommendations

**Recommendation 1** - Ecologically sustainable development must be the overarching objective of the new Act.

**Recommendation 2** - All decisions, powers and functions under the new Act and relevant subordinate instruments, must be exercised consistent with ecologically sustainable development.

**Recommendation 3** - The new Act should be called the *Sustainable Development Act*.

**Recommendation 4** - All key procedural safeguards must be included in the new 'enabling' Act and not delegated to subordinate instruments.

<sup>18</sup> The Green Paper (p 3) states that the Government will set its high-level planning agenda through an 'enabling' act (which will 'establish the broad framework' rather than detailed prescriptions) and a series of overarching NSW planning policies set by the Cabinet.

<sup>19</sup> Independent Review Report Vol. 1, pp 37-38 and corresponding recommendation 7. These include: certainty, transparency, due process, elimination of unnecessary delay, a constructive approach to giving effect to policy objects in the legislation, and observation of the rule of law.

<sup>20</sup> Green Paper, p17.

<sup>21</sup> Independent Review Report Vol. 1, p 38.

## 4. Community and Stakeholder Engagement

Chapter 4 of the Green Paper outlines a number of positive reform proposals for community and stakeholder engagement. We strongly support proposals to provide for legislated, genuine and early community engagement for strategic planning at all levels, and regarding a range of development assessment processes.

We welcome the recognition by the Green Paper and Independent Panel of the extremely high level of dissatisfaction that the community has with the current planning system, and the urgent need to reconnect communities with the system. In preparing this submission, we sought community input through EDO NSW clients, and for example, through two Green Paper seminars.<sup>22</sup> A high level of “consultation fatigue” was expressed by community members who have made efforts to engage with various reform processes in recent years (such as consulting on LEPs and regional strategies). There was a high degree of cynicism as to how the proposed system will materially differ at the local level. Recent initiatives by the Government that have been announced with no consultation, have not renewed community confidence.<sup>23</sup>

All planning engagement processes must reflect the Government’s commitments to restore public trust and accountability to the planning system and the public service. In particular, we note one of the Premier’s five customer service principles is ‘redesigning public service delivery to suit people, not bureaucracies’.<sup>24</sup> We strongly support the Independent Review Panel’s findings that upfront engagement is about listening to the community’s needs and preferences first (rather than simply presenting a draft strategic plan),<sup>25</sup> and equipping them with information and understanding to make informed decisions. At the practical level this means:

- being sensitive to the capacities and limitations (time, skills and understanding) of different communities and sectors to engage early with the planning system;
- explaining the influence and respective roles of the State Plan and planning system, being responsive to community views on these, and being clear about ways to engage;
- engaging with diverse sectors of the community in existing settings and networks that they are comfortable with (rather than expecting the community to ‘go to’ government);
- tailoring outreach to avoid the risk that less affluent or less engaged communities end up with poorer-quality or less desirable development in their neighbourhoods;
- effectively managing the risks and consequences of ‘consultation fatigue’, for example, where local communities have recently been asked to engage in LEP or regional plan-making processes – including hearing from communities themselves on managing this; and
- avoiding ultimatums, such as requiring the community to ‘rise to the challenge’ of early consultation, if the design of government processes does not make this easy or realistic.

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<sup>22</sup> In Sydney on 4<sup>th</sup> September and Ballina on 6<sup>th</sup> September 2012.

<sup>23</sup> For example, recent changes to the assessment of conservation of riparian areas, biodiversity and Aboriginal cultural heritage requirements were announced with no warning or consultation (Department of Planning & Infrastructure, Planning Circular *PS 12-003 Initiatives to improve housing supply*, 6 June 2012).

<sup>24</sup> Chris Eccles, Secretary of the Department of Premier & Cabinet, ‘Restoring Trust in Government’, speech to the ANZSOG Conference, 28/7/2011, p 5.

<sup>25</sup> See, for example, Independent Review Panel, Vol. 1, pp 46-47: ‘What was seen as desirable was obtaining a strong community foundation for drafting a plan, prior to the actual preparation of a draft plan.’ However, we are more equivocal than the Panel regarding the success of engagement in the Strategic Regional Land Use Plan process. To date (with draft plans not yet finalised), communities’ concerns about environmental and agricultural protection against the negative impacts of mining expansion have not been sufficiently addressed.

It is hoped the Public Participation Charter will assist the process of ensuring public consultation processes 'suit people', instead of suiting bureaucratic or political imperatives.

EDO NSW welcomes the intention that 'Community and public interest will be at the centre of the new planning system.'<sup>26</sup> In broad terms, we support the four high-level changes proposed in the Green Paper to increase public confidence, integrity, accessibility and transparency:

- i) A Public Participation Charter**
- ii) Strategic community participation**
- iii) Transparency in decision making**
- iv) Use of information technology and electronic planning**

We explore these in turn below.

### **i) A Public Participation Charter**

EDO NSW welcomes the Government's support for a *Public Participation Charter* 'to require appropriate community participation in plan making and development assessment.'<sup>27</sup> We see the Charter's purpose as educative (for authorities and communities), and as a tool for greater accountability. Further information is needed on how the Government will develop and finalise the Charter to ensure it is comprehensive and clear to implement. The practical influence and effectiveness of a charter will greatly depend on how it is implemented and whether compliance is mandatory.

EDO NSW, drawing on our work with NCC NSW and TEC, propose that the Charter:<sup>28</sup>

- be implemented as a schedule to the new Act, and is referred to in the body of the Act;
- sets out community rights and government obligations for public participation at all stages of the planning system (including lawmaking and amendment processes);
- would support (not replace) prescriptive legislative standards for notification and consultation, and inform the ways in which legal protections are implemented.
- would apply to all Government departments and decision makers under the Act, and to development proponents where relevant;
  - these bodies would need to take all reasonable steps to ensure consultation accords with these strategies and the Charter's principles;
  - decision makers would be required to prepare a community participation strategy that sets out specific measures they will undertake to comply with the Charter principles, and would be subject to regular review;

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<sup>26</sup> Green Paper, p 19.

<sup>27</sup> Green Paper, p 19. The Green Paper goes on to note the Charter 'could include' (in summary): recognition of rights to participate; requirements for easy to understand information; support for new methods of interactive engagement; provisions for clear feedback; encouraging best practice (p 22). The charter concept first arose from a joint EDO and Total Environment Centre (TEC) project called *Reconnecting the Community with the Planning System* (2010), available at: [http://www.edo.org.au/edonsw/site/policy\\_discussion.php#reconnecting\\_community\\_planning\\_system](http://www.edo.org.au/edonsw/site/policy_discussion.php#reconnecting_community_planning_system)  
The proposal was further developed in *Our Environment, Our Communities* (August 2012), a report prepared by the Nature Conservation Council of NSW (NCC), TEC and EDO NSW in anticipation of the Green Paper (<http://nccnsw.org.au/planningreport> or [http://www.edo.org.au/edonsw/site/policy\\_discussion.php#OEOC](http://www.edo.org.au/edonsw/site/policy_discussion.php#OEOC)).

<sup>28</sup> See further *Our Environment, Our Communities* (August 2012) prepared by the Nature Conservation Council of NSW (NCC), (TEC) and EDO NSW, p 29.

- be subject to independent statutory review and public consultation on its operation and effectiveness (for example, after 12 months), with regular reviews over a longer period.

Where relevant, these points could be included in a preamble describing the Charter's role.

The joint report *Our Environment, Our Communities* (August 2012) explores the concept of a Public Participation Charter.<sup>29</sup> As that report notes, effective public participation involve steps to inform, engage, interrogate, facilitate dialogue and evaluate outcomes.<sup>30</sup> The Charter concept also reflects suggestions from the recent *Review of International Best Practice*.<sup>31</sup>

It is important that the Charter's principles, language and implementation should be refined and road-tested with the wider community to ensure broad ownership. Lessons could also be drawn from community experience (positive and negative) with the relative weight of existing charter documents, such as the Local Government Charter and local government Code of Meeting Practice.<sup>32</sup>

Tailored input should be sought from groups who, for a range of reasons, may be less able or likely to engage (for example, Aboriginal people, culturally and linguistically diverse groups, young people and seniors, people living in lower socio-economic areas, and in areas marked for high growth). On that basis, we give in-principle support to the Charter being 'an integral part of the planning system' (Green Paper p 21), as a mandatory high-level strategy.

### Rights and responsibilities in a Public Participation Charter

We recommend embedding the following community rights and corresponding government and proponent responsibilities in the *Public Participation Charter* for the planning system:

1. **Right to participate:** Communities expect and have a right to participate in plan making, development assessment, law reform processes and related decisions, in order to promote healthy, liveable, inclusive and sustainable communities. As a consequence these principles will be implemented in good faith and community participation methods should go beyond the minimum standards in the legislation.
2. **Right to information:** Communities have a right to information (on plans, developments and reform processes) that is transparent, accurate, independent and accessible via a

<sup>29</sup> Available at <http://nccnsw.org.au/planningreport> or [http://www.edo.org.au/edonsw/site/policy\\_discussion.php#OEOC](http://www.edo.org.au/edonsw/site/policy_discussion.php#OEOC).

<sup>30</sup> See *Our Environment, Our Communities* (August 2012), p 25:

1. *Inform – the information provided should be transparent, accurate and easy to understand.*
2. *Engage – the process is not simply the passive supply of information but seeks to encourage views and engage informed opinion.*
3. *Interrogate – information can be complex but resources should be provided to allow interrogation and translation.*
4. *Facilitate dialogue – there should be attempts to bring various stakeholders together to devise solutions on a level playing field.*
5. *Evaluate – the success or otherwise of the effort is reviewed and lessons learnt.*

<sup>31</sup> See Green Paper, p 20; and L. Stein, *Review of International Best Practice in Planning Law: for the NSW Department of Planning* (2012). Best practice for community participation in plan making was found to involve a number of components: 'Express a general objective for participation in the legislation, require the development of a community participation plan in the legislation and produce guidelines (including formatting guidelines), and require that the participation guidelines be followed. Set out in the completed plan the consultation that has taken place.'

<sup>32</sup> Under s 8 of the *Local Government Act 1993*, see [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/lga1993182/s8.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/lga1993182/s8.html).

variety of methods. Public reports outlining the issues, responses and further research undertaken are to be made available prior to the decision.

3. **Accessibility:** Communities have a right to suitable and accessible notification and participation opportunities with regard to timing, location and style.
4. **Facilitation:** Consultation should be independently facilitated where appropriate, to ensure consultation processes and results have credibility.
5. **Re-engagement:** Communities have a right to be re-engaged where a proposal is amended (other than for minor amendments), rather than rely on existing information.
6. **Engaging with diversity:** Authorities and decision makers ('**Authorities**') will recognise the diversity of interests and specifically identify and tailor information for:
  - individuals and groups who may be less likely or able to engage independently (for example, Aboriginal people, culturally and linguistically diverse groups, young people, seniors, people living in lower socio-economic areas, and in areas marked for high growth)
  - those individuals and organisations likely to have an interest in the proposal, including those who may be directly impacted,
  - those likely to have an interest in the local and regional implications of the project, and
  - those organisations with a state or national interest.

Decision makers will have regard to equity considerations when engaging communities, and bear the onus to ensure that residents who are less likely or able to engage are not disadvantaged.

7. **Rights to be heard:** Authorities recognise that participation is not simply the passive supply of information. Communities have a right to be heard and authorities will seek to engage informed opinion, encourage and record views, and provide feedback to foster the further development of possible alternatives and solutions.
8. **Right to interrogate:** Authorities will assist community members, including those with limited resources, to interrogate and understand complex information. (For example by the provision of funds to obtain independent advice; meetings with panels of experts; or commissioning of further research by consent authorities, made public prior to a decision).
9. **Facilitate dialogue:** Authorities will facilitate dialogue by bringing together a comprehensive range of community stakeholders, and allow the opportunity to devise solutions on a level playing field.
10. **Equity:** Authorities will engage with communities on reforms to environmental, planning and development law and policy on an equitable basis. The level of engagement will match the scale of potential changes.
11. **Community participation plans:** Authorities will consult publicly on draft community participation plans, which will be legally required to meet the Charter's requirements and open to challenge if they do not.
12. **Feedback and reporting:** Authorities will invite feedback and report on how they have applied the Charter and their community participation plans in annual reporting requirements. Reporting format is to allow comparison across authorities.
13. **Evaluation:** Community engagement strategies (general or project specific) will be evaluated according to pre-set key performance indicators such as range of groups contacted; surveys of satisfaction with information provided and engagement methods; accurate recording of views; accessibility of information and events.

In addition, to improve how consultation is done, further consideration should be given to *who* conducts the consultation.

A key concern expressed by EDO NSW seminar participants centred on *who* does the consulting. It was strongly conveyed that Government representatives who visit a region are

there to tell the community what is happening and why it is a good thing, rather than ask what the community thinks or what the community would like to see happen in their area.<sup>33</sup> In this context, it was repeatedly recommended that consultation should be undertaken by independent consultants with specific expertise in community engagement. The EDO NSW can provide case studies of independent consultations that have successfully engaged local communities. We further recommend that independent consultants contracted to undertake consultation processes be fully funded by the Planning Department for strategic planning and the proponent for development assessments.

#### **Case study – benefits of independent experts facilitating consultation**

The consultation process in relation to **Dunoon Dam in the Northern Rivers** provides an example of the value of an independently facilitated consultation process.<sup>34</sup> The proposal involved a concept to expand the current capacity of the Northern Rivers water supply. The proponent – the regional water supply authority (Rous Water) – engaged Sustainable Futures Australia to hold the community consultation meetings and to design and implement the community consultation procedures. The process unearthed valid grounds for community opposition to the dam project and no community ownership of the project. Consequently, the process focussed on the development of a project reference group that has driven a future water strategy (of which the original proposal of the Dunoon dam is merely one component being investigated as an option only). The benefits from the process have been extensive: the community is engaged, all sorts of expertise has been allowed into the discussion, all sorts of alternative options including cheaper solutions to future water supply are being feasibility tested, and so far all of the threatened flora and fauna that would have been destroyed still exist.

#### **Case study – considering alternative scenarios**

A developer in **Coffs Harbour** purchased a property earmarked for medium to high density residential development.<sup>35</sup> It conducted a five-day design workshop for the site, attended by local residents, neighbours and other stakeholders. At the end of the workshops, six development scenarios were put forward for the public to comment on, before a final plan was chosen and lodged for approval. This example highlights the benefits of engaging the community early and considering alternative scenarios.

### **i) Strategic community participation**

EDO NSW gives strong in-principle support to the early engagement opportunities in strategic planning summarised at p 21 of the Green Paper (Figure 6) as part of our call for 'genuine and meaningful public participation throughout the planning process'.

The White Paper will need to outline specifics on how the Government will invest in involving communities across the State. Nevertheless, the Green Paper's references to planning processes in cities like Vancouver, Seattle and Portland are a welcome acknowledgement of

<sup>33</sup> This is illustrated by the fact that there were almost twice as many attendees at the EDO NSW Ballina seminar on the Green Paper than attended the seminar conducted by the Government the previous week, notwithstanding that overall attendance was very low due to consultation fatigue, as noted.

<sup>34</sup> See: [http://www.rouswater.nsw.gov.au/cp\\_themes/default/page.asp?p=DOC-OBH-12-02-36](http://www.rouswater.nsw.gov.au/cp_themes/default/page.asp?p=DOC-OBH-12-02-36) and <http://www.sustainablefutures.com.au/content/view/70/31/>.

<sup>35</sup> EDO NSW, *Major Projects Toolkit: A voice for the community* (2010), funded by City of Sydney. The company concerned was Petrac.

the need for wholesale change.<sup>36</sup> The Grattan Institute's report, from which these case studies are drawn, confirms that community engagement in Australia needs to be 'an order of magnitude' greater.<sup>37</sup> As these 'leading international practices' suggest, this will undoubtedly require significant time, human resources and funding to ensure real and informed community participation.

The Government's White Paper will therefore need to provide more detail on mechanisms, models and resources to involve local communities in planning processes across cities and regions. Our previous submissions,<sup>38</sup> and the recent joint report from NCC, TEC and EDO NSW, *Our Environment, Our Communities*, set out a range of other innovative approaches that should be further considered.<sup>39</sup> For example, there is demand for enhanced visual depictions of various planning scenarios, and the capacity to understand their different consequences. In the meantime, we welcome the Green Paper's commitments that there will be a 'strong evidence base for decisions... made available to all', 'the trade-offs explained clearly', and 'objectives and scenarios for local growth and change will be tested publicly'.<sup>40</sup>

### Case study – 'Mini publics' for strategic planning?

'Mini-publics' are an emerging mode of community engagement that involves *deliberation*, not merely consultation. This process invites a cross-section of a community (local, state or national) to identify issues, hear from experts, consider different perspectives and resolve problems together. As Carson notes, there are 'many impressive case studies of mini-publics designing, planning, evaluating and resolving challenges associated with city planning':

*Residents who deliberate as a mini-public have a great deal to offer decision-makers and thinkers. They live in their environment, they interact with it constantly, they have thoughtful suggestions to offer and they are prepared to share their knowledge and experiences. They can be trusted to wrestle with complexity, to explore common ground, and to think well about their own future and their city's future, or cities of the future.*<sup>41</sup>

The EDO's main concern relating to public participation is not with the Green Paper's emphasis on community engagement upfront, but its proposed corollary – that once strategic plans are in place (indeed in some cases, before regional or local plans are finalised<sup>42</sup>), there will be less opportunity for engagement at the local level. Relevant proposals include a significant increase in code-assessed development, and 'a presumption of a right to develop'.<sup>43</sup> (This is discussed further below).

<sup>36</sup> Green Paper, p 23.

<sup>37</sup> Grattan Institute, *Cities: Who Decides?* (2010). See media release, "Give city dwellers a real say", 18/10/2010, at: [http://www.grattan.edu.au/news/20101018\\_media\\_release\\_cities\\_who\\_decides.pdf](http://www.grattan.edu.au/news/20101018_media_release_cities_who_decides.pdf).

<sup>38</sup> See for example, EDO NSW Joint submission (March 2012), pp 15-16, and response to Issues Paper, 'F7'.

<sup>39</sup> The report refers to engagement techniques of the International Association for Public Participation; 'Gov 2.0'; Australian local government; Queensland and Victorian initiatives; international case studies drawing on The Grattan Institute's *Cities: Who Decides?* (2010); 'ePlanning'; and social media. See NCC NSW, TEC and EDO NSW, *Our Environment, Our Communities* (August 2012), available at <http://nccnsw.org.au/planningreport> or [http://www.edo.org.au/edonsw/site/policy\\_discussion.php#OEOC](http://www.edo.org.au/edonsw/site/policy_discussion.php#OEOC).

<sup>40</sup> Green Paper p 23.

<sup>41</sup> Lyn Carson, 'Whoops, we forgot to ask residents what future cities should be like!' (abstract), University of Western Sydney, *Governing City Futures* conference, 16-17 August 2012. See further [www.actedemocracy.net](http://www.actedemocracy.net); see also the New Democracy Foundation, [www.newdemocracy.com.au](http://www.newdemocracy.com.au).

<sup>42</sup> Green Paper, 'Strategic Compliance', pp 53-57.

<sup>43</sup> See, for example, Green Paper p 18, 'Principles for reform'.

## ii) Transparency and evidence-based decision making

EDO NSW strongly supports the Green Paper's broad proposals for increased transparency and evidence-based decisions. We submit that the Government needs to take this a step further in the context of community engagement and strive for 'community endorsed evidence.'

We believe the best means of strengthening transparency and accountability mechanisms is through legislative requirements, rather than relying on (for example) codes and guidelines. We look forward to the further refinement of specific proposals in the White Paper.<sup>44</sup>

Consistent with State Plan goals 29-32,<sup>45</sup> the expectation and commitment to transparency and evidence-based decisions must span the entire system. This includes all government agencies, as well as the private sector, in relation to:

- the strategic planning phases;
- environmental impact assessment (EIA) and approval of development proposals; and
- publication of monitoring data, compliance audits and breach enforcement statistics.

As explored in the next section, transparency and integrity will also affect public confidence in whether 'current, reliable and accurate electronic planning data' is available across NSW.<sup>46</sup>

## iii) Use of information technology and electronic planning

We agree that the planning review is an important opportunity to integrate and develop better information technology (IT) systems and policies for best practice planning and public engagement.<sup>47</sup> Dedicated resources will be essential to the effective integration of IT. In particular the White Paper should set out how the new planning system will:

- better integrate environmental data-sets from different sources, and ensure data is comprehensive, accurate and up-to-date (for policymaking and public access);
- provide easier access to information on strategic plans and development applications, including overhauling systems for electronic access and alerts;
- develop new online engagement tools for community participation and stakeholder dialogue;
- clarify agency responsibilities, and convenient and appropriate methods for contact.

EDO NSW also supports additional suggestions from the Independent Review Panel relating to plain English guides, use of new media, and translations into community languages to increase accessibility and participation in the planning system. Resources should be made specifically available to consult with Aboriginal people, rural and remote stakeholders,

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<sup>44</sup> This includes in relation to plain English explanatory material; ready access to planning and contextual information; and 'detailed *Sectoral Strategies*' to inform and explain decisions. See Green Paper, p 24.

<sup>45</sup> See, for example, NSW Government state plan, *NSW 2021* (2011), at <http://www.2021.nsw.gov.au/restore-accountability-government>, in particular State Goals 29-32. See also The Hon Brad Hazzard MP, media release, "Overhaul of the planning system heralds a new era in NSW", 12 July 2011.

<sup>46</sup> Green Paper, p 25.

<sup>47</sup> As outlined in the NCC, EDO and TEC's joint submission on the Planning Review Issues Paper (March 2012), response to 'F7'; and joint report, *Our Environment, Our Communities* (August 2012).

seniors, young people and culturally and linguistically diverse groups on effective engagement (using IT or otherwise as culturally or demographically appropriate).<sup>48</sup>

### **Community & stakeholder engagement - Summary of recommendations**

**Recommendation 5** - The Public Participation Charter must set out a series of community rights and Government/departmental/proponent responsibilities, and be developed by consultation with the community.

**Recommendation 6** - The Public Participation Charter should be a schedule to the new Act and applied to all relevant processes including: law making and amending, all strategic planning and plan/policy making, development assessment and the development and amendment of Codes.

**Recommendation 7** - The new planning system must establish best practice mandatory notification and consultation requirements for *both* strategic planning and development assessment. Consultation at the strategic planning stage cannot preclude consultation at the project level at a later stage.

**Recommendation 8** - Independent consultants with expertise in community engagement should be contracted to run consultation processes, funded by the Government for strategic planning or law reform and by the proponent for development assessment.

**Recommendation 9** - Significant resources in terms of time and funding must be committed to do best practice public engagement properly, as demonstrated by international case studies.

**Recommendation 10** - The onus is on the NSW Government to provide further detail in the White Paper and the Exposure Bill as to how consultation processes will be improved, and further detail on the methods that will be used to address current levels of consultation fatigue and scepticism.

**Recommendation 11** - The new planning system must ensure more equitable rights to review of decisions to ensure transparency and accountability.

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<sup>48</sup> Independent Review Panel, Vol. 1, pp 130-131. We note the objects of the *EPBC Act 1999* (Cth) specifically recognise the contribution of indigenous peoples to land management, and proposes to fulfil the Act's functions and powers in partnership with indigenous peoples and other stakeholders.

## 5. Strategic Planning

The Green Paper outlines a number of positive reform proposals on strategic planning in Chapter 5. These include:

- A strategic planning framework with consistent and interlinking tiers, that ‘will deliver improved biodiversity and environmental outcomes’;<sup>49</sup>
- Clear efforts to integrate land use planning with infrastructure;
- Agreement to integrate land use planning with natural resource management;
- Commitments to greater evidence-based planning and policy development, and cultural change for greater transparency, service and engagement; and
- Improving environmental assessment through the consideration of the cumulative impacts of development in various levels of strategic plans.

Our joint response to the Planning Review Issues Paper proposed seven high-level recommendations for strategic planning. EDO NSW reiterates these recommendations to inform the White Paper’s development.<sup>50</sup>

Consistent with previous submissions, EDO NSW believes the Government’s White Paper must set out a comprehensive framework for *State, regional and subregional* strategic planning which is designed to:<sup>51</sup>

- describe how the goal of ecologically sustainable development will be put in practice through regional policies and local planning decisions;
- undertake independent baseline studies of catchments’ environmental qualities, such as for resources like water, soil, vegetation, biodiversity, minerals and air quality;
- collate, share and publish data across sectors in ways that promote accuracy, transparency and evidence-based decision making;
- identify competing land uses and values (including environmental and cultural values) across regions;
- take account of potential cumulative impacts of development over time;
- integrate natural resource management (NRM) goals into the planning process;
- identify sensitive areas of NSW where certain kinds of development is prohibited (such as mining), based on an assessment of environmental, water supply, social and agricultural-value criteria;
- provide for comprehensive rights of public participation, and support to engage;

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<sup>49</sup> Green Paper, p 6.

<sup>50</sup> NCC, EDO and TEC Joint submission (March 2012), recommendations 18-24. Strategic planning, at all levels, must:

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

<sup>51</sup> See also NCC, EDO and TEC Joint submission (March 2012), pp 17-18. The International Association of Impact Assessment has also developed a series of ‘performance criteria’ for a good-quality SEA process. These are broadly summarised as *Integrated, Sustainability-led, Focused, Accountable, Participative* and *Iterative*. See ‘SEA Performance Criteria’, IAIA Special Publication Series 1, Available from [www.iaia.org/publicdocuments/specialpublications/sp1.pdf](http://www.iaia.org/publicdocuments/specialpublications/sp1.pdf).

- promote resilience to climate change for communities and their environments, addressing risks and opportunities via mitigation and adaptation;
- consider and integrate infrastructure needs (including all forms of public transport) ahead of new development, based on identified values, qualities and potential growth; and
- prioritise the value of landscape and ‘green infrastructure’<sup>52</sup> – parks, waterways, wildlife corridors etc.

A number of these areas are discussed in more detail below.

The Green Paper sets out major structural change at the strategic planning level that will include a new four-level hierarchy of plans:

- i) NSW Planning Policies**
- ii) Regional Growth Plans**
- iii) Subregional Delivery Plans**
- iv) Local Land Use Plans**

We consider these proposals in turn, and then provide further recommendations on how the new system should:

- v) Embed ESD in strategic planning**
- vi) Integrate natural resource management and environmental outcomes in strategic planning**
- vii) Build-in urban sustainability, design and climate change requirements**

We look forward to seeing further detail on these issues in the White Paper and draft legislation.

## **i) NSW Planning Policies**

According to the Green Paper, the NSW Cabinet will agree on around 10-12 State Planning Policies to provide practical, high level planning direction on key policy areas.<sup>53</sup> Existing State Environmental Planning Policies (**SEPPs**) will be repealed and, where necessary, given effect further down the planning hierarchy. It is not clear whether this process will include public consultation as recommended by the Independent Review Panel.<sup>54</sup>

The White Paper needs to clarify the level of inclusiveness and community engagement on State Planning Policies.<sup>55</sup> We look forward to details on the legislative consultation requirements, and an express requirement for the application of the proposed Public Participation Charter to strategic planning processes.

Public input and scrutiny of NSW Planning Policies will be crucial to the legitimacy and community ownership of the system, given the proposals for ‘cascading’ consistency. The process must therefore align with the recommendations on ‘Community and stakeholder engagement’ noted above.

<sup>52</sup> See ‘Recognising the value of “green infrastructure”’ under Infrastructure below.

<sup>53</sup> For example: housing, employment, biodiversity, agriculture, mining/petroleum, coastal management, retail, tourism, regional development and infrastructure (see Green Paper, p 32); as well as a clear policy ‘focused on the achievement of natural resource management outcomes’ (case study, p 35).

<sup>54</sup> Independent Review Panel, Vol. 1, recommendations 15-18.

<sup>55</sup> The Green Paper (Figure 6, p 21) notes that ‘Community participation will be key and legislatively provided for in the making of State Planning Policies’ and all other levels of plans.

The Green Paper proposes that, unlike SEPPs, NSW Planning Policies will not be statutory planning instruments. They will instead be identified in the new Act and be implemented through strategic regional, subregional and local plans.<sup>56</sup>

As noted in the introduction, in preparing this submission EDO NSW sought feedback from communities who have engaged in planning processes through talking to our clients, environment groups and through two seminars. A significant concern that was consistently raised related to how the environmental protections in some existing SEPPs will be retained, given that State Planning policies will not be statutory instruments. The Green Paper suggests that the protections will be collapsed into Local Land Use Plans (**LLUPs**). However, as strict compliance is not required with LLUPs there are significant concerns that protections will be lost. (The various problems of non-compliance with LLUPs are discussed further below).

The White Paper will therefore need to address many questions raised by the proposed shift to 'non-statutory' strategic planning policies:

- How will the new Act ensure that the measures in those policies are implemented in practice, and able to be enforced?
- How will conflicting priorities between high-level policies will be resolved, in a way that effectively promotes 'triple bottom line' outcomes and achievement of ESD?<sup>57</sup>
- How will the Government ensure that all environmental protections in existing SEPPs are retained and strengthened, to 'deliver improved biodiversity and environmental outcomes'?;<sup>58</sup>
- What safeguards will ensure the long-term stability of NSW Planning Policies (for example, mandatory consultation before substantive changes) and certainty of outcomes?
- What other public accountability and transparency measures will protect the public interest, particularly in the absence of parliamentary scrutiny?

NSW Planning Policies must also be careful to avoid reproducing the problems with some current SEPPs that have contributed to the loss of public faith in the planning system.

The new Act should include effective community, environmental and governance safeguards, such as:

- increasing accountability for NSW Planning Policies, by making them disallowable statutory instruments and subject to judicial review (as distinct from SEPPs – see *Huntlee* case below);
- providing that NSW Planning Policies will set minimum environmental standards and allow local controls to improve on these baseline standards;
- preventing public authorities from self-assessing impacts of their proposals;
- mandatory public consultation and strategic environmental assessment to inform NSW Planning Policies (these are discretionary for SEPPs);

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<sup>56</sup> See, for example, Green Paper p 32.

<sup>57</sup> See Green Paper, p 29: 'When implementing strategic planning: the objects must promote "triple bottom line" outcomes' (among other things). We submit that clear objectives and integrated reliance on ESD principles should be part of an effective framework for determining prioritisation.

<sup>58</sup> Green Paper, p 6. Environmental protections currently exist in, for example, SEPP 14 (Coastal Wetlands); SEPP 19 (Bushland in Urban Areas); SEPP 26 (Littoral Rainforest); SEPP 33 (Hazardous and Offensive Development); SEPP 39 (Spit Island Bird Habitat); SEPP 44 (Koala Habitat Protection); SEPP 65 (Design Quality of Residential Flat Development); SEPP 71 (Coastal Protection); BASIX SEPP; Rural Lands SEPP.

- address the disparity of effectiveness between strategic policies that facilitate development (generally strong, by prioritising development) and those that protect environmental values (generally weak, by requiring consideration or permission);<sup>59</sup> and
- prescribe minimum timeframes for regular, independent review of strategic planning instruments appropriate to the significance and intended period of application.<sup>60</sup>

The recent *Huntlee*<sup>61</sup> decision shows the difficulties that communities face in holding the Minister for Planning accountable for the making of SEPPs. 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 beyond challenge. In our view, the planning review must ensure that the process for making State Planning Policies is made more accountable and transparent, and is subject to oversight by the Courts.<sup>62</sup>

EDO NSW therefore submits that the proposed non-statutory status of State Planning Policies will not promote community confidence – particularly if the policies can be changed by Cabinet with no parliamentary or judicial scrutiny. We therefore submit that State Planning policies should be statutory instruments.

## ii) Regional Planning

### *‘Regional Development Plans’ – a focus on community development and wellbeing*

The Green Paper proposes that ‘Regional Growth Plans’ will provide the principal direction for regional or metropolitan growth over 20 years. We welcome several of the key components proposed for Regional Growth Plans, for example, consideration of cumulative impacts.<sup>63</sup> To better convey a sense of balanced development based on ecological sustainability and community wellbeing (rather than mandated growth), we suggest adopting the term ‘Regional Development Plans’ instead of ‘Regional Growth Plans’.

<sup>59</sup> Compare, for example, Infrastructure and Mining SEPPs with those on Coastal Wetlands and Koala Habitat.

<sup>60</sup> The EP&A Act requires authorities to ensure SEPPs, LEPs and DCPs are kept ‘under regular and periodic review’. For example, former cl 15 of the SEPP (Major Development) 2005 included a review after 12 months of operation and then at 5 yearly intervals. However, this clause was recently repealed by the SEPP (State and Regional Development) 2011, which does not contain a mandatory review clause.

<sup>61</sup> *Huntlee Pty Ltd v Sweetwater Action Group Inc; Minister for Planning and Infrastructure v Sweetwater Action Group Inc* [2011] NSWCA 378

<sup>62</sup> See further 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>63</sup> See Green Paper p 34. Key components are proposed to include (among others):

- *detailed key actions required to provide for housing supply and affordability, employment, urban renewal, natural resources, biodiversity conservation and other areas of regional focus*
- *a consideration of cumulative impacts in setting the parameters for growth and change*
- *alignment between future land use changes and the planning and programming of infrastructure and services*
- *clear accountabilities for delivery and annual reporting of performance including implementation of actions*
- *a requirement for review every five years.*

### *Incorporate regional conservation plans into regional plans*

The status of regional conservation plans (**RCPs**) or equivalent under the new planning system is unclear.<sup>64</sup> According to the Office of Environment and Heritage, 'regional strategies and RCPs form an integrated package demonstrating the Government's commitment to balanced development and conservation outcomes for NSW.'<sup>65</sup> We suggest RCPs be integrated and updated as an operative part of regional plans.

### *Regional strategic planning should be based on catchment boundaries*

Consistent with our previous submissions and the Independent Review Panel's proposal,<sup>66</sup> EDO NSW submits that regional strategic planning would be best undertaken based on catchment boundaries wherever practicable (either as currently delineated, or based on the most up-to-date science).<sup>67</sup> This would support improved integration with natural resource management – including in relation to Catchment Action Plans and RCPs.

### **iii) Subregional Delivery Plans**

The Green Paper suggests these subregional plans will be 'the new transformative delivery tool for high growth areas'.<sup>68</sup> As the 'principal planning tool for effecting land use change and [setting] development parameters...',<sup>69</sup> Subregional Delivery Plans must include the range of community and environmental protections, and governance safeguards, outlined in this submission. For example:

- Best practice consultation processes in accordance with the Public Participation Charter;
- Transparent and evidence-based decision making;
- An active commitment to ecologically sustainable development (ESD);
- Integrated environmental and natural resource management (NRM) outcomes; and
- Built-in urban sustainability, design quality and climate change responses.

The White Paper will also need to provide further detail on:

- what criteria will identify additional areas for Subregional Delivery Plans;

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<sup>64</sup> Regional conservation plans have been prepared by the Office of Environment and Heritage (OEH, previously the Department of Environment, Climate Change and Water)

<sup>65</sup> See OEH website: <http://www.environment.nsw.gov.au/biodiversity/regconsplans.htm>, accessed August 2012.

<sup>66</sup> Independent Review Panel, Vol. 1 'Community Plans', p 40: 'Particularly in non-urban areas, it may be appropriate to undertake strategic planning on a regional basis, establishing regional boundaries with reference to a discernible feature such as the boundaries of a particular catchment.'

<sup>67</sup> See, for example, University of New England – Institute for Rural Futures, *Project Note: Eco Civic Regionalisation of NSW* (May 2004). See [www.ruralfutures.une.edu.au](http://www.ruralfutures.une.edu.au) or [www.nrc.nsw.gov.au](http://www.nrc.nsw.gov.au). This major study 'identified considerable mal-alignment of LGA and catchment management (CMA) boundaries' and 'produced a nested hierarchy of optimal resource management and local government regions for the State of New South Wales.'

<sup>68</sup> They will be prepared for areas in metropolitan Sydney, growth centres in the Hunter and Illawarra, and additional subregions 'identified in areas of change'. See Green Paper, p 36-37. The Green Paper states that these plans will directly rezone land, provide a framework for code-complying assessment and development parameters, consolidate agencies' development requirements, and link with infrastructure planning. Subregional plans will also identify priority growth areas, biodiversity corridors, conservation areas and prime agricultural land.

<sup>69</sup> Green Paper, p 37.

- how higher-level regional plans in *other areas* will fulfil equivalent functions;<sup>70</sup>
- the practical implications of subregional plans as higher-level zoning tools; and
- how the Government will manage:
  - community consultation
  - strategic input from environmental and NRM agencies, and
  - the environmental risks of removing local-level concurrences and referrals at the regional and subregional levels.

### ***Regional Planning Boards should act to achieve strategic planning objects and ESD***

The Green Paper notes that local councils and ‘Regional Planning Boards’ will be central to consulting on and developing Subregional Delivery Plans.<sup>71</sup> If Regional Planning Boards are adopted, we recommend the new Act:

- sets out clear functions and membership categories for Regional Planning Boards (and that membership provides for additional local community representation<sup>72</sup>);
- include transparent process requirements, for example all meeting minutes and Board reports be made public;
- requires Regional Planning Boards and their members to exercise their powers and functions in order to achieve the strategic planning objects, and consistent with the main object of ESD.

### ***‘Growth Infrastructure Plans’ and ‘Sectoral Strategies’ need a triple bottom line focus***

The Green Paper states that Subregional Delivery Plans are to include ‘Growth Infrastructure Plans’, and be further underpinned by evidence from ‘Sectoral Strategies’.

Whereas the Green Paper’s language here focuses on ‘drivers for growth’, EDO NSW reiterates the need for a balanced, triple bottom line focus. The aims of regional and subregional plans should be healthy lifestyles, environmental benefits and socially inclusive communities – as well as economic development – supported by triple bottom line indicators.

This balance is crucial to growth areas, where by definition, more people will be affected by the quality of the natural and built environment, services and infrastructure. Without a triple bottom line focus in these plans, the result may be more dwellings, but less amenity.

The White Paper must also demonstrate how detailed Sectoral Strategies, as a ‘strong public evidence base to inform strategic planning’,<sup>73</sup> will maintain and improve environmental and NRM outcomes.<sup>74</sup> In addition, we submit that sectoral environmental data must be integrated into ‘performance assessment of planning outcomes’.<sup>75</sup> This includes annual reports, audit reports, legislative reviews, and the State budget. Without this, the planning

<sup>70</sup> For example, in relation to sectoral data-gathering, infrastructure planning, council cooperation, community consultation.

<sup>71</sup> Green Paper, pp 38-39. We understand these Boards are proposed to provide stakeholder partnerships to oversee regional and subregional planning (Green Paper, p 86).

<sup>72</sup> See Green Paper, p 86 for proposed composition.

<sup>73</sup> See Green Paper, pp 24, 38. It is proposed these will cover sectors such as ‘housing, employment, retail, environment, rural, mining and other areas of focus’, for example ‘natural resources’ (pp 27-28, Figure 7).

<sup>74</sup> For example, our prior submissions note the need to better aggregate agencies’ spatial and environmental data, and to identify and fill gaps in mapping, NRM accounting and environmental qualities. See, for example, NCC, EDO NSW and TEC joint submission to Planning Review Issues Paper (March 2012), ‘A legislative framework for effective strategic planning’, p 18; ‘Information aggregation and data quality’, p 97.

<sup>75</sup> See Green Paper, p 24.

system will continue to prioritise an incomplete series of economic indicators at the expense of qualitative and quantitative environmental and social indicators.

#### iv) Local Land Use Plans

The Green Paper proposes that plain-English Local Land Use Plans (**LLUPs**) would replace Local Environmental Plans (**LEPs**). A significant change is that LLUPs are to guide desired development outcomes, but emphasise merit-based assessment rather than strict controls.<sup>76</sup> EDO NSW recognises the need to update local land use planning. However, the Government should consider a more balanced approach to flexible development standards.

Given the potential significance of the shift, the Green Paper does not clearly articulate the argument – in terms of public benefits – for the proposed shift to flexible standards across all development controls.<sup>77</sup> ICAC has noted the ‘increasing tendency towards departures from the stated requirements’, and stated that ‘wide discretion to approve projects... creates a corruption risk and community perception of lack of appropriate boundaries’.<sup>78</sup>

A further criticism of adopting flexible development standards is that this prioritises developer rights and interests over those of the community (by way of a ‘second bite of the cherry’ after strategic planning). On one hand, proponents could literally ‘push the envelope’ by seeking merit assessment if their development exceeds local standards. On the other hand, communities are to accept that, ‘having done that strategic planning, it will be a case of full steam ahead’, with less opportunity to shape individual projects in their neighbourhood.<sup>79</sup>

There is therefore significant potential for the implementation of flexible standards at the local level to undermine the strategic goals for an area, as identified through a comprehensive and inclusive strategic planning process.

These proposals seem inconsistent with State Plan objectives to promote ‘Certainty for communities and investors’ and ‘Return planning powers to local communities’.<sup>80</sup> This imbalance is exacerbated by two further proposals discussed under Development Assessment below – to permit spot rezoning despite strategic planning, and to give new review rights to proponents whose rezoning applications are refused.<sup>81</sup>

The Green Paper accepts the Independent Review Panel’s recommendation that LLUPs must be consistent with strategic plans,<sup>82</sup> and we support this recommendation. The

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<sup>76</sup> As proposed, LLUPs would cover four common areas:

- strategic intent (comparable to existing Community Strategic Plans);
- a statutory spatial land use plan;
- delivery of infrastructure and services; and
- development guidelines and performance monitoring requirements.

<sup>77</sup> The Green Paper (p 40) states that existing LEPs are ‘rigid statutory instruments with development controls that often lack strategic context’, flexibility and responsiveness to change.

<sup>78</sup> ICAC, *Anti-corruption safeguards and the NSW planning system* (February 2012), p 5.

<sup>79</sup> See for example, *Sydney Morning Herald*, “‘Bold and daring’ or undemocratic? Planning law change could leave you voiceless”, 27/6/2012: [www.smh.com.au/business/property/bold-and-daring-or-undemocratic-planning-law-change-could-leave-you-voiceless-20120627-211e9.html](http://www.smh.com.au/business/property/bold-and-daring-or-undemocratic-planning-law-change-could-leave-you-voiceless-20120627-211e9.html). See also Green Paper, pp 53-54: ‘Making it clear to the community that a development proposal that is consistent with the plan will go ahead encourages better community participation in the strategic planning phase...’ (p 54). This ‘social contract’ may be undermined if communities feel the system is ‘weighted’ to allow development to go ahead anyway.

<sup>80</sup> *NSW 2021*, ‘Restore accountability to Government’, p 55

<sup>81</sup> The new review rights for developers are proposed where local councils or the Planning Department refuses to support the developer’s rezoning application. See Green Paper, pp 65-66.

<sup>82</sup> Green Paper, p 41.

Independent Review Panel also supports additional flexibility in controls currently found in Development Control Plans (DCPs),<sup>83</sup> though with more detailed qualifications than the Green Paper.<sup>84</sup>

EDO NSW therefore submits that the Government should consider a more balanced approach to development standards. Alternative approaches could include:

- requiring strategic alignment *and* retain relatively strict local controls in LLUPs;
- identifying which types of local controls are ‘unable to accommodate innovation to the detriment of local communities’,<sup>85</sup> and providing flexibility only for those controls;<sup>86</sup>
- creating a presumption that local controls apply, with *proponents bearing the onus* to satisfy a range of criteria including that:
  - adherence would bring about an *inappropriate planning outcome*,<sup>87</sup> and
  - the project will maintain or improve environmental/social outcomes; and
  - the project will not contribute unacceptably to cumulative impacts or adversely affect environmental values and priorities (strategic and local);
- Including a power for Councils to add/alter conditions to respond to change.

Finally, EDO NSW generally supports the Independent Review Panel’s proposed objects for LLUPs (including the identification of sensitive areas which limit development, and to provide controls for climate change impacts).<sup>88</sup> The Act should require authorities to pursue LLUP objects consistent with the overarching object of ecologically sustainable development.

### ***New zones and greater flexibility within zones***

We do not support the proposal for ‘**enterprise zones**’ in the Green Paper without significant safeguards and clear limitations on where they can apply.<sup>89</sup> For example, such zones cannot include any areas of high conservation value, threatened biodiversity etc. Short-term economic stimulus must not be a justification for unsustainable or development, especially if inadequate planning leads to a future public cost burden.

If such zones are established, we submit that strict urban sustainability requirements must apply to these zones, for example regarding resource efficiency for energy, water, building materials and waste (as discussed further below). Best practice sustainability is a reasonable prerequisite if ‘financial incentives’ are offered to stimulate investment in these areas. This would channel investment and jobs towards cleaner development and industries. We would also support the prerequisites of ‘Local government and community support’ (for

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<sup>83</sup> See Independent Review Panel, recommendations 67-70

<sup>84</sup> Namely, 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>85</sup> Green Paper, p 40. Identification of relevant controls would be on a public interest basis, and require community consultation.

<sup>86</sup> This would include examining the ‘SEPP 1’ objections process and subsequent provisions in the new Standard Instrument LEP allowing flexible interpretation of LEP development standards. See further EDO NSW, SEPPs factsheet, at [http://www.edo.org.au/edonsw/site/factsheet/fs02\\_1\\_4.php](http://www.edo.org.au/edonsw/site/factsheet/fs02_1_4.php)

<sup>87</sup> See, for example, Independent Review Panel, recommendation 69. On onus of proof issues, see, for example, The Hon B. Preston, Chief Judge of the Land & Environment Court, ‘Internalising Ecocentrism in Environmental Law’ (September 2011), speech to Griffith University QLD, p 7.

<sup>88</sup> Independent Review Panel, recommendation 19.

<sup>89</sup> The Green Paper proposes these zones would be characterised by ‘little, if any development controls providing they do not result in any significant adverse environmental impacts’ and could potentially apply to whole LGAs. See Green Paper, p 44-45.

example, that the community endorse the application of such zones to a particular area at the strategic planning stage), and minimal environmental impact for such zones.<sup>90</sup>

The proposed **suburban character zoning** to allow communities to preserve local character (such as by 'excluding medium or high density development') has potential benefits, but requires further exploration and careful design.<sup>91</sup> For example:

- the Green Paper does not explain interactions with existing heritage protections;
- such zoning must identify and respond to the detail of local community aspirations and outcomes (for example, relating to site sensitivity, design, character, amenity and setbacks); and
- such zoning must not increase pressure on or disadvantage other areas – that is, local amenity, environment protection and design quality should be baseline requirements that all communities have a right to, not merely in small-scale zoning.

Any proposed **future urban land release zones** must be subject to extensive community consultation at the strategic planning stage, with specific consideration of any high conservation attributes that must be retained on greenfield sites before development, and the provision of public transport infrastructure (including footpaths and cycle-ways) and other community infrastructure (such as parks and libraries) in such areas.

Finally, while it is not mentioned in the Green Paper, we reiterate our strong support for a **new environmental protection zone** to allow local councils and communities to better protect lands for conservation purposes.<sup>92</sup>

## v) Embed ecologically sustainable development

As noted, the Government has proposed that 'sustainable development' will remain the main object of the new Planning Act, though as noted, there is a lack of clarity around this in the Green Paper. The important challenge is to embed *Ecologically Sustainable Development* throughout the new system, including in all strategic planning processes. For example, the new Act should require that:

- the content and implementation of all strategic plans must be consistent with ESD;<sup>93</sup>
- objects for strategic planning are to be:
  - consistent with ESD, and
  - pursued 'to support the overarching objects of the Sustainable Planning Act' (as the Independent Review Panel proposes);<sup>94</sup>
- a high-level NSW Planning Policy on *Sustainability* should require minimum standards for energy and water efficiency (updating BASIX<sup>95</sup>), climate change

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<sup>90</sup> Green Paper, p 45.

<sup>91</sup> For example, improved requirements relating to character in the Housing Code.

<sup>92</sup> Similar to the Government's May 2012 proposal, with some additional recommendations. 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.

<sup>93</sup> Namely – integrated decision making, the precautionary principle, intergenerational equity, conservation of biodiversity and ecological integrity, internalisation of environmental costs (including the polluter pays principle).

<sup>94</sup> Independent Review Panel, Vol. 1, p 42.

<sup>95</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.

- mitigation and adaptation, other building design standards, and measures to encourage clean industry<sup>96</sup> – to be given effect further down the hierarchy; and
- outcomes of strategic plans should be measured against consistency with ESD, based on agreed environmental, social and economic indicators and targets.<sup>97</sup>

EDO NSW believes the subsidiary strategic planning objects proposed by the Review Panel (recommendation 8) are generally sound. These objects would assist the achievement of ESD, and the integration of natural resource management and environmental protection into strategic planning. We single out 5 proposals for strong support.<sup>98</sup>

- Identify sensitive areas containing (or likely to contain) factors that will limit or prevent development taking place, such as:
  - biodiversity and other ecological constraints; significant landscapes or features, including Aboriginal cultural landscapes or sites; riparian corridors; items or localities of likely or known heritage significance; existing land uses that can be expected to place constraints on land use in their vicinity.
- 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 expectations are likely to arise.
- Identify past and present human activity constraints with broader than localised impacts.
- Strategic planning can and should encompass 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.

## vi) Integrate environmental outcomes and natural resource management

EDO NSW welcomes the Government's support for joint recommendations to integrate environmental considerations and NRM much earlier in the planning system.<sup>99</sup> The White Paper will need to build on these commitments, and further demonstrate how natural resource management (NRM) will be integrated into strategic planning, development assessment, and compliance monitoring and reporting. This integration needs similar

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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>96</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>97</sup> This is discussed further 'Delivery of a new planning system' below.

<sup>98</sup> See Independent Review Panel Report, Vol 1, pp 42-43 and 48.

<sup>99</sup> Green Paper, p 35. In particular we welcome the following broad commitments:

- A clear NSW Planning Policy focused on the achievement of natural resource outcomes
- Spatial interpretations of high level principles and targets for environmental outcomes at the regional scale, which is underpinned by a strong and shared evidence base to inform strategic regional planning
- Subregional Delivery Plans will put into action how those principles and targets will be achieved in that context
- Translation into statutory provisions in the local plan and guiding local decisions.

See also NCC NSW, EDO NSW and TEC, Submission to the Planning Review Issues Paper (March 2012), pp 8-14 and 17-20.

prominence to that given to integrating infrastructure in the Green Paper. This would be also consistent with an overarching commitment to ecologically sustainable development.

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 in recent submissions on the Planning Review.<sup>100</sup>

In particular, the new Act must ensure that strategic plans:

- Are based on the best information available
  - Including baseline environmental studies, strategic environmental assessment, and a system of State environmental accounts.<sup>101</sup>
- Identify and protect valuable and sensitive natural areas from development
  - As noted above, we support the Independent Panel's recommendation that strategic planning should '*Identify sensitive areas containing (or likely to contain) factors that will limit or prevent development...*'<sup>102</sup>
  - The absence of strategic limits and prohibitions on development can have serious and ongoing consequences for communities and conservation.<sup>103</sup>
- Ensure cumulative impacts are properly assessed and considered.<sup>104</sup>
  - We welcome the Government's support for the Independent Review Panel's recommendations 12 and 13 to identify and consider present and future cumulative impacts.<sup>105</sup> This must include, for example, assessment of

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<sup>100</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>101</sup> See 'State environmental accounts' under 'Delivery of a new planning system' below. Local, state and federal government authorities already hold a substantial amount of information that could feed directly in to a centralised information system of State environmental accounts. At the federal level, see Dr A. Hawke et al, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, Final Report (October 2009), Chapter 19; See also 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>102</sup> Independent Review Panel, recommendation 19. See also Review Panel discussion, 'Identification of the areas where development might be inappropriate', Vol. 1, p 50.

<sup>103</sup> This is illustrated by the Planning Assessment Commission's (PAC) approval of the Warkworth Extension Project (09\_0202), 3 Feb. 2012. The PAC noted pp 8-9 (emphasis added):

*... A number of rural communities have been faced with this situation in the past. In almost all cases the mines have been approved and the communities have either been radically altered in character or become non-viable. With the current price of coal this outcome is almost inevitable when the overall economic benefits of the mines are balanced against local community impacts. It appears that it is only if there are wider negative implications from the mining proposal that refusal becomes a possibility. If this is to change the NSW Government will need to develop a clear policy position that provides further guidance to decision-makers as to how social impacts on rural villages are to be balanced in the approval process for coal mines.*

<sup>104</sup> See Independent Review Panel report, recommendation 73. Cumulative impacts at the development assessment and monitoring and reporting stages are discussed further below.

<sup>105</sup> Review Panel recommendations, Vol. 1 pp48- 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.*

cumulative impacts on biodiversity, air and water quality, native vegetation and catchment health, and the cumulative impacts of GHG emissions.<sup>106</sup>

- The White Paper needs to clarify the legal mechanisms in the *Sustainable Planning Act* that will put these recommendations into practice; and outline what will be the practical effect of such requirements.<sup>107</sup>
- Integrate State NRM targets, Catchment Action Plans and NRM agency expertise
  - The NSW Government has adopted thirteen state-wide targets for natural resource management (NRM).<sup>108</sup> Catchment Action Plans (CAPs) are important local and regional NRM tools that draw on these targets.<sup>109</sup>
  - The new planning system and Act must integrate state-wide NRM targets and CAPs into strategic planning, development assessment and performance monitoring.
  - The White Paper should establish a model for inter-agency collaboration to assist local communities in developing strategic plans (for example, CMAs and OEH). This is consistent with the Independent Review Panel's proposal for a 'duty to cooperate' between agencies.<sup>110</sup>
- Use strategic environmental assessment to complement, not replace, site-based assessment.
  - If strategic environmental assessment (SEA) of larger areas is to be used in NSW, the *Sustainable Planning Act* must set out rigorous and objective requirements (for process, outcomes and implementation).<sup>111</sup>

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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.*

<sup>106</sup> NCC, EDO NSW and TEC (March 2012), pp 12 and 19.

<sup>107</sup> As the Chief Judge of the Land and Environment Court notes: 'This failure to deal with cumulative environmental effects is particularly encountered in the fields of biodiversity, water and climate change regulation.' The Hon B. Preston, 'Internalising Ecocentrism in Environmental Law', Speech to the 3<sup>rd</sup> Wild Law Conference, 16-18 September 2011, Griffith University, Queensland, pp 6-7.

<sup>108</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>109</sup> Established under the *Catchment Management Authorities Act 2003* (NSW), 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.

<sup>110</sup> Independent Review Panel's (recommendation 9).

<sup>111</sup> In particular, 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 consultation on an environmental report on the plan at the same time as community consultation is conducted on the plan itself; and
- complement, but not replace, site-level impact assessment, and
- require ongoing monitoring of the significant effects of implementing the plan.

See also NCC, EDO and TEC Joint submission (March 2012), pp 17-18. The International Association of Impact Assessment has also developed a series of 'performance criteria' for a good-

- While we support the appropriate use and refinement of SEA,<sup>112</sup> we do not agree with the suggestion that SEA may obviate need for site-level assessment.

## vii) Build-in Urban Sustainability, Design Quality and Climate Change responses

The Green Paper agrees with the Independent Panel that strategic planning needs to address the challenge of ‘facilitating sustainable growth’ and ‘promote “triple bottom line” outcomes’.<sup>113</sup> However, issues of urban sustainability, design quality and climate change are surprisingly absent from the discussion.

The new strategic planning regime needs to deal openly and effectively with these three important areas, addressed in turn below. This should begin with the State Plan and high-level ‘NSW Planning Policies’; be implemented in more detailed regional and sub-regional strategic plans and LLUPs; and be supported by resourcing and cultural change within the public and private sectors.

### *Urban Sustainability Goals and Standards*

Sustainable cities that reduce our ecological impacts should be an integral part of ‘making NSW number one’.<sup>114</sup> The new Act and NSW Planning Policies need to mandate urban sustainability goals – both at strategic and local planning levels. These should apply to areas such as energy and water use, construction, transport, waste reduction, biodiversity and bushland protection.<sup>115</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. 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>116</sup> The 2011 National Urban Policy also includes *Sustainability* as a primary goal: ‘to advance the sustainability of Australia’s natural and built environment, including through better resource and risk management’ and corresponding objectives.<sup>117</sup>

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quality SEA process. These are broadly summarised as *Integrated, Sustainability-led, Focused, Accountable, Participative* and *Iterative*. See ‘SEA Performance Criteria’, IAIA Special Publication Series 1, Available from [www.iaia.org/publicdocuments/specialpublications/sp1.pdf](http://www.iaia.org/publicdocuments/specialpublications/sp1.pdf).

<sup>112</sup> Federally, the Hawke Review (at 3.13) recommended greater use of strategic assessments (noting that ‘safeguards need to be created to ensure that plans are robust and fit for purpose.’ *Report of the Independent Review of the EPBC Act 1999* (2009), rec. 6; ‘The Next Generation of Planning for ESD’.

<sup>113</sup> Green Paper, p 29.

<sup>114</sup> NSW State Plan: A plan to make NSW number one, [www.2021.nsw.gov.au](http://www.2021.nsw.gov.au).

<sup>115</sup> For example, see: *Discussion paper on cool roofs regulation in South Australia* (Dec. 2010), [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>116</sup> See, for example, City of Sydney Council, *Sydney 2030 – Green/Global/Connected*, at [www.sydney2030.com.au](http://www.sydney2030.com.au); Dubbo City Council, ‘Sustainable City’ homepage, <http://www.dubbo.nsw.gov.au/CouncilServices/SustainableCity>, which notes Dubbo has the highest percentage of household solar installations in Australia (at 28%).

<sup>117</sup> 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>. The corresponding NUP 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*;

The White Paper needs 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 our previous submissions have noted, urban sustainability is a critical part of achieving ESD and 'triple bottom line' outcomes, as cities consume vast amounts of energy, water and materials. However, urban sustainability has not been 'mainstreamed' beyond the development of BASIX.

As an immediate demonstration of its commitment to urban sustainability, the NSW Government should overhaul the Building Sustainability Index (BASIX) SEPP.<sup>118</sup> This could be integrated into a new NSW Planning Policy on *Sustainability* (noted above). We recommend:

- strengthening minimum requirements of BASIX to reflect technological advances;<sup>119</sup>
- extending its operation to commercial and industrial sites (not dwellings only);
- raising standards for multi-unit dwellings that are currently subject to lesser targets;<sup>120</sup>
- establishing mandatory sustainability requirements in law for retrofitting existing buildings (in particular commercial and industrial); and
- setting minimum baselines, but removing the prohibition on consent authorities, such as local councils, from imposing more stringent water and energy use limits.<sup>121</sup>

### *Design Quality standards – for liveability, sustainability, health and social inclusion*

The White Paper needs to outline how the NSW planning system will require appropriate design quality standards, including for residential flat developments, such as those now contained in SEPP 65.

Beyond this, any increase in code-complying assessment and approval must be accompanied by agreed design standards that promote liveable and sustainable communities, healthy lifestyles and social inclusion. Such standards must be subject to detailed professional and community consultation that outlines alternative scenarios, options and consequences for local areas.

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#### *7. Increase resilience to climate change, emergency events and natural hazards.*

<sup>118</sup> The *State Environmental Planning Policy (Building Sustainability Index – BASIX) 2004* is the principal building regulation relating to sustainability.

<sup>119</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. See Nicholas Landreth, Kevin WK Yee and Scott Wilson, 'Assessing the Effectiveness of Building Simulation to Regulate Residential Water Consumption and Greenhouse Gas Emissions in New South Wales, Australia, *Proceedings of Building Simulation 2011: 12<sup>th</sup> Conference of International Building Performance Simulation Association, Sydney, 14-16 November, 2859, 2864.*

<sup>120</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.'

<sup>121</sup> The BASIX SEPP overrides any environmental planning instrument that is inconsistent with it. See *BASIX SEPP 2004*, cl 7. See further A. Thorpe and K. Graham, 'Green Buildings – are Codes, Standards and Targets Sufficient Drivers of Sustainability in New South Wales?' (2009) 26 *Environmental and Planning Law Journal* 486, 489.

## Climate change readiness – mitigation and adaptation

The Green Paper does not discuss climate change, despite the Government's commitment to comprehensive, evidence-based strategic planning and integrated NRM outcomes. However, the Government's State Plan commits to 'minimise impacts of climate change in local communities'.<sup>122</sup> The EP&A Act's inadequacies in this area are well-documented,<sup>123</sup> as are the likely impacts of how climate change will affect NSW.<sup>124</sup>

The White Paper must deliver clear statements on how the new planning system will engage with and manage these risks and opportunities in the coming decades<sup>125</sup> – via mandatory mitigation and adaptation policies.

This should begin at the strategic level with NSW Planning Policies, including as part of a broader 'Sustainability' Policy, and in the proposed policies on coastal management, environmental protection and NRM outcomes.<sup>126</sup> These State policies must move beyond guidance and require mandatory action by consent authorities and proponents.

Consistent with our previous recommendations, 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>127</sup>
- establish a robust, state-wide approach to coastal climate change adaption;
- 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>128</sup>

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<sup>122</sup> See NSW State Plan targets, [www.2021.nsw.gov.au](http://www.2021.nsw.gov.au).

<sup>123</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>124</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>125</sup> See, for example, Ernst & Young, *Business opportunities in a low carbon economy* (September 2010), report for Industry and Investment NSW on behalf of the NSW Innovation Council, p 3: 'Climate change, and the policy action directed at addressing climate change, is creating new opportunities and challenges for NSW industry over the next decade.' This is 'shifting incentives towards renewable and lower emission electricity generation technologies', and 'expanding demand for carbon-reducing technology, product and services for use across a variety of industries.' Available at: <http://www.business.nsw.gov.au/innovation-and-research/innovation-in-nsw/innovation-resources-and-publications/cross-sectoral-analyses>.

<sup>126</sup> See, for example, Green Paper, pp 27 and 35.

<sup>127</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>128</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.

## **Strategic Planning - Summary of recommendations**

**Recommendation 12** - The Public Participation Charter must apply to the making and amending of all plans in the proposed plan hierarchy.

**Recommendation 13** - All plans must: be consistent with ESD, have a triple bottom line focus, be based on community endorsed evidence and be subject to regular review against performance and sustainability indicators.

**Recommendation 14** - The new Act should provide that *State Planning Policies*: are disallowable statutory instruments and subject to judicial review; set minimum environmental standards (including equivalent protections in current SEPPs); prevent public authorities from self-assessing their own proposals; and are subject to regular independent review.

**Recommendation 15** - *Regional Growth Plans* should: be called 'Regional Development Plans'; incorporate existing Regional Conservation Plans; be based on catchment boundaries where possible.

**Recommendation 16** - *Local Land Use Plans* must not allow variations or spot rezonings other than in exceptional circumstances that maintain or improve environmental outcomes. Appropriate zoning should be established by community endorsed strategic plans for an area.

**Recommendation 17** - The new Act should set minimum criteria for *zones*, but allow local areas to place additional controls for conservation purposes. Enterprise zones should have extremely limited application and be subject to sustainability requirements. There should be a new category of environmental protection zone.

**Recommendation 18** - All strategic plans should: integrate environmental outcomes and natural resource management, ensure cumulative impacts are considered, and build-in urban sustainability, design quality, and climate change adaptation where appropriate.

## 6. Development Assessment

The Green Paper outlines some positive reform proposals for the development assessment stage in Chapter 6. These include:

- community participation will occur for a range of development assessment ('State Significant Development, Merit Assessed Development, Priority Infrastructure Projects, and merit-related issues and design matters for Code Assessment Development');
- improving environmental assessment through use of accredited consultants (currently proposed for State significant development); and
- Harnessing information technology & e-planning for accessibility and efficiency.

Notwithstanding these positives, the White Paper must recalibrate a range of proposals that are of potential concern in the Green Paper. We consider each of these areas below:

- i) New proponent rights and less public input at project-level**
- ii) 'Strategic compliance' and removal of concurrences**
- iii) Limit code-complying assessment to low risk, low impact development**
- iv) State Significant Development – greatest impacts need greatest scrutiny**
- v) Non-compliant development and spot rezoning**

In addition, the White Paper needs to deliver a range of critical further measures, consistent with key principles in our previous submissions.<sup>129</sup> In particular:

- vi) Development assessment criteria – Objective tests needed for environmental outcomes**
- vii) Independent and comprehensive environmental impact assessment**
- viii) Equitable third party review and appeal rights: for accountable decisions**
- ix) Fast-tracking environmentally friendly development**

### **(i) New proponent rights and less public input at project-level is inequitable**

While EDO NSW welcomes the Green Paper's emphasis on community engagement upfront, we have significant concerns with the proposed corollary – that as a result of this early engagement, once strategic plans are in place (or even before regional or local plans are finalised<sup>130</sup>), there will be:

- less opportunity for engagement at the local level
- significant increase in code-assessed development, and
- 'a presumption of a right to develop'.<sup>131</sup>

The way code-assessed development is implemented (discussed below) could significantly impact on the degree of public participation and opportunities for review and appeal of

<sup>129</sup> See, for example, NCC, EDO and TEC joint submission (March 2012), p 60. We have proposed a range of improvements for efficient development assessment, such as objective decision-making tools, rejection of inadequate applications and a commitment to proper resourcing for consent authorities and expert agencies.

<sup>130</sup> See Green Paper, pp 53-55.

<sup>131</sup> The latter quote is from a 'principle of reform' on p 18 of the Green Paper.

decisions. In our view, effective strategic planning is likely to defuse some of the site-by-site battles and tensions that have characterised the current system. However, it will be difficult to maintain public confidence or 'buy-in' if community members feel they have no knowledge, or 'no say', about significant individual projects in their neighbourhood. This is compounded by the Green Paper proposals for significant additional rights for proponents.

The White Paper will need to rectify and carefully manage these issues. The Government must ensure that communities do not feel sidelined by efforts to streamline development assessment and approval, including in relation to notification, consultation and appeal rights.

## **(ii) 'Strategic compliance' and removal of concurrences**

EDO NSW is concerned that the direction of several proposals to 'streamline' development assessment will weaken environmental impact assessment requirements and accountability. Areas of concern include: strategic compatibility certificates, fettering the ability of authorities to refuse projects, and removal of concurrences.

### **'Strategic compatibility certificates'**

EDO NSW opposes the Green Paper's suggestion that 'any development proposal that conforms to the parameters set out in the strategic plan should be allowed to proceed', in advance of local plan updates, via a departmental 'strategic compatibility certificate'.<sup>132</sup> We would also oppose review rights for proponents whose strategic compatibility applications are rejected,<sup>133</sup> particularly without corresponding third party objector rights.

Our reasons for opposing the strategic compatibility concept are as follows:

- 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;
- regional and subregional plans (and certainly State-level plans<sup>134</sup>) would likely be too high-level to allow meaningful application to the details of individual developments;
- the proposed mechanism lacks important safeguards to protect local social and environmental values (for example, where strategic data and principles do not account for site-specific values); and
- upfront 'strategic compliance' approvals risk repeating mistakes of the former Part 3A regime, across a broad range of development, for example, by fettering subsequent discretion, engagement and review.

The White Paper should instead canvass other measures that maintain environmental rigour, community engagement and accountability; as well as incentives for the timely but considered implementation of subregional and local land use plans.<sup>135</sup>

### **Consent authorities cannot refuse proposals that comply with subregional standards**

The Green Paper proposes that 'councils and other consent authorities cannot refuse a proposal that complies with detailed building envelopes and standards developed through subregional planning...'.<sup>136</sup> We oppose this policy position.

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<sup>132</sup> The Green Paper proposes, for example, strategic compatibility certificate would be followed by consent authority determination 'after the consideration of community views' (p 53-54).

<sup>133</sup> Green Paper, pp 54 and 66.

<sup>134</sup> See Green Paper, Figure 14 flowchart, p 55. The first box states 'Development proposed consistent with *State* or regional/subregional planning strategies'. (emphasis added)

<sup>135</sup> The Green Paper notes these reforms seek to overcome 'delay or failure to implement metropolitan and regional strategic planning at the local level.'

Development assessment and approval processes should lead to well-planned, sustainable cities and neighbourhoods. It is not clear how a presumed 'right to develop' is better public policy than allowing the consent authority, with community input, to decide whether a proposed project is the best design and use of a site in the particular circumstances.<sup>137</sup>

The Land and Environment Court has recognised that it may not always be appropriate to develop a site to the maximum standards allowed, for example, at the interface of zones where neighbours' amenity may be adversely affected.<sup>138</sup>

While 'rule certainty' could be one possible justification for removing authorities' discretion to refuse compliant projects, this is undercut by the Green Paper's further proposals that proponents could seek to vary standards and requirements set out in subregional plans.<sup>139</sup>

Furthermore, we note the proposal for part code-based, part merit assessment risks 'compartmentalising' decisions.<sup>140</sup> If such proposals are to be assessed, consent authority should consider the impacts of the project as a whole.

The argument for a 'right to develop' has not been adequately made out in the context of the Government's commitment to triple bottom line outcomes.<sup>141</sup> As noted, courts have recognised that developing to the maximum scope of controls may not always be appropriate. It may be appropriate, for example, to give clearer statements via provisions or departmental policies, on when development *can* be refused despite meeting standards.<sup>142</sup>

### **Removing legal concurrence requirements through strategic planning**

The Green Paper proposes the removal of agency concurrence and approvals for individual projects, on the basis that these will be dealt with upfront in strategic plans.<sup>143</sup> EDO NSW has strong concerns about the local environmental impacts of this proposal. Instead, a full and transparent consideration of concurrence requirements is needed 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).

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<sup>136</sup> Green Paper, p 48; see also pp 53-54.

<sup>137</sup> Joint submission (March 2012), p 58, response to Issues Paper Q. D8.

<sup>138</sup> For example, in *Appwam Pty Ltd v Ashfield Council* [2011] NSWLEC 1001, the Court was required to assess a development on the interface of industrial and residential sites. Commissioner Morris found [at 37]: "*The redevelopment of land, which is zoned for industrial purposes at the interface with a residential area, presents design challenges to ensure that the different uses can function without adverse impacts being caused to the amenity of residents of those areas whilst maintaining efficient operations for the industrial business. These constraints can mean that it is not always possible to optimise the development controls that apply to such an industrial site and not adversely affect the amenity of adjacent residents*".

<sup>139</sup> Green Paper, p 55.

<sup>140</sup> Green Paper, p 55.

<sup>141</sup> See, for example, Green Paper, pp 18 and 29.

<sup>142</sup> For example, the *Mining Act 1992* (NSW) specifies general powers to refuse applications, and includes examples of reasons for doing so (without limiting the power's generality) – for example ss 22, 23(3), 41, 63. See also the *Petroleum (Onshore) Act 1991* (NSW), ss 19, 21 and 22.

<sup>143</sup> For example, Green Paper, p 55.

Dealing with some concurrences upfront, while retaining other important, site-specific environmental safeguards will promote efficiency and robust assessment.

Major projects should be subject to integrated decision making – not concurrence exemptions or mandatory approvals.

The Independent Review Panel report recommends an ‘Assessment Facilitation Unit’ for dealing with concurrences – including for major projects.<sup>144</sup> We believe this is a more transparent and orderly alternative to a general removal of concurrences as proposed in the Green Paper.

Concurrence requirements are important because:

- they ensure expert government departments have a say about how projects proceed;
- they ensure that the objects of other environmental laws are met;
- they improve the level of scrutiny to the assessment and approval process, so that a project’s particular environmental impacts are accounted for, and fully considered.<sup>145</sup>

EDO NSW agrees that some concurrences such as bushfire risk can be handled upfront,<sup>146</sup> and that baseline ‘template conditions’ could speed up assessment<sup>147</sup> subject to local conditions. However, we oppose a ‘blanket’ approach to removing concurrences due to environmental a risk. Any new approach to concurrence would need to deal with the following issues.

- **Transparency and environmental protections** – While existing concurrences are clear and legally required, upfront ‘negotiation’ between agencies leaves scope for closed-door discretion (for example, on strategic approaches to Aboriginal heritage, threatened species and native vegetation protection or pollution licensing). There is no guarantee that existing environmental checks and balances will not be compromised.
- **Proportionality**<sup>148</sup> – One reason for inter-agency concurrences is to ensure project scrutiny matches potential impacts.<sup>149</sup> Removing requirements for project-level agency agreement reduces tailored solutions; and increases the risk that important site-level qualities, or new information, will be overlooked or ignored.
- **Major projects ‘override’** – State significant development and infrastructure projects continue to be *exempt* from a wide of concurrences, as under former Part 3A.<sup>150</sup>

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<sup>144</sup> This Unit would be established in the Planning Department: ‘to act as a central coordinating body for obtaining concurrences from other government departments and instrumentalities’. The Unit’s involvement would be triggered once a specified period has elapsed since the concurrence authority received the project referral (for example 45, 55 or 65 days). See Independent Review Panel, Vol. 1, recommendations 76-91 (pp 9-10).

<sup>145</sup> EDO NSW, *Major Projects Toolkit: A voice for the community* (2010), funded by City of Sydney.

<sup>146</sup> See Green Paper, p 55.

<sup>147</sup> See, for example, Review Panel recommendation 86.

<sup>148</sup> Proportionality of impact assessment remains a Government objective (Green Paper, p 47).

<sup>149</sup> For example, a threshold of impact ‘triggers’ a need for expert agency consideration and agreement.

<sup>150</sup> For example, s 89J-K of the *EP&A Act* provides exemptions for the following:

- (a) the concurrence under Part 3 of the *Coastal Protection Act 1979* of the Minister administering that Part of that Act,
- (b) a permit under section 201, 205 or 219 of the *Fisheries Management Act 1994*,
- (c) an approval under Part 4, or an excavation permit under section 139, of the *Heritage Act 1977*
- (d) an Aboriginal heritage impact permit under s 90 of the *National Parks and Wildlife Act 1974*

These exemptions undermine the Government's commitment to proportional assessment, and integrating infrastructure, environment and NRM considerations in land use planning. Indeed, the Green Paper suggests such exemptions could expand to projects considered by Joint Regional Planning Panels (**JRPPs**).<sup>151</sup> Participants in the recent EDO NSW seminars expressed a high level of scepticism as to how the proposed changes will actually differ in practice from Part 3A. There is a genuine fear that some of the Green Paper's proposals for state significant development and infrastructure projects will simply reinstate Part 3A, to the exclusion of local communities.

- **Strength of conditions** – Removing concurrences would reduce on-the-ground expert scrutiny and threaten the adequacy of development approval conditions, as regulators (for example, the Environment Protection Authority) can no longer make independent decisions based on particular circumstances.

### (iii) Limit code-complying assessment to low risk, low impact development

The detail and thresholds set in the Codes will be fundamental to the integrity and success of the new Act.

The Green Paper proposes to 'maximise the proportion of complying developments', starting with houses, by way of a '10 day fast track code approval for low risk low impact development'.<sup>152</sup> The legitimacy of this proposal, and the reforms as a whole, depend on limiting code-based approval to projects of *genuinely* low risk and low impact. Maximising code assessable developments has in the past led to inappropriate expansion to achieve arbitrary numerical 'targets', including in environmentally sensitive areas.<sup>153</sup>

Also of significant concern is the proposal to consider extending the code-based approval to industrial and other buildings,<sup>154</sup> where these could in fact have significant impacts.

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- (e) *an authorisation referred to in section 12 of the Native Vegetation Act 2003 (or under any Act repealed by that Act) to clear native vegetation or State protected land,*
  - (f) *a bush fire safety authority under section 100B of the Rural Fires Act 1997,*
  - (g) *a water use approval under section 89, a water management work approval under section 90 or an activity approval (other than an aquifer interference approval) under section 91 of the Water Management Act 2000.*

Furthermore, the following authorisations cannot be refused if they are necessary for carrying out the SSD that is authorised by a development consent under Part 4, Div. 4.1:

- (a) *an aquaculture permit under section 144 of the Fisheries Management Act 1994,*
- (b) *an approval under section 15 of the Mine Subsidence Compensation Act 1961,*
- (c) *a mining lease under the Mining Act 1992,*
- (d) *a production lease under the Petroleum (Onshore) Act 1991,*
- (e) *an environment protection licence under Chapter 3 of the Protection of the Environment Operations Act 1997 (for any of the purposes referred to in section 43 of that Act),*
- (f) *a consent under section 138 of the Roads Act 1993,*
- (g) *a licence under the Pipelines Act 1967.*

<sup>151</sup> Green Paper, p 56.

<sup>152</sup> Green Paper, p 63; see also p 6.

<sup>153</sup> This included the repeal of s 76A(6) of the EP&A Act. See joint submission (2012), p 41-42.

<sup>154</sup> Green Paper, p 63: 'The Government will look at extending the codes to':

- 'new industrial buildings on industrial land,'
- 'additions to those buildings,'
- 'additions to existing commercial buildings'
- 'townhouses, terrace housing and villas', and
- 'housing on smaller lots.'

The Green Paper is silent on many important questions around the code proposals including:

- How will community views be sought and reflected in code-making?
- How will this affect community rights to be heard (or appeal) on local developments?
- How will the Government ensure robust project assessment and code compliance, given widespread concerns about private certifiers and oversight?

Below are a number of essential safeguards that must be clearly articulated in the White Paper and draft legislation:

- **Low impact only** – Restrict codes to genuinely low risk, low impact development as initially indicated<sup>155</sup>, otherwise proposals should be merit assessed (discussed below).
- **Participation** – The Public Participation Charter must be applied to code-making and code amendments, including on issues of notification expectations; certification, complaints and enforcement; and visual demonstrations of what developments could be code approved in different zones.
- **Notification** – Consider and consult on when and how code-assessable project notification and information should be provided and accessible (for example, on-site signage, direct to neighbours, online, web-based automatic notification);
- **Implementation** – Codes must be promulgated as legislative instruments, with minimum rules and standards, subject to judicial review.
- **Rules and standards** – The new Act must include clear and objective rules and standards that set the minimum requirements for code development and content, and safeguards to avoid perverse outcomes:
  - Code assessable development must not apply in environmental protection zones (EPZs) or other environmentally sensitive areas (for example, where proposal would affect listed ecological communities or critical habitat);
  - Codes must not apply to matters currently protected in an existing SEPP (such as koala habitat, littoral rainforest, wetlands, sensitive coastal development etc). This is one way of ensuring the protections in current SEPPs are maintained (as noted, this is an area of significant community concern);
  - Codes must not apply in areas of Aboriginal cultural significance;
  - Code assessable development must meet a ‘maintain or improve’ environmental values test, factoring in the specific environmental qualities, amenity and sensitivity of the area;
  - A process is needed to effectively deal with cumulative impacts, zone interfaces and ‘edge effects’ to maintain community amenity and wellbeing across different zones (including consideration of strategic and site-specific mapping, setbacks, and impacts of code-assessed development outside zone boundaries); and
  - Codes must be consistent with ESD, including with reference to specific sustainability measures (see below). Decision makers must apply ESD principles when they promulgate a code.
- **Enforceability** – The new Act 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.
- **Sustainability** – The new Act should require Codes to integrate mandatory and robust sustainability requirements (for example, for energy and water efficiency,

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<sup>155</sup> Green Paper, p 63.

building materials, waste and other environmental impacts, including for retro-fitting existing buildings).

- **Local conditions** – Despite the diversity of NSW local government areas, the current *SEPP (Exempt and Complying Development Codes)* applies uniform categories of exempt and complying development across the State.<sup>156</sup> Local communities and councils must have flexibility to determine what is suitable as complying development in their areas. We welcome the Government’s commitment to ‘work with stakeholders to ensure the codes respond better to local conditions’, and will consider the White Paper’s proposals in more detail.
- **Rural and regional application** – Specific consideration and consultation is needed as to the needs and suitability of code assessable development in areas outside Sydney.
- **Private certifier governance** – The NSW Government must prioritise reforms to private certification *before* expanding code assessment in the new planning system. These reforms must deliver greater quality assurance and independence (for example, independent allocation of certifiers), mandatory certifier qualifications and credentials, mandatory training, reporting and audits; and incentives for council enforcement action and complaint handling.
- **‘Minor variations’** – Private certifiers should not be able to sign off on minor variations to complying development. This has significant potential to undermine application of the Codes, create inconsistencies and inequities at a local level, and potentially undermine the strategically planned goals for an area.
- **Regular review** – Lastly, the new Act should provide for regular independent review of codes to ensure processes, participation, outcomes and governance are effective.

Given the potential significance of codes within the new system, EDO NSW will closely examine proposals for code-assessable development in the White Paper against these criteria.

#### (iv) State significant development – greatest impacts need greatest scrutiny

The initial proposals for major project assessment in the Green Paper pose significant risks to the Government’s intent to restore public trust, transparency and accountability to the planning system; and are cause for significant community concern.<sup>157</sup> As noted, a consistent concern raised by EDO NSW seminar participants was the fear that the new system in practice will simply reinstate some of the worst aspects of Part 3A. In particular:

- strategic level ‘concept plan’ approvals;
- ‘public priority infrastructure’; and
- ‘streamlining Director General Requirements’ including ‘reducing the 28 day consultation period if not required’

These proposals appear to replicate several inequities and governance risks of the former Part 3A. For example, as noted in this submission, there are a range of problems with exempting major projects from environmental concurrences.

The White Paper will need to demonstrate to the community that the Government, in its desire for ‘streamlining’, does not tip the balance too far by removing important checks and balances. The onus is on the NSW Government to prove to the community that the new system will not repeat mistakes of the past. Arbitrary rezoning for state significant

<sup>156</sup> See further joint EDO NSW, NCC & TEC submission (March 2012), pp 41-42.

<sup>157</sup> Green Paper pp 58-59.

development projects has the potential to completely undermine strategic planning. The only way to do this is to include detail of the necessary safeguards and best practice procedural standards in the White paper, Exposure Bill and new Act.

### **Problems with concept plans**

The concept plan process was one of the significant problems with former Part 3A. It allowed projects to be approved as concept plans with only a 'broad brush' description of the development. Detailed information about the development was not needed, and there was no formal opportunity for public participation, and no opportunity to challenge the Director-General's EARs.<sup>158</sup>

A concept plan approval was taken to indicate 'in principle' approval of a proposed project, deferring further detail to later.<sup>159</sup> Furthermore, it was possible to make a single application for approval of a concept plan and approval to carry out the project.<sup>160</sup> This meant that projects could be approved on the basis of concept plans without the need for further assessment. This made it difficult, or even impossible, to assess these projects effectively, since the breadth of the specific impacts of the proposal remained unclear. Further, once concept approval was obtained, there was no opportunity for third party merits appeal for subsequent approvals.

If concept approvals are to be used in the new planning system then these key concerns would need to be resolved. The process for concept planning in the new system must be more robust. Authorities should be able to consider a range of options and be presented with objective evidence on impacts of the proposals *as well as* impacts if the proposal did not go ahead. There should be a clear option for decision-makers to refuse concept plans at an early stage. This reduces costs for developers and provides up front certainty.

### ***Clear legal framework and decision-making criteria needed***

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. In particular, a new planning system must foster better decision making for development proposals by:

- placing clear limits on discretionary decision making;
- incorporating objective decision making tools (such as a 'maintain or improve environmental outcomes' test);
- requiring information to be made publicly available prior to decision-making;
- mandating genuine and iterative public participation;
- requiring decision makers to provide reasons for decisions, and
- ensuring equitable merit appeal rights for decisions.<sup>161</sup>

Any framework for assessing State significant development must include these key features.

Within this framework for achieving ESD, it may be appropriate for State significant proposals to be assessed under additional criteria to those for local development,<sup>162</sup>

<sup>158</sup> Section 75M, EP&A Act (now repealed). See EDO NSW *Major Projects Tool Kit* (2010).

<sup>159</sup> When determining whether to approve a concept plan, the Minister was required to decide what further assessment would be required before final approval was given. Final project applications for stages or elements of the concept plan could be determined by the Minister or by the local council

<sup>160</sup> Section 75M(3A) (now repealed).

<sup>161</sup> See joint submission (March 2012), response to Issues Paper Q's A12 and D31 (pp 38, 62).

provided assessment remains proportionate to potential impacts.<sup>163</sup> Clarity is needed as to how 'state planning principles' will be developed, how they will be applied, and how they relate to state planning policies?

EDO NSW has consistently submitted that the largest projects require the most comprehensive assessment requirements. Full carbon accounting is one example.

#### **Full carbon accounting for major projects**

EDO NSW believes full greenhouse gas (GHG) emissions accounting should be mandatory for State and regionally significant development and infrastructure under the new planning system. Carbon accounting should be one aspect of integrating climate change mitigation and adaptation into planning laws.

This would help to ensure that the true environmental costs of projects are taken into account in the assessment process (consistent with ESD principles). This should flow through from planning into other relevant areas of the law such as mining and petroleum legislation. Where other state or federal schemes already require GHG monitoring and reporting, the planning system could integrate these schemes' findings. We explore integrating carbon accounting and considerations in more detail elsewhere.<sup>164</sup>

#### **(v) Merit assessment' – information, timeframes, independent decision-making panels**

The White Paper will need to reconcile the Green Paper's call for a transparent, evidence-based approach and the suggestion that too much information is sometimes required for decisions.<sup>165</sup> We suggest there is a need to focus on providing decision makers and the public with the *best information available* for a decision. This term could be used in the new Act with a principle-based definition to guide its meaning.

In relation to assessment timeframes,<sup>166</sup> we generally support the Independent Review Panel's recommended notification and public submission periods, and determination periods.<sup>167</sup> These periods balance efficiency and transparency, and match development types. The new Act should permit consent authorities to *extend* consultation periods, where complexity or impacts so warrant this (consistent with Public Participation Charter principles).<sup>168</sup>

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<sup>162</sup> The Green Paper needs clarification on this point (p 58): 'As discussed in Chapter 7, the introduction of state planning principles will provide a better strategic framework in which to assess state significant proposals...' Does 'state planning principles' refer to high-level NSW Planning Policies, or something different?

<sup>163</sup> Green Paper, p 47.

<sup>164</sup> EDO NSW, NSW Legislative Council Inquiry into CSG Impacts, responses to questions on notice (January 2012), pp 10-14, at [http://www.edo.org.au/edonsw/site/pdf/subs/120119csg\\_responses\\_questions\\_on\\_notice.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/120119csg_responses_questions_on_notice.pdf)

<sup>165</sup> 'Matching information requirements to the assessment stage', Green Paper, p 60: 'There is often an excessive amount of supporting information required to be submitted at every stage of a development process...'

<sup>166</sup> Green Paper, p 60, 'Speedy assessments'.

<sup>167</sup> Independent review panel, recommendations 62-64

<sup>168</sup> We note that in the context of the current COAG reform agenda, NSW will need to meet national timeframes at a minimum if seeking Commonwealth accreditation.

In reference to bringing JRPPs into the assessment process,<sup>169</sup> such proposals must avoid compromising these Panels' independence and legitimacy (in reality or appearance); or creating privileged access for proponents compared with communities. This emphasises the importance of sufficient community involvement with independent decision making panels.<sup>170</sup>

Finally, while the Green Paper also notes it is 'important that the decision makers are not involved in designing proposals' in relation to JRPPs, it is unclear how the proposed 'amber light approach'<sup>171</sup> will avoid this problem.

The Green Paper proposes increased use of independent panels. EDO NSW and our clients have had variable experiences with panels and the department in the approval process under the current system, as demonstrated by the case studies summarised below.

### **Case studies – development approvals**

As several recent Planning Assessment Commission (PAC) and departmental decisions demonstrate (below), where large-scale developments across NSW have significant environmental and social impacts, the current decision-making process (by expert panels or otherwise) unduly prioritises economic outcomes over environmental and social outcomes.

- 1) The \$200 million-plus Cronulla Shark's Leagues Club redevelopment (a large mixed-use neighbourhood retail centre and residential estate) was approved in August 2012, despite widespread concerns about its proximity to Towra Point Nature Reserve (a Ramsar-listed wetland), distance from public transport, the planning rationale for increasing densities in that area, as well as the development's size.
- 2) The \$400 million-plus Kings Forest Development involved the rezoning of lands zoned for environmental protection into lands for urban expansion, for 4500 new dwellings, retail and a golf course. In August 2010 the Planning Department approved the development under Part 3A largely as planned – despite overwhelming objection via almost 1400 submissions from community members, council and public authorities, raising concerns about land conversion, species conservation, flood assessment and other issues.
- 3) The \$105 million Kingscliffe development of 127 tourist dwellings, resort and recreational facilities received 40 submissions, of which three were in support. The most common concern objection related to the site impact on 12 threatened species with habitat within the site. The approval was nonetheless granted by the PAC in August 2012, with the number of approved dwellings decreased from 180 to 127.
- 4) The Champions Quarry development in the Lismore LGA is an example of community and council exhaustion and disempowerment – where essentially the same development refused by the local council and the specialist Land and Environment Court was resubmitted under Part 3A and approved by the PAC. There is great disparity between

<sup>169</sup> Green Paper, p 61.

<sup>170</sup> Our March 2012 joint submission with NCC and TEC noted (p 38): 'Some of our members and clients support the use of JRPPs and have seen positive outcomes in decisions made in their region. Others criticise JRPPs for not allowing sufficient time for community input and not having sufficient local representation and local knowledge.'

<sup>171</sup> Whereby consent authorities advise what amendments '...would, if adopted, render the proposal acceptable...' (Independent Review Panel, cited in Green Paper p 61). See Review Panel recommendation 74.

what the Council and the Court found to be unacceptable environment and social impacts,<sup>172</sup> and the findings and decision of the PAC three years later. This undermines community faith in the planning system to deliver sound and consistent outcomes.<sup>173</sup>

- 5) The PAC's recent approval of the Warkworth Mine Extension (currently under legal challenge<sup>174</sup>) will allow the mining of a site set aside as a biodiversity offset (from the original project), and severely impact on Bulga village residents, who have also relied on the offset site as a buffer from the mine. In approving the mine expansion, the PAC made some candid comments about the current balancing of economic, social and environmental factors in the NSW planning system:

*... A number of rural communities have been faced with this situation in the past. In almost all cases the mines have been approved and the communities have either been radically altered in character or become non-viable. With the current price of coal this outcome is almost inevitable when the overall economic benefits of the mines are balanced against local community impacts. It appears that it is only if there are wider negative implications from the mining proposal that refusal becomes a possibility. If this is to change the NSW will need to develop a clear policy position that provides further guidance to decision-makers as to how social impacts on rural villages are to be balanced in the approval process for coal mines.*<sup>175</sup>

For the purposes of the Government's White Paper, these decisions demonstrate:

- the importance of more robust and balanced environmental, social and economic criteria in development decision-making processes;
- the need for panels to be established with clear criteria regarding: independence, membership, expertise, scope of powers and transparency;
- the Land and Environment Court's critical oversight role, including for expert panel decisions;
- that proper community engagement and empowerment (including in public hearing procedures<sup>176</sup>) are crucial to create and maintain public faith in the planning system;
- the need to ensure any expert-based approval system is not geared towards fast-tracking development and 'rights to develop' – and is instead focused on delivering ecologically sustainable development.

Our experience with IHAPs and JRPPs has also been variable as noted.<sup>177</sup>

<sup>172</sup> The Council's refusal was based on 11 grounds including non-compliance with DCP buffers and zoning objectives; unacceptable water and soil stability impacts, and inadequate rehabilitation plans; unacceptable visual impacts; traffic, noise and dust; Aboriginal cultural heritage impacts; economic considerations (such as eco-tourism); and the public interest.

<sup>173</sup> A similar situation arose in relation to the 'Hub' regional waste facility at Molong, which was refused by the Land and Environment Court (*Hub Action Group v the Minister for Planning and Orange City Council* 2008] NSWLEC 116) but later resubmitted and approved as a Part 3A development. See EDO NSW, *The State of Planning in NSW* (2010), p 30, at [http://www.edo.org.au/edonsw/site/policy\\_discussion.php#stateofplanning](http://www.edo.org.au/edonsw/site/policy_discussion.php#stateofplanning).

<sup>174</sup> EDO NSW is representing the Bulga Milbrodale Progress Association Inc. in a merit appeal before the Land and Environment Court against the PAC's decision. See [http://www.edo.org.au/edonsw/site/casework\\_key.php#bulga](http://www.edo.org.au/edonsw/site/casework_key.php#bulga).

<sup>175</sup> Planning Assessment Commission, Warkworth Extension Project (09\_0202), 3 February 2012, pp 8-9 (emphasis added).

<sup>176</sup> At present, minimal procedures have been prescribed for the conduct of a PAC public hearing, although the EP&A Act regulations may make provision for PAC procedures, including for reviews (*Environmental Planning and Assessment Act 1979* (NSW), s 23E). This is significant given that in some circumstances the holding of a public hearing will remove objectors' merits appeal rights to the Land and Environment Court (EP&A Act, s 23F; s 75L(1)(c)).

<sup>177</sup> For example, the Manly IHAP has had favourable reviews – see:

<http://www.manly.nsw.gov.au/planning-and-development/miap-manly-independent-assessment->

The White Paper must also clearly set out the role of panels as distinct from the critical oversight role of the Land & Environment Court.

## (vi) Non-compliant development and spot rezoning

EDO NSW supports robust merits assessment processes. Consistent with our comments on the importance of limiting application of Codes, it is essential that merits assessment remains a requirement for any development where, for example, there are significant environmental impacts.

While the Green Paper emphasises the ‘certainty’ of its strategic planning approach as a key rationale for reform, this intention is contradicted by proposals to give developers additional *flexibility* in two significant areas at the local level – non-compliant development and spot rezoning. As pointed out by the expert planner Nicole Gurrin at the EDO NSW Green Paper seminars, there is an inherent contradiction in the aim to provide ‘flexible certainty.’ Furthermore, Sydney Metropolitan LGAs almost all have a 100% approval rate for DAs, and so ‘uncertainty’ for developers may be overstated.<sup>178</sup>

As the Green Paper notes, ‘Good development assessment processes are characterised by rules and processes for approval which are clear and predictable.’ (p 47) ‘Providing certainty’ is also one of six key corruption prevention safeguards that ICAC puts forward for the planning system.<sup>179</sup> In other words, the community, developers and investors should be able to read the ‘rules’ (which are based on thorough strategic planning) to know the outcome.

By contrast, the current proposals expect the public and their councils to engage in and accept strategic outcomes, while at the same time allowing developers to ‘game the system’ to secure their preferred outcome on individual projects. Furthermore, the Green Paper does not give information about any objective decision-making framework that may apply (see next section).<sup>180</sup>

Taken together, the proposals for development that exceeds local standards, spot rezoning and proponent review rights put at risk the otherwise strong commitments to rigorous strategic planning; and to restoring public confidence in an equitable planning system.

First, development that *exceeds* local development standards can still be considered ‘based on its merits and in the context of plan objectives’.<sup>181</sup> This has the potential to reduce

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panel//. However, JRPPs have had mixed reviews, for example see: <http://inner-west-courier.wherelive.com.au/news/story/panel-ousts-cr-faker>;

<http://www.burwoodscene.com.au/2011/06/18/protest-march-in-croydon/>;

<http://www.streetcorner.com.au/news/showPost.cfm?bid=21068&mycomm=BM>

<sup>178</sup> The presentation slides are available at: <http://www.edo.org.au/edonsw/site/presentations.php>.

<sup>179</sup> ICAC notes: ‘In recent years, there has been an increasing tendency towards departures from the stated requirements. The existence of a wide discretion to approve projects, which are contrary to local plans and do not necessarily conform to state strategic plans, creates a corruption risk and community perception of lack of appropriate boundaries. A re-emphasis on the importance of strategic planning, clear criteria to guide decisions and a consistent decision-making framework will help address this issue.’ (ICAC 2012, p 5)

<sup>180</sup> For example, requiring that a consent authority must not grant approval unless to do so is consistent with achieving ESD. See the Hon B. Preston, ‘Internalising Ecocentrism in Environmental Law’, Speech to the 3<sup>rd</sup> Wild Law Conference, 16-18 September 2011, Griffith University, Queensland, p 4.

<sup>181</sup> See Green Paper, p18.

certainty, clarity and consistency. It also undermines an equitable strategic planning processes, whereby all parties would be expected to comply with the resulting standards.

While we do not support the above proposal, if it is adopted, we strongly recommend there be legislated rights for public participation and for third party merit appeals.<sup>182</sup> As noted in relation to LLUPs above, the Green Paper proposes there will be scope for 'community participation',<sup>183</sup> but does not discuss objector appeal rights in these circumstances.

Second, proponents would have further flexibility under proposals for rezoning. We question the rationale for allowing developer-proposed rezoning in the first place, and the proposed new rights of review if councils or the Planning Department refused a rezoning proposal. There is no clear public benefit to these proposals. Furthermore, spot rezoning undermines strategic planning – the very cornerstone of the Government's reforms.<sup>184</sup>

To summarise our views on non-compliant development and spot rezoning:

- Robust merit assessment is appropriate for developments that have significant environmental impacts, and should not be Code assessed.
- The general right for merit assessment where development applications exceed agreed development standards is currently proposed in the absence of clear public interest justification, and equitable safeguards for the community and environment. The new system must not create unfair, inconsistent local situations that put the profit of a developer ahead of the interests of the community. However, the new system should also avoid creating perverse incentives like encouraging mediocre design standards, and creating barriers to proposing best practice and innovative sustainable designs. The White Paper must include further specific detail on how this balance will be achieved.
- We oppose spot rezoning rights for proponents (exceptional circumstances may justify spot rezoning, such as where new scientific data demonstrates existing zoning would lead to inappropriate planning outcomes).
- If spot rezoning *is* allowed, we oppose the new rights for developers to seek review of council or department refusals, particularly without equitable community rights. Developers should not be given new rights for non-compliant projects, particularly if councils and communities cannot refuse or object to projects that *do* comply.

#### **(vii) Development assessment criteria – Objective tests needed for environmental outcomes**

The Green Paper does not propose statutory assessment criteria that decision makers must comply with in determining development applications. This will be one of the most significant parts of the new planning system, as s 79C of the EP&A Act is currently.

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<sup>182</sup> For example, see Independent Review Panel recommendations 25-26; in addition, ICAC has recommended expanding merit appeal rights for private sector developments that represent a significant departure from existing development standards; or that are significant and controversial (among other things). See Independent Commission Against Corruption, *Anti-corruption safeguards and the NSW planning system* (February 2012), recommendation 16.

<sup>183</sup> 'Merit Assessed Development' and 'merit-related issues and design matters for Code Assessment Development' (Green Paper, Figure 6, p 21).

<sup>184</sup> See further EDO NSW submission (May 2012) on the Government's 'More local, more accountable plan making' Discussion Paper, at [http://www.edo.org.au/edonsw/site/pdf/subs/120504lep\\_changes.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/120504lep_changes.pdf).

The Independent Review Panel sets out a model for statutory assessment criteria, with some reference to s 79C.<sup>185</sup> The Panel included a range of important factors including climate change projections, human health and liveability; important natural resource and heritage considerations; as well as cumulative impacts (at least for ‘merit’ and ‘impact’ assessable development<sup>186</sup>). While we support retaining consideration of the ‘public interest’, we are concerned about the potential for a proposed ‘public *benefit*’ test to distort decision-making and override consideration of significant adverse impacts.<sup>187</sup> The main problem with the Review Panel’s model is that, by listing factors to be ‘taken into account’, the relative weight of these factors remains open to discretion. There is no requirement that baseline environmental standards be met, but only factors considered.

Finally, there are no requirements to consider or apply the principles of ecologically sustainable development (ESD); or an overarching requirement that decision makers exercise their functions consistent with ESD. Overall, the proposed approach does not address several existing inadequacies in integrating environmental protection, natural resource management and ESD considerations into NSW land use planning.

### *A two-step framework for integrated development determination*

EDO NSW, along with NCC and TEC, has called for a more objective decision making framework that would afford better environmental protection, reduce the risk of corruption and substantially improve the legitimacy of the planning system.<sup>188</sup> The proposed scheme, which would replace the existing framework under s 79C, is as follows.

*First*, the decision-making framework would set certain objective environmental standards that must be met before approval is possible. In particular, the new Act could include a rigorous ‘maintain or improve environmental outcomes’ test. The standards captured by this test could ultimately be part of a single methodology covering biodiversity, native vegetation, catchment health and water quality, energy and water use, climate change and pollution.<sup>189</sup> In the meantime, suitably strengthened existing methodologies – such as BASIX, SEPP 65<sup>190</sup> and those applying to Biobanking and native vegetation – could operate as proxies while the single methodology is developed.<sup>191</sup>

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

This two-stage approach is consistent with an overarching objective of implementing ESD, and ensuring that ‘decisions on land use and resource management are made within the

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<sup>185</sup> Independent Review Panel, Vol. 1, recommendations 66-75, with specific focus in rec. 72: *The factors to be specifically taken into account during an assessment process are: Aboriginal heritage; air quality; biodiversity; climate change projections; employment creation; housing affordability; human health and liveability; non-indigenous heritage; social impacts; soils; water and the water cycle.*

<sup>186</sup> Independent Review Panel, recommendation 73.

<sup>187</sup> Independent Review Panel, recommendation 75.

<sup>188</sup> See, for example, joint submission to NSW Planning Review Issues Paper (March 2012), pp 64-65.

<sup>189</sup> Compliance with these methodologies could be deemed to be consistent with ESD under this legislative model

<sup>190</sup> Relating to design quality for residential flat development.

<sup>191</sup> The development of this methodology is obviously an issue of some complexity and would need to be done in close consultation with the community, developers and agencies within Government.

physical capacity of the environment.<sup>192</sup> It also reflects a leading practice identified by the DAF, 'Objective rules and tests'.<sup>193</sup>

### (viii) Independent and comprehensive environmental impact assessment

The Green Paper takes some encouraging first steps for improving environmental impact assessment (EIA). It proposes that (at least for State significant projects) '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>194</sup>

We strongly support these proposals, set out under the Green Paper's proposals for State significant projects. We submit that such safeguards are warranted for all types of EIA. The White Paper must provide details of how the new Act will explicitly address the potential for real or perceived bias in the system, by 'breaking the nexus' of direct payment between proponent and assessor.

Consistent with our previous submissions, we recommend a range of additional improvements to EIA processes to ensure that decision makers have the best information available. The new planning system must endeavour to:

- introduce a framework for the independent appointment of environmental consultants;
- introduce further measures to ensure the integrity of environmental impact statements including:
  - accreditation of environmental and planning consultants,
  - ensuring assessment and scrutiny is commensurate with potential impacts,
  - requiring or allowing decision makers to reject reports that are unsatisfactory,
  - replace public authority 'self-assessment' with a more accountable approach,
  - enhance transparency of EIA as part of renewed community engagement,<sup>195</sup>
  - adopt best practice standards for strategic environmental assessment as noted,
  - external peer-review of environmental assessment reports, and auditing of subsequent operating outcomes, and
  - requiring the Planning Minister to report annually on the EIA system (trends, statistics, impacts and accuracy of predictions);
- expand EIA provisions to require assessment of the cumulative impacts of multiple projects, the potential impacts of feasible alternatives, and climate change impacts (including mitigation and adaptation requirements);

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<sup>192</sup> NSW *Parliamentary Debates*, Legislative Assembly, 17 April 1979, Hansard p 4278, The Hon William Haig, Minister for Corrective Services, regarding the philosophy of the *Environmental Planning and Assessment Act*.

<sup>193</sup> Development Assessment Forum, *A Leading Practice Model for Development Assessment*, p 2: *Development assessment requirements and criteria should be written as objective rules and tests that are clearly linked to stated policy intentions. Where such rules and tests are not possible, specific policy objectives and decision guidelines should be provided.*

<sup>194</sup> Green Paper, p 58.

<sup>195</sup> See, for example, EDO NSW, *Ticking the Box – Flaws in the Environmental Assessment of Coal Seam Gas Exploration Activities* (November 2011). This report contains a number of case studies highlighting inadequacies in the current Review of Environmental Factors (REFs) process.

- strengthen penalties for providing inaccurate information beyond false and misleading statements – to include negligent or reckless inaccuracies; and
- link in best practice assessment with comprehensive baseline data and current environmental accounts, with resource and time allowances to address data gaps.

For more detailed information on improving EIA, including a range of system-wide co-benefits, please refer to Part 1 of our previous joint submission (March 2012).<sup>196</sup>

### **(ix) Equitable third party review and appeal rights: for accountable decisions**

Appeal rights are a fundamental access to justice issue, and a source of community mistrust in the current system, as ICAC explains.<sup>197</sup> The Green Paper's only reference to appeal rights is that 'It is proposed that existing appeal rights under the Act be retained.'<sup>198</sup> We welcome this statement and look forward to further detail in the White Paper.

As outlined comprehensively in previous submissions,<sup>199</sup> the new planning system should:

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

As discussed above, we oppose rights for developers to apply for spot rezoning and new rights of review if rezoning applications are refused, given the new emphasis on upfront strategic planning. As noted, the Green Paper proposes these rights in addition to allowing greater flexibility of development standards.

In proposing more flexible development standards, the Green Paper does not indicate a position on appeal rights for third party objectors. In such circumstances, appeal rights to challenge 'exceeding' proposals would be an essential safeguard to community rights. Both the Independent Review Panel and the ICAC have supported third party appeal rights in this regard. For example, it is critical that merit reviews of state significant development are not precluded by review hearings.

The Independent Review Panel recommended that objectors should have (notifiable) merit appeal rights where they are directly affected by a project that exceeds local standards.<sup>200</sup>

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<sup>196</sup> NCC, EDO and TEC (March 2012), p 20- 'Improvement in the integrity of environmental impact assessment'

<sup>197</sup> 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>198</sup> Green Paper, p 66.

<sup>199</sup> See joint submission (March 2012), from p 75, response to Issues Paper Part E.

<sup>200</sup> Independent Review Panel, recommendations 25-26:

Similarly, ICAC (2012) has suggested that additional third party merits appeal rights should apply to certain categories of private sector development, including development that:

- is significant and controversial (for example, large residential flat developments);
- represents a significant departure from existing development standards; and
- is the subject of voluntary planning agreements.<sup>201</sup>

We strongly emphasise the need to retain existing third party merits appeal rights for the community, and improve these rights to be on a more equitable footing with developers. As extensively documented, third party review rights clearly do *not* result in a deluge of unmeritorious cases coming before the court. While appeal rights on either side are exercised in very few cases,<sup>202</sup> developer appeals make up the vast majority of merit appeals to the LEC. In 2010-11, there were 378 developer appeals and only four objector appeals.<sup>203</sup> In other words, less than 1% of development determinations are appealed overall, and only 1% of *these appeals* are made by objectors. This in part reflects the additional resources available to developers, but also reflects the imbalance of when merit appeal rights are available.<sup>204</sup>

Finally, we welcome the Independent Review Panel's support for 'open standing' for civil enforcement proceedings.<sup>205</sup> We strongly recommend this be supported in the White Paper and expressly provided for in the new Act.

## (x) Fast-tracking 'environmentally friendly' development for the mainstream

The new *Sustainable Planning Act* should adopt processes and standards that facilitate, encourage and reward green innovation.<sup>206</sup> Queensland's 'Green Door' policy (2011) is one

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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>201</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>202</sup> 0.57% (indicative) as a proportion of development determinations. See Department of Planning, *Local Development Performance Monitoring 2010-11*, p 80, Table 6-1, at <http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=29mGD0zKm9c%3d&tabid=74&language=en-AU>.

<sup>203</sup> Department of Planning, *Local Development Performance Monitoring 2010-11*, pp 80-81.

<sup>204</sup> A recent EDO paper 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). This paper documents three case studies where third party merits appeal rights were not available to challenge large and controversial developments, despite significant community concern. The *Huntlee* (residential development) and *Bega Wood Pellet Mill* cases did not involve designated development, and so did not have merits appeal rights. The *Haughton* power stations case involved designated development, but as they were deemed 'critical infrastructure' no merits appeal rights existed.

<sup>205</sup> Independent Review Panel, recommendation 120: *The open standing provisions in section 123 of the Environmental Planning and Assessment Act 1979 be incorporated in the proposed Sustainable Planning Act. An appropriate way should be provided to ensure early and effective intervention against unapproved activities that are having (or have the potential to have) significant impacts in a locality.*

<sup>206</sup> This reflects the ESD principle of 'improved valuation, pricing and incentive mechanisms':

such positive initiative, although one designed to mesh with an existing planning system.<sup>207</sup> With the opportunity to build a new planning system, NSW should aim to go further, and ‘make NSW number 1’ in sustainability.

There is growing industry awareness that sustainable development needs to become the mainstream.<sup>208</sup> However, in recent years, governments of all persuasions have focused on the idea of ‘cutting red tape’ as a means of fast-tracking development and economic productivity.<sup>209</sup> Rarely do ‘fast-tracking’ initiatives target projects on the basis of fulfilling best practice standards of sustainability or environmental sensitivity.

In some cases the opposite is true. Many eco-friendly retrofitting initiatives (for example, introducing residential renewable or low-emissions generation, building houses with recycled material) are currently hampered by planning laws and building regulations.<sup>210</sup> This imposes a regulatory barrier to green businesses, and impedes more efficient use of resources.

To increase incentives for green development, EDO NSW would support measures to encourage proactive innovation in building and planning. For example, Queensland’s small-scale ‘Green Door’ initiative required projects to demonstrate exceptional performance across four principles that identify key sustainability outcomes, and required early community engagement prior to lodging a development application.<sup>211</sup>

NSW should develop similar incentives but on a broader scale – moving from showcase initiatives to the mainstream. Significant efficiency gains can be made through processes that streamline approvals for forward-looking, low-impact, efficient and climate-adapted planning proposals that suit the local community.

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*(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. See Protection of the Environment Administration Act 1991 (NSW), s 6(2)(d).*

<sup>207</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>208</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>209</sup> See for example, COAG Communique, April 2012.

<sup>210</sup> As with restrictions on LEPs imposing more stringent housing construction standards than BASIX (see above).

<sup>211</sup> The policy aimed to accelerate decisions for development proposals that are identified to be the most sustainable in Queensland, emerged from a 2010 cross-sectoral summit on population growth. 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.

## **Development assessment - Summary of recommendations**

**Recommendation 19** - The expanded review rights for developers must be matched by equal review rights for third parties. These review rights must be set out in the new Act.

**Recommendation 20** - The new Act must include clear requirements for public consultation and apply the Public Participation Charter to all development assessments, and the development and amendment of Codes.

**Recommendation 21** - Concurrence requirements must be retained for large projects and any proposal where there is a significant environmental impact or cultural heritage issue involved.

**Recommendation 22** - Concept planning processes must not preclude further public consultation or review at a later stage.

**Recommendation 23** - Strategic compliance certificates should not be part of the new planning system due to the risk of undermining local strategic planning, unless endorsed by a local community.

**Recommendation 24** - Codes must only apply to genuine low risk low impact development. Codes must not apply to areas of high conservation value, environmental sensitivity, cultural heritage significance etc. Clear thresholds and parameters for the application of Codes must be set out in the new Act.

**Recommendation 25** - Clear legislative requirements for assessing State significant development must be set out in the new Act, with best practice standards for public consultation, independent environmental assessment, and review.

**Recommendation 26** - Consultants who undertake environmental assessment must be qualified, accredited and independently appointed to assess projects.

**Recommendation 27** - Mandatory environmental assessment criteria must be set out in the new Act.

**Recommendation 28** - The new Act should require all developments meet objective test of whether a development maintains or improves environmental outcomes.

**Recommendation 29** - Independent decision-making bodies must be established and function in accordance with clear and transparent legal requirements set out in the Act.

**Recommendation 30** - Mechanisms to fast-track innovative “green” design should be considered further in the White Paper.

**Recommendation 31** - The new Act must have an open standing provision for civil enforcement proceedings.

## 7. Infrastructure planning and coordination

EDO NSW does not propose to comment in detail on the Green Paper's proposals for infrastructure planning and coordination in Chapter 7. We acknowledge the need for integrated upfront planning in this regard, and see benefits in providing for infrastructure such as for early identification of future public transport infrastructure needs. This includes a need to clearly explain these potentially complex interactions, so the community can develop informed opinions and provide feedback.

The Green Paper proposes that Growth Infrastructure Plans will fit under Sub-regional Delivery plans in the planning hierarchy. We submit that the Public Participation Charter must apply to the development of Growth Infrastructure Plans and that local communities be provided with clear visual information, evidence supporting the need for proposed projects, and alternative scenarios to consider. There also needs to be better consideration of how existing infrastructure will meet the needs of higher density development and commitment of funding to infrastructure before new sites can be developed.

### *'Public priority infrastructure'*

The Green Paper signals an expedited approvals process for projects that are deemed to be 'public priority infrastructure'. 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. Major public infrastructure projects can have significant environmental and social impacts, just as private projects do – and problems are likely in relation to 'concept stage' approval as have arisen in the past. As noted, concept approvals based on scarce information and resulting in reduced review rights have been a primary cause of community alienation.<sup>212</sup>

The White Paper will need to clarify what criteria and governance safeguards would be applied to the public priority infrastructure proposal, and how it will avoid 'compromising community and environmental outcomes'. For example, if the proposal goes ahead, any such projects should have to demonstrate to an independent body that they comply with an 'impact hierarchy':

- first that environmental impacts have been avoided wherever practicable,
- second, that unavoidable impacts been mitigated to the extent practicable, and
- third, if necessary, how robust offsetting may be used to offset eligible impacts.<sup>213</sup>

### *Recognising the value of 'green infrastructure'*

Consistent with triple bottom line planning outcomes, we also submit that the focus on infrastructure integration should recognise the value of 'green infrastructure'.<sup>214</sup> 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

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<sup>212</sup> See above, 'State Significant Development – greatest impacts require the greatest scrutiny'.

<sup>213</sup> See ANEDO, 'Best practice standards for environmental regulation', at Appendix A.

<sup>214</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>.

people's health, stimulate a city's economy, raise community spirit and further social integration.<sup>215</sup>

Strategic planning needs to properly value 'green infrastructure' and integrate it into broader infrastructure planning and funding (including the State Infrastructure Strategy, regional plans and Growth Infrastructure Plans<sup>216</sup>). 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>217</sup>

#### **Infrastructure planning and coordination - Summary of recommendations**

**Recommendation 32** - The Public Participation Charter must apply to the process of developing Infrastructure Growth Plans.

**Recommendation 33** - The White Paper will need to clarify what criteria and governance safeguards would be applied to public priority infrastructure proposals.

**Recommendation 34** - Strategic planning needs to properly value 'green infrastructure' and integrate it into broader infrastructure planning and funding, including the State Infrastructure Strategy, regional plans and Growth Infrastructure Plans.

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<sup>215</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>216</sup> See Green Paper, p 72.

<sup>217</sup> See AILA, *Landscape Principles*, at <http://www.aila.org.au/landscapeprinciples>.

## 8. Delivering a new planning system

The Green Paper outlines a number of positive reform proposals in relation to implementation and accountability in the final Chapter. These proposals include:

- Commitments to greater evidence-based planning and policy development, and cultural change for greater transparency, service and engagement;
- Improved transparency, monitoring and accountability, including via:
  - plain-English materials and better explanation of engagement opportunities,
  - increased use of online development tracking,
  - clearer agency accountabilities, performance monitoring and regular review;and
- A 'CEOs Group' involving key agencies is proposed as a governance mechanism for the planning system

We strongly support these proposals, but we note that given the overlap of environmental and planning issues, one notable omission from the CEOs group is the Chief Executive of the Office of Environment and Heritage

In addition to detailing these proposals, the White Paper needs to deliver a range of further measures, consistent with the key principles in our previous submissions. In particular:

- (i) Improved accountability and enforcement**
- (ii) Sustainability indicators and reporting**
- (iii) Transitional arrangements**

We outline these areas in more detail below. For full details please see our joint submission to the Planning Review Issues Paper (March 2012), in particular Chapter E.

### **(i) Improving accountability, compliance and enforcement**

#### *Accountability*

EDO NSW has outlined several ways to improve checks and balances in the planning system to ensure greater transparency, accountability and probity, in this and previous submissions to the Planning Review.<sup>218</sup> These include:

- placing greater limits and objective criteria on discretionary decision making;
- requiring information to be made publicly available, prior to decisions being made;
- deeper community engagement and mandatory public consultation processes;
- breaking the nexus between developers, environmental consultants and private certifiers, to bring greater independence and rigour to assessment and certification;
- expanded third party merits appeals to promote greater equity, access to justice, lower corruption risks and better decisions;
- a greater range of orders and penalties to improve compliance and enforcement; and
- improved transparency, monitoring and reporting on objectives, decisions, compliance and enforcement.

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<sup>218</sup> See, for example, 'Transparency and evidence-based decision making' above; see also NCC NSW, EDO NSW and TEC, joint submission (March 2012), pp 95-96, response to Issues Paper question 'F6'.

EDO NSW also strongly supports the tenor of ICAC's recommendations in its report on *Anti-corruption safeguards and the NSW planning system* referred to elsewhere in this submission.<sup>219</sup> We welcome the Independent Review Panel's analysis of ICAC's recommendations,<sup>220</sup> and look forward to further consultation on the detailed design and implementation of accountability safeguards at the White Paper stage.

### **Compliance and enforcement**

EDO NSW makes the following recommendations for improving on compliance and enforcement in the new planning system, which should be addressed in the White Paper:

- With respect to **penalties**:
  - increase maximum penalties available for certain breaches of the planning regime, with more specific penalty ranges for different offences,
  - include a power to suspend or revoke an approval for breaches of environment conditions,<sup>221</sup>
  - adopt a tiered penalty system in the Act, setting a range of penalty categories relative to seriousness, to inform the community and guide sentencing,
  - ensure greater equity between penalties (and powers) for local council enforcement and departmental enforcement, and
  - strengthen penalties for inaccurate information beyond 'knowingly false or misleading' to negligent or reckless material inaccuracies.
- With respect to **orders and offences**:
  - a new, flexible range of orders should be made available to enforcement authorities and courts, with corresponding remedies for non-compliance, and
  - further research on the use and adequacy of different existing offences would assist the design the enforcement system under the new planning Act.
- To increase **transparency, public confidence and awareness of enforcement**, the *Sustainable Planning Act* should require enforcement authorities (councils and departments) to:
  - adopt and publish enforcement policies,
  - publish all compliance data provided by development proponents (online wherever possible)<sup>222</sup>
  - publish data on complaints received and investigated, and
  - report on the exercise of their enforcement powers (with support and resourcing).

### **(ii) Sustainability indicators and reporting**

The efficacy of the NSW planning system should not be judged solely on its ability to achieve development approval rates or numerical employment and housing indicators. As the Productivity Commission has noted, 'a combination of several benchmarks is often needed

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<sup>219</sup> Available at [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au). This report lists six key corruption prevention safeguards and makes 16 recommendations, many of which reinforce the points above: providing certainty; balancing competing public interests; ensuring transparency; reducing complexity; meaningful community participation and consultation; and expanding the scope of third party merit appeals.

<sup>220</sup> Independent Review Panel, Vol. 2, Part 5.

<sup>221</sup> For example, see powers under the EPBC Act and the Mining Act (NSW).

<sup>222</sup> For example, s 320(2) of the *Protection of the Environment Operations Act 1997* (NSW) states that 'The EPA or other regulatory authority may disclose monitoring data by publishing it in such manner as it considers appropriate.' The new Act should include provisions that maximise transparency.

to reflect system performance...'.<sup>223</sup> Fast approvals that deliver poor quality, high risk or unsustainable development are not in the public interest. More fundamental is the planning system's effectiveness in producing ecologically sustainable outcomes that maintain or improve our environment and wellbeing.

This requires a genuinely 'new approach' to reporting of strategic planning and development outcomes, in a way that integrates urban sustainability indicators, NRM goals and community engagement. Progress against these factors should be published and reported.

### **Centralised environmental information system to aid monitoring and reporting**

Sound strategic planning must be based on the best available science and other information, and full cost accounting for environmental values and ecological services. The new planning system provides the opportunity to comprehensively rethink how the Government deals with planning and environmental information.

Strategic planning for NSW would benefit greatly from a centralised system – to collate, share and publish data across sectors in ways that promote accuracy, transparency and evidence-based decision making.<sup>224</sup> Government agencies already hold a substantial amount of information that could feed directly into such an information system, including from catchment management authorities, local councils, state and federal departments.<sup>225</sup>

This system could be expanded to develop and monitor sustainability indicators and NRM targets, which arm decision makers with information on the value of biodiversity and ecological services.<sup>226</sup> Progress could be published in annual reports – for local, regional, and State Plan and alongside traditional economic indicators in the State budget.

### **State environmental accounts**

The NSW Planning Review provides a unique opportunity for the NSW Government to commit to an integrated system of State environmental accounts that links to natural resource management targets.<sup>227</sup> This commitment should include resources and timeframes for development, and link clearly with high-level planning documents such as Regional Development Plans.

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<sup>223</sup> 'For example, while longer development approval times may seem to be less efficient, if they reflect more effective community engagement or integrated referrals, the end result may be greater community support and preferred overall outcome.' Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* research report (April 2011), Vol. 1, p xxviii.

<sup>224</sup> See EDO NSW, NCC & TEC joint submission on the Planning Review Issues Paper (March 2012), p 19.

<sup>225</sup> For example:

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

See EDO NSW, NCC & TEC submission to NSW Planning Review Issues Paper (March 2012), pp 52-53.

<sup>226</sup> See for example, *The Economics of Ecosystems and Biodiversity* (TEEB) project, at [www.teebweb.org](http://www.teebweb.org).

<sup>227</sup> For biodiversity, land, water and communities. See NSW Natural Resources Commission, 'Statewide Targets', at <http://www.nrc.nsw.gov.au/WorkWeDo/StandardAndTargets/State-wideTargets.aspx>.

While environmental accounts are not yet well established in Australia, there are initiatives underway at the federal level,<sup>228</sup> including as recommended by the Hawke Review of the EPBC Act.<sup>229</sup> In the UK, an Independent Committee has been established ‘to advise the Government on the State of English Natural Capital’.<sup>230</sup> There is no more significant way for the NSW Government to demonstrate its commitment to triple bottom line outcomes than to develop and establish a system of State environmental accounts.

### (iii) Transitional provisions

Transitional arrangements from the EP&A Act to the new Act require careful consideration as strategic plans, codes and policies are consulted on and finalised. The Green Paper suggests transitional issues will be addressed further in the White Paper.<sup>231</sup>

The Green Paper cites with approval the Independent Review Panel’s comments that strategic planning ‘must be a process that is gradually implemented in partnership’ with many stakeholders.<sup>232</sup> EDO NSW agrees with this assessment. Strategic planning, data gathering, meaningful engagement and code formulation will necessarily take time.

However, as noted, the Green Paper’s proposals for ‘strategic compliance’ in the interim pose a considerable risk of pre-empting these processes, and undermining community trust in a balanced and equitable planning system. The White Paper will need to recalibrate these proposals, to assure the public that the planning system and transitional arrangements will place ‘Community and public interest... at the centre’.<sup>233</sup>

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<sup>228</sup> See Australian Bureau of Statistics, ‘Completing the Picture - Environmental Accounting in Practice’ media release, 10 May 2012, at <http://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbyReleaseDate/7F28835E079362EACA2579F900124A79?OpenDocument>.

<sup>229</sup> See *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act* (August 2011), recommendation 67 (‘accepted in principle’), pp 109-110. See also Hawke, A. (2009), Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, Final Report, October 2009, Chapter 19; Wentworth Group of Concerned Scientists *Accounting for Nature: a Model for Building the National Environmental Accounts for Australia*, (2008) .

<sup>230</sup> See UK environment department website, at <http://www.defra.gov.uk/naturalcapitalcommittee/about/>.

<sup>231</sup> Green Paper, p 83.

<sup>232</sup> That is, ‘...between State and local governments, the development industry, conservation and social advocacy networks.’ See Green Paper, p 29.

<sup>233</sup> Green Paper, p 19.

### **Delivering a new planning system – summary of recommendations**

**Recommendation 35** - The CEO of OEH must be part of the CEOs Group.

**Recommendation 36** - Additional mechanisms for ensuring improved accountability and enforcement, including a flexible range of regulatory tools and penalties to address planning breaches, should be explicitly included in the new Act.

**Recommendation 37** – The White Paper should detail the comprehensive range of sustainability and performance indicators by which the new system will be assessed.

**Recommendation 38** - Compliance and enforcement policies and statistics should be published in a consistent and comparable form.

**Recommendation 39** -To embed a commitment to ESD, performance monitoring should include a range of sustainability indicators that are more sophisticated than the ‘area of environmental land protected’.

**Recommendation 40** - Transitional arrangements from the EP&A Act to the new system must be in place while strategic plans, codes and policies are finalised.

## Attachment A: Best practice standards for planning and environmental regulation

Following COAG announcements in April 2012 to streamline environmental assessment and approvals at the federal and state levels, ANEDO) released a briefing paper on *Best practice standards for environmental regulation* (June 2012).<sup>234</sup> Below is an excerpt of this paper.

For the purposes of this paper, “best practice standards” is taken to mean those elements/provisions that must be clearly articulated in legislation (both state and federal) to enshrine best practice environmental planning and assessment processes.

This section sets out 10 high-level elements that should form the basis for effective environmental and planning laws, state and federal:

1. Clear objects that prioritise ecologically sustainable development (ESD)
2. Objective test for good environmental outcomes
3. Independent assessment
4. Comprehensive assessment based on best information available
5. Projects must minimise environmental impacts (impact hierarchy)
6. Best practice standards for strategic environmental assessment processes
7. Oversight and review
8. Public participation
9. Compliance and enforcement
10. Monitoring and review

These principles aim to ensure that our natural capital is sustained for the benefit and appreciation of present and future Australians. In giving effect to these elements, governments and communities will also protect the social and economic benefits of a healthy environment, which all of us rely upon.

1. Clear objects that prioritise ecologically sustainable development (ESD)

Environment protection and planning legislation must set out clear objectives, which prioritise ecologically sustainable development (ESD) as the overarching aim.<sup>235</sup> These objectives must then be consistently and rigorously applied to all decisions and actions to implement the legislation.

2. Objective test for good environmental outcomes

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<sup>234</sup> Australian Network of Environmental Defenders Offices *Background Briefing Paper: Environmental Standards & Their Implementation In Law* (June 2012), at <http://www.edo.org.au/policy/policy.html>.

<sup>235</sup> See for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), sections 3 and 3A; see also *Protection of the Environment Administration Act 1991* (NSW), s 6. The aim of ESD is to achieve a level of development that meets the needs of the present without compromising the ability of future generations to meet their own needs. See World Commission on Environment and Development, *Our Common Future* (1987), at 43. Principles of ESD include:

- Applying the precautionary principle (to deal with environmental threats where there is scientific uncertainty)
- Intergenerational and intra-generational equity (accounting for the needs of present and future generations)
- Conservation of biological diversity and ecological integrity (as a *fundamental* consideration);
- Improved environmental valuation, pricing and incentive mechanisms (for example, internalising environmental costs and adopting the ‘polluter pays’ principle).

All projects must be assessed against an objective and consistent test, such as whether the project will “maintain or improve environmental outcomes”.<sup>236</sup> Robust, science-based methodologies and assessment tools should be developed to objectively and consistently apply the test to development proposals. Such a test will help ensure Australia develops in an ecologically sustainable way.

### 3. Independent assessment

Environmental assessment must be done by independent accredited experts, rather than by someone appointed and paid by the proponent. To increase transparency and remove any perceptions of bias, the experts should be assigned to a project by an independent body.

### 4. Comprehensive assessment based on best information available

Projects with the largest potential impacts should attract the greatest scrutiny. In addition to assessing the direct environmental impacts of a proposal, environmental assessment must be expanded to include:

- assessment of cumulative impacts of multiple projects
- assessment of climate change impacts (including mitigation and adaptation requirements), and
- assessment of the potential impacts of feasible alternatives.

Independent assessors and decision-makers must be provided with the best information available. Best practice assessment must therefore be underpinned by comprehensive baseline data and current environmental accounts, with resource and time allowances to address data gaps.

### 5. Projects must minimise environmental impacts (impact hierarchy)

Development proposals must demonstrate that they comply with an ‘impact hierarchy’:

- first that environmental impacts have been avoided wherever practicable
- second, that unavoidable impacts been mitigated to the extent practicable, and
- third, if necessary, how offsetting may be used to offset eligible impacts.

Any proposed biodiversity offsetting must comply with clear legal requirements including:

- avoidance of ‘red-flag’ environmental values that cannot be offset
- equivalency of values that may be offset (‘like for like’), and
- ensuring that any offsets are protected in perpetuity (including from future development).

Offsetting schemes that do not meet these criteria must not be accredited.

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<sup>236</sup> For example, the Hawke review recommended a robust, scientific ‘improve or maintain’ test (with regard to environment and heritage) be adopted when approving a class of action under an endorsed policy, plan or practice. See Report of the Independent Review of the EPBC Act (2009), recommendation 6(2)(b)(ii). Several NSW environmental assessment processes adopt a test that actions cannot be approved unless they ‘improve or maintain’ environmental outcomes. This includes the Biobanking offsets scheme under the *Threatened Species Conservation Act 1995* (NSW) and the *Native Vegetation Act 2003* (NSW) which regulates land clearing. Similarly, a standard of “net environmental benefit” has been put forward in Western Australia and Victoria in the context of biodiversity offsetting. See eg, EPA Victoria, *Discussion Paper: Environmental Offsets* (2008), [http://epanote2.epa.vic.gov.au/EPA/publications.nsf/2f1c2625731746aa4a256ce90001cbb5/cfa2d441a0e31fb7ca2574670004b739/\\$FILE/1202.3.pdf](http://epanote2.epa.vic.gov.au/EPA/publications.nsf/2f1c2625731746aa4a256ce90001cbb5/cfa2d441a0e31fb7ca2574670004b739/$FILE/1202.3.pdf)

## 6. Best practice standards for strategic environmental assessment processes

Strategic assessment of larger areas and multiple projects must be undertaken according to rigorous, objective and transparent legislative requirements (see Part C below). Strategic assessment must:

- be based on comprehensive and accurate mapping and data
- be undertaken at the earliest possible stage
- assess alternative scenarios and cumulative impacts
- involve ground-truthing of impact assessment
- involve extensive public consultation, and
- complement, but not replace, site-level impact assessment.

Any Commonwealth accreditation framework must ensure that the relevant strategic assessment meets strict, best practice criteria in terms of process, outcome and ongoing implementation. Accreditation can only occur when all criteria are met and it is demonstrated that the assessment will ensure ongoing maintenance or improvement of environmental values.

## 7. Oversight and review

Consistent with Australia's international obligations, and in order to accommodate new and emerging information, the Australian Government must retain a review or "call-in" power over state-based projects, including those done under a strategic assessment or bilateral agreement. An expert 'Environment Commission' should be established to undertake an independent review role (see Part B below).

## 8. Public participation

Environmental assessment and planning laws must clearly prescribe mandatory public participation at each stage – in relation to strategic planning, strategic assessment and individual development assessment. All information relating to environmental assessment and decision-making must be publicly available. Sufficient timeframes must be set out in legislation to allow active, iterative, and considered participation from local communities. Involving the community should go beyond traditional 'inform and consult' models, and encourage best practice engagement that delivers more widely acceptable outcomes. Specific requirements must be made for consultation with Indigenous Australians wherever a proposal or assessment involves cultural heritage.

## 9. Compliance and enforcement

A range of regulatory tools and penalties should be available to address breaches of legislation. To ensure transparency and accountability, all legislation should include 'open standing' to bring proceedings for breaches. Statistics on compliance and enforcement should be published regularly, in a consistent and comparable form.

## 10. Monitoring and review

The efficacy of all environmental assessment and planning laws must be periodically and independently reviewed – to assess whether the relevant processes, implementation and decision-making are improving or maintaining environmental values, and whether the legislation is achieving ecologically sustainable development. There must also be specific legislative requirements for regular review of any accredited plan or policy.