



Submission to the Review of the NSW Planning System (Stage 1)

4 November 2011

The EDO Mission Statement:

To empower the community to protect the environment through law, recognising:

- the importance of public participation in environmental decision making in achieving environmental protection
- the importance of fostering close links with the community
- the fundamental role of early engagement in achieving good environmental outcomes
- the importance of indigenous involvement in protection of the environment
- the importance of providing equitable access to EDO services around NSW

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EXECUTIVE SUMMARY

The Environmental Defender's Office NSW (EDO) is a community legal centre specialising in public interest environmental law. The EDO welcomes the opportunity to provide input to the independent review panel on stage one of the NSW planning review.¹ The EDO has a long history of engagement with the planning system in NSW. Moreover, we have commented extensively in relation to recent tranches of reform that have significantly restructured the NSW planning system.²

EDO's Vision for a new Planning System

The EDO's vision for a NSW planning system is one that:

- **Places sustainability at the centre** of planning and development decisions.
- Ensures **early, high and sustained levels of public engagement on decision-making**.³
- Mandates **engaging and effective processes for sustainable strategic land use planning** – coordinated and translatable across state, regional and local levels.
- Improves the **liveability of NSW communities** – including a healthy environment; good public health; fair choices for transport, work and lifestyle; affordability; and a sense of community.
- **Protects and enhances ecological integrity and services** for public benefit, now and in the future.
- **Requires accountability, integrity and transparency of all participants** – including decision-makers, government agencies, development proponents and objectors.
- **Provides for certainty of outcomes** in a way that meets and manages diverse community expectations.

The EDO's vision is based on strategic planning that gives appropriate weight to environmental, social and economic factors, and gives effect to those considerations at the State, regional and local level in accordance with the principles of ecologically sustainable development (ESD).

Achieving the vision – Principles to underpin a new Planning Act

The EDO has developed 10 principles which it believes should inform and underpin a new approach to planning in NSW. These principles have been developed through the EDO's analysis and review of planning laws over a number of years up to the present.

¹ See www.planningreview.nsw.gov.au.

² EDO Policy submissions on planning law from 2003-2011 can be found at <http://www.edo.org.au/edonsw/site/policy.php#4>.

³ This was a common finding regarding successful cities comparable to Australian cities, in J. Kelly, "Cities: Who Decides?" (2010), Grattan Institute, available at www.grattaninstitute.edu.au.

The philosophy underpinning these principles aims to **place sustainability at the centre** of planning and development decisions; to **genuinely engage the community** in plan-making and development decisions; and to **restore balance, transparency and accountability** to the planning system.

To inform stage 1 of the planning review, the independent review Panel has called for comment across four broad areas. We have grouped our 10 key principles and expanded upon them under each of these areas. In doing so, we note there is considerable cross-over between these areas, particularly in relation to public participation, transparency and accountability and review and appeal rights.

A – Objectives and Philosophy

- **Guiding principle: Implementing ecologically sustainable development (ESD)**
- EDO supports a new planning system that is framed by the overarching concept of ecologically sustainable development (**sustainable development** or **ESD**).
- The system needs to move beyond merely seeing ESD as a consideration in decision-making.
- A new planning Act would clearly state that ESD is its overarching objective, and that social, cultural and economic matters must be managed within sustainable boundaries.
- All decisions, powers and functions under the Act should be exercised to achieve ESD as the overarching objective; and the principles of ESD should assist decision-makers to achieve that objective.
- Strategic plans must describe how ESD will be operationalised through planning decisions for regional and local areas.
- In brief, the principles of ESD include:
 - the precautionary principle
 - inter-generational equity
 - conservation of biological diversity and ecological integrity
 - improved environmental valuation, pricing and incentive mechanisms, and
 - the polluter pays principle.

B – Plan-making

- **Guiding principle: A focus on Strategic Planning**
- A new Act should have good strategic planning at its core, from which all other decisions flow, instead of ad hoc developer-driven planning.
- The starting point for implementing ESD is to have comprehensive medium and long-term strategic planning based on comprehensive local data.
- State-level strategic planning can provide useful goals at the big-picture level, but implementation is dependent on related legislation and disciplines.

- Regional strategies – done well and informed by proper biodiversity mapping, and incorporating climate-ready strategies – are key documents, and should have legislative weight.
- Local Plans should complement and supplement regional plans with specific local considerations.
- There are multiple benefits from outlining clear regulatory environmental assessment and public consultation requirements for strategic planning, and from taking the time to produce high quality strategic planning. These benefits include:
 - long-term sustainability for a region
 - buy-in of local communities, and
 - plugging the economic drain associated with conflicts over land-use planning.
- A new planning Act should therefore stipulate processes for strategic planning (including mandatory public consultation and environmental assessment processes), give appropriate legislative weight to plans, ensure decision-making consistency with approved plans, and include review provisions to keep plans up-to-date and track cumulative impacts.

- Guiding principle: Genuine, appropriate and timely public participation

- Community consultation and public participation is recognised both domestically and internationally as an important and integral part of environmental decision-making. It should be a core operating principle of a new planning Act. Genuine public consultation can avoid bad decisions, and improve other decisions through appropriate local conditions.
- Open, early engagement with local communities improves decision-making processes, minimises conflict during the assessment process and improves local community acceptance of proposals.
- In particular, ‘open standing’ is integral to the effective, transparent operation of planning laws, holding decision-makers to account and ensuring decisions are properly made.
- Open standing has been available in the NSW Land and Environment Court for over 30 years, and has not led to the ‘floodgates’ being opened to excessive or inappropriate litigation.
- Providing merits appeal rights for third parties (including checks and balances to ensure that vexatious merits appeals do not occur) has the capacity to deliver better environmental outcomes as well as increasing the transparency and accountability of decision-making.

- Guiding principle: Making planning law climate change ready

- A new planning Act should require:
 - a comprehensive assessment of the climate change implications of all development;
 - the incorporation of climate change considerations into strategic planning; and

- the introduction of best practice criteria and standards that all proposed development must comply with in order to proceed.
- These provisions must apply to all categories of development.
- Climate change (and its cumulative impacts) must be a mandatory consideration under a new planning Act.

C – Development assessment

- Guiding principle: Transparency and accountability for all development, including major public projects

- The new planning system should require accountability, integrity and transparency of all participants – including decision-makers, government agencies, development proponents and objectors.
- It is appropriate that a new planning Act has a part designed to deal with assessment of major public infrastructure projects.
- As these projects will be large and have significant environmental, social and economic ramifications, they should attract a more rigorous assessment process, with comprehensive public participation and review rights, and consideration of cumulative impacts.
- There must be clear parameters and provisions to prevent ‘forum shopping’ by developers.

- Guiding principle: Improving the objectivity, credibility and cumulative impact review of Environmental Impact Assessment

- A new Act should set out clear mandatory minimum requirements for environmental impact assessment (EIA), to ensure all assessments under the Act are objective and independent.
- The EIA process must be overhauled to ensure independent accredited experts are allocated to assess projects based on their expertise, and not chosen by proponents.
- The largest projects, such as public infrastructure and mining projects, should attract the highest level of environmental assessment.
- The Act should provide for development and use of objective assessment methodology tools, to ensure objective and consistent decision-making based on robust and objective scientific criteria.
- The Act should require decision-makers to consider a project’s cumulative impacts.

- Guiding principle: Ensuring integration with other environmental legislation

- A new planning Act should complement related environmental and natural resource management legislation, and not override it. A simple, integrated, concurrence system is an essential part of a whole-of-government approach to implementing ESD.
- Concurrences should be required for developments that affect issues under related legislation (eg, threatened species, water), and the Department of Planning should defer to other departments that have relevant expertise in assessing environmental impacts.
- We recognise the need for efficient development assessment processes within this framework. The concurrence system should make clear what is expected of developers, including on what information they must provide in the process.
- It should also promote efficient cross-department communications. This could include a ‘one-stop-shop’ approach that facilitates inter-agency approvals that are comprehensive, but not convoluted.

- Guiding principle: Applying a meaningful ‘maintain or improve’ test to key developments

- Several NSW Acts now contain the legislative test that actions cannot be approved unless they ‘improve or maintain environmental values’.
- In the 2009 Hawke review of the *EPBC Act* (Cth), it was suggested that such a test be adopted nationally. The test was first established in relation to broadscale clearing of native vegetation on rural land under the *Native Vegetation Act 2003* (NSW).
- There is a strong equity argument that if rural landholders have their on-farm development constrained by this test, then urban developers should be equally constrained unless they can show their development maintains or improves environmental outcomes.
- A new Planning Act should apply this test to urban areas, and require a transparent and objective assessment methodology be developed to ensure the consistent application of the test.
- Any environmental offsetting must be done according to a clear, transparent and scientifically justifiable regulatory regime, based on ‘like for like’ offsets.

D – Administrative procedures

- Guiding principle: Recognising the pre-eminent role of the Land and Environment Court

- The NSW Land and Environment Court is internationally recognised as a best practice jurisdiction regarding ESD. As a specialist body, it is best equipped to deal with the difficult task of translating ESD into practice. It has three decades of

experience in hearing planning and development issues and therefore has unparalleled expertise and well established processes and principles.

- A new planning Act must recognise the Land and Environment Court's primacy as a review body, over and above any specialist commissions or panels (such as PACs or JRPPs⁴) and also jurisdiction of other Courts (such as the Supreme Court). This is essential for the application of consistent, transparent, and impartial decision-making standards.

- **Guiding principle: Regular review of the Act**

- There must be a clear process set out in the new planning Act for independent review
- Regular review should also be built-in to strategic plans, regulations and environmental planning instruments

Each of these areas and guiding principles are explored below.

Background – where have we come from?

In 1979, the planning system was complex, inconsistent, highly politicised, ad hoc instead of strategic, and disconnected from local communities – often resulting in poor environmental outcomes. The response to these problems at the time was to introduce a new, forward looking planning Act. Unprecedented at the time, the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) was underpinned by principles of genuine public participation, transparency, accountability, consistent decision-making and comprehensive environmental assessment.

The Act established in 1979 was one of most progressive in the world at the time, as it recognised the value of **genuine public participation** – not only in terms of democracy and good governance but the implicit recognition that community consultation leads to better decisions. Similarly, the introduction of a system of **environmental impact assessment** meant that in theory, all potential impacts of a development were identified and considered in the determination of development applications. This was consistent with ecologically sustainable development and the precautionary principle.

Three decades on, these principles have been buried under layers of incremental amendment resulting in substantial change. The EP&A Act is now a more complicated and multi-layered piece of legislation, accompanied by Regulations and a myriad of environmental planning instruments, regional strategies and planning policies. There have been at least nine major tranches of reforms since 1993. Many mark the turning point as 2005, with the introduction of a fast-tracking major project assessment system, 'Part 3A'.

In the last few years, significant changes to plan-making, development assessment,

⁴ Planning Assessment Commission (PAC), see www.pac.nsw.gov.au; Joint Regional Planning Panels (JRPPs), see www.jrpp.nsw.gov.au.

exempt and complying development and private certification have been implemented. Efforts have been made to make the planning system in NSW more consistent (for example, the standard Local Environment Plan) and more strategic (for example, Regional Strategies). There are various layers of development assessment and review by at least five different bodies: the Minister for Planning, the Planning Assessment Commission, Joint Regional Planning Panels, local councils, and the Land and Environment Court.

In the final stages of the former State Government, the planning system had once more become complex and highly politicised, disconnected from local communities, and resulting in poor environmental outcomes.

In 2010 the EDO prepared two major commissioned reports, *Reconnecting the Community with the Planning System* (August 2010) and the *State of Planning in NSW* (December 2010). The *State of Planning* Report concluded with the clear need to overhaul the planning system with a new regime.⁵ It provided a detailed overview of the existing system, the development assessment process, and case studies to illustrate ongoing problems with the EP&A Act. For the purposes of stage 1 of the current review, this submission will not revisit all of the issues canvassed in those reports. Rather, they remain relevant and useful resources for what went wrong with the planning system and how we can work to fix it.

2011 has been a particularly eventful year in planning law. We have seen a change of State government; the repeal of the major symbol of the State's planning dysfunction, Part 3A; and the commencement of a revised system for major project assessment in October 2011, which retains some Part 3A features and improves on others. Importantly, in July we saw the NSW Government commit to a comprehensive 18-month review of the planning system, and the appointment of an independent panel to chair the review.⁶

Consistent with its two major reports from 2010, the EDO believes a new planning regime needs to reduce the system's complexity and restore the core principles of community participation; comprehensive environmental assessment; greater transparency and accountability; and a renewed and genuine emphasis on sustainable development. This approach will restore good governance, while reflecting the changing circumstances of our world and our environment over the last 30 years.

Undoubtedly the current review presents a once-in-a-generation opportunity. We hope it marks the turning point that puts sustainable development and community engagement at the centre of how we plan, develop and grow our State.

⁵ EDO, *Reconnecting the Community with the Planning System* (August 2010), via www.planning.nsw.gov.au; and *State of Planning in NSW* Report (December 2010), at <http://www.edo.org.au/edonsw/site/publications.php#stateofplanning>.

⁶ See www.planningreview.nsw.gov.au. See also The Hon Brad Hazzard MP (Minister for Planning) media release, 'Laying the foundation for a new planning system', 20 July 2011.

A. OBJECTIVES AND PHILOSOPHY

Guiding principle – Implementing Ecologically Sustainable Development

Why should the planning system prioritise sustainable development?

The concept of ESD was developed in response to a global realisation that rates of exploitation of natural resources are not environmentally sustainable. The overarching 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.⁷ In particular, the concept of ESD attempts to make it clear that environmental impacts are no longer seen as separate from economic and social considerations.⁸ This is often paraphrased as the “triple bottom line”. Other key tenets are that broad public participation in policy development, combined with greater accountability, is essential to achieving sustainable development.⁹

At an international level, Australia is signatory to several international conventions that are particularly relevant to implementing the principles of ecologically sustainable development.¹⁰ In order to implement its commitments, the Australian Government negotiated with the states to develop the *National Strategy on Ecologically Sustainable Development* (1992).¹¹ The key emphasis of the strategy was to ensure that environmental, economic and social considerations are integrated into government decision-making. The Strategy made it clear that protecting biological diversity and maintaining ecological processes is a key element in achieving ESD, and in satisfying Australia’s international obligations.

As a result of the national strategy, the NSW Government adopted ESD, which has now been incorporated into over 60 pieces of NSW legislation.¹² As stated by Dovers (2008)¹³ and noted by Hawke¹⁴ in the 10 year review of the *Environment Protection and Biodiversity*

⁷ World Commission on Environment and Development, (1987) *Our Common Future* at 43.

⁸ For example, see: The 2002 *World Summit for Sustainable Development* and the *National Strategy for Ecologically Sustainable Development*, available at <http://www.environment.gov.au/esd/national/nsesd/index.html>.

⁹ See *Agenda 21* – the international plan of action for sustainable development: http://www.un.org/esa/dsd/agenda21/res_agenda21_01.shtml. Australia was also one of 178 nations to adopt *Agenda 21*.

¹⁰ In 1992, Australia endorsed the *Rio Declaration on Environment and Development*. The Declaration was essentially a worldwide commitment to sustainable development, which is a concept marrying economic development, social development and environmental protection - <http://www.worldsummit2002.org/> The Rio Declaration consisted of 27 principles intended to guide future sustainable development around the world <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>.

¹¹ <http://www.environment.gov.au/about/esd/index.html>

¹² Justice Paul Stein, ‘Are decision-makers too cautious with the precautionary principle?’ (2000) 17 *Environmental and Planning Law Journal* 3 at 22. See, eg, *Protection of the Environment Administration Act 1991* (NSW), s 6.

¹³ Dovers, S. (2008) ‘Policy and Institutional Reforms’, in D. Linenmayer, S. Dovers, M. Harriss Olson and S. Morton (Eds.), *Ten Commitments: Reshaping the Lucky Country’s Environment*, at p. 216.

¹⁴ Hawke, A. (2009) *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, Final Report*, October 2009.

Conservation Act 1999 (Cth) (**EPBC Act**), despite the challenges presented by the concept of ESD, there is “no other credible candidate for an integrative policy framework”.

In our view, ‘placing sustainability at the centre’ should not be seen as just one of many stakeholder value judgements about planning laws. Nor is it an attempt to pre-empt important community engagement on what values are important. Rather, we believe sustainability must be the starting point because only ‘sustainable’ development will maintain the community’s ability to participate in environment and planning decisions – and make real and effective choices about them – across present and future generations. By definition, if development continues that is ad hoc, unplanned or unsustainable this will limit future choices, by prioritising immediate interests and the use of scarce environmental resources for current ends.

We also believe there are a range of public policy challenges that make sustainable development more important than ever. First, there is “the deadly serious issue of climate change, which has loomed ever larger in the public and political eye for years”¹⁵ – but which was entirely absent from public policy consciousness when the EP&A Act commenced. Our State and the nation are also grappling with demographic challenges, including an ageing population, population growth and urban expansion.¹⁶ This matrix of challenges emphasises the need to plan for development in NSW through the prism of sustainability.

In our view, ESD and its principles represent an overarching paradigm which should frame all planning and development decision-making. That is, all developments must demonstrate they are sustainable in order to proceed.

Current EP&A Act objectives do not achieve sustainable outcomes

The objects of the current NSW planning law do not achieve sustainable outcomes. The EP&A Act aims to *encourage, promote* and *provide for* a diverse range of approximately 10 outcomes.¹⁷ While “the promotion of ecologically sustainable development” is one of the Act’s objectives, ESD plays only a minor role in shaping how the Act is applied in practice. It is one of the list of unprioritised and potentially inconsistent objects; and the clause only requires the ‘promotion’ of ESD, rather than its *achievement*.¹⁸ At present, where a consent authority is required to consider ESD under the EP&A Act in making a

¹⁵ Biscoe J, *Walker v Minister for Planning* [2007] NSWLEC 741, at 164.

¹⁶ See, eg, Australian Government Department of Infrastructure and Transport, Discussion Paper, *Our Cities- building a productive, sustainable and liveable future* (2010) and research paper, available at <http://www.infrastructure.gov.au/infrastructure/mcu/urbanpolicy/ourcities.aspx>.

¹⁷ EP&A Act, s 5. In brief, the objects include:

- (a) to *encourage* a range of actions related to the proper management, development and conservation of resources and land in order to promote ‘social and economic welfare... and a better environment’; particular services and facilities (eg, land for public purposes, utilities, affordable housing); protection of the environment (with particular reference to native animals and plants and threatened species); and ‘ecologically sustainable development’;
- (b) to *promote* shared responsibility for planning across different levels State of government; and
- (c) to *provide increased opportunity for* public involvement and participation in environmental planning and assessment.

¹⁸ Section 5, *Environmental Planning and Assessment Act 1979*.

decision (as an element of the ‘public interest’ under s 79C¹⁹), there is only a requirement to *have regard to* ESD, rather than make a decision consistent with it.

It is in the public interest that the planning system better balances the need for orderly development with the protection and enhancement of ecological values. This means accounting for the true environmental cost of development, as well as acknowledging the benefits.²⁰ Unfortunately in our experience, the weak application of ESD often means that negative environmental outcomes are pushed aside in favour of positive economic arguments – without an acknowledgement that environmental, social *and* economic goals could be reconciled and achieved with better objectives, strategies and processes.

Implementing sustainable development in a new planning system

The above analysis shows that ESD does not currently play a prominent role in development assessment in NSW. To be given proper effect, ESD needs to move beyond the realm of merely being a consideration in decision-making. A new Planning Act should clearly state that:

- ESD is the Act’s overarching objective, and all decisions, powers and functions under the Act should be exercised to achieve sustainable development;
- social, cultural and economic matters must be managed within sustainable boundaries;
- the principles of ESD are central guiding principles for decision-makers, and bind the terms of decisions made under the Planning Act.
- strategic plans must describe how ESD will be operationalised through planning decisions for regional and local areas.

It is important to note that this does not mean that undue weight is given to environmental factors at the expense of economic factors. Rather, ESD provides a sound framework for making development decisions in a way that respects the right of future generations to a healthy and productive environment; as well as providing for present and future economic and social prosperity.

When community groups and councils are dismissed as being ‘anti-development’, this may be a broader signal that the types of development on offer are simply inadequate for the needs and priorities of 21st century Australian communities. Meanwhile, research suggests that other jurisdictions are doing better with sustainable development, including on public engagement.²¹

¹⁹ Including for development proposals under Part 4, and new Part 4 Division 4.1 (for major projects, ie State Significant Development and State Significant Infrastructure).

²⁰ See R. Gittins, “Prosperity cannot be paid forever by maxing out our green credit”, National Times, 19 May 2010, available at: <http://www.smh.com.au/opinion/politics/prosperity-cannot-be-paid-forever-by-maxing-out-our-green-credit-20100518-vc1p.html#ixzz1civ9xYMP>.

²¹ For example, comparable international cities that have adopted a focus on sustainability and/or genuine public engagement include Freiburg (Germany), Copenhagen (Denmark), Dublin (Ireland), Seattle, Oregon, Austin, Chicago (USA), Toronto (Canada), Vancouver (Canada). See, eg, L. Kelly, *Cities: Who Decides?* (2010), Grattan Institute. On Copenhagen see M. Rosser, “Call for Resilient Cities” (2009) *Planning News*, vol. 35, no. 5. On sustainable transport options see P. Newman, “Pipe Dreams and Ideologues: Values and Planning” (2005), *People and Places*, vol. 13, no. 3.

New Zealand's *Resource Management Act 1991* provides an example of a legislative model that puts sustainability at the fore. Its purpose is to promote the sustainable management of natural and physical resources. More specifically, the definition of "sustainable management" is instructive as to how the legislation is designed to work:

sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.²²

Decision-makers are given the mandate to achieve the Act's purpose, and to this end are required to:

- recognise and provide for matters such as the protection and preservation of the coast, natural landscapes, native vegetation and habitats, heritage and customary rights;²³ and
- have regard to matters such as the ethic of stewardship, the intrinsic value of ecosystems and the benefits of renewable energy.²⁴

By contrast, the non-hierarchical objects of the NSW EP&A Act make it too easy for a decision-maker to give greater weight to other considerations, having 'turned their mind' to ESD as one aspect of the public interest. As Hodgson JA noted in the *Walker* case concerning a Part 3A development:²⁵

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

Making sustainable development easier – making it mainstream

In implementing ESD, the new Planning Act should actively facilitate sustainable development by adopting processes and standards that encourage green innovation. The Queensland Government's 'Green Door' policy provides a potential reference point.²⁶ The policy emerged from a 2010 cross-sectoral summit on population growth. It will accelerate decisions for development proposals that are identified to be the most sustainable in Queensland. An eligible project should demonstrate exceptional performance across all four Green Door principles, which identify key sustainability outcomes. Namely – exemplary planning processes, ecological processes (eg water, waste and materials, ecosystems, energy), economic development and community wellbeing.²⁷ Importantly, it is understood the initiative requires developers to commit to undertake

²² Section 5 of the *Resource Management Act 1991* (NZ), emphasis added.

²³ Section 6 of the *Resource Management Act 1991* (NZ).

²⁴ Section 7 of the *Resource Management Act 1991* (NZ).

²⁵ *Minister for Planning v Walker* [2008] NSWCA 224, Hodgson JA at [52], emphasis added.

²⁶ Queensland Government, *Green Door Information Paper* (July 2011), available at <http://www.dlqp.qld.gov.au/greendoor>.

²⁷ Queensland Government, *Green Door Information Paper* (July 2011), p 11.

stakeholder and community engagement prior to the formal lodgement of the development application.

While this is a positive initiative, it is designed to mesh with an existing planning system. With the opportunity to build a new planning system, NSW can go further. In addition to encouraging green innovation, the NSW system should put sustainability at the centre, by progressively discouraging and preventing development that is not sustainable. Meanwhile, there is growing developer awareness that sustainable development needs to become the mainstream.²⁸

B. PLAN-MAKING

Guiding principle – A focus on Strategic Planning

Strategic planning refers to a process which involves the setting of long-term strategic goals and targets for a particular area or region. Strategic planning is meant to result in an overall developmental blueprint that identifies, among other things, which areas are to be conserved and which areas are open for future development.²⁹

Existing tools that contribute to strategic planning in NSW are:

- State Plans;
- Metropolitan and regional strategies;
- Local environmental plans (**LEPs**);
- The ‘Standard instrument’ (**Standard LEP**) gazetted in 2006;³⁰
- State environmental planning policies (**SEPPs**); and
- Coastal policies and strategies.

There is widespread recognition that future approaches to strategic planning need greater coordination, more rigorous data as an evidence-base, and significantly more investment – in all senses of the word – in engaging the community.

Better strategic planning

Properly done, the strategic planning process should:

- identify competing **land uses and values** (including environmental and cultural values) across regions, with local communities’ assistance – including in urban zones;
- undertake independent **baseline studies** of catchments’ environmental qualities, such as for resources like water, soil, vegetation, biodiversity, minerals and air quality;
- take account of potential **cumulative impacts**;

²⁸ See, eg, Siobhan Toohill, “Embedding Sustainability at Stockland”, Centre for Social Impact: http://www.csi.edu.au/site/Knowledge_Centre/Asset.aspx?assetid=c9627ec3f646d127.

²⁹ See R. Ghanem and K. Ruddock “*Are New South Wales’ planning laws climate-change ready?*” (2011) Environmental and Planning Law Journal 28, p 17.

³⁰ See Department of Planning and Infrastructure website, at <http://www.planning.nsw.gov.au/LocalEnvironmentalPlans/StandardInstrument/tabid/247/language/en-US/Default.aspx>

- collate, share and **publish data** across sectors in ways that promote accuracy, transparency and evidence-based decision making;
- integrate **economic, social and environmental factors** in decision-making;
- describe how the goal of **ESD** will be put in practice through regional and local planning decisions;
- integrate natural resource management (**NRM**) **goals** into the planning process;
- establish “**no-go zones**” – sensitive areas of NSW where certain kinds of development (such as mining) are prohibited, based on an assessment of environmental, water supply, social and agricultural-value criteria;
- provide for comprehensive rights of **public participation**, and support to engage;
- promote **resilience to climate change** for communities and their environments, addressing risks and opportunities via mitigation and adaptation.
- devote sufficient resources to **regional development**, to develop effective decentralisation strategies and divert population growth from Sydney;
- consider and integrate **infrastructure needs** (including all forms of public transport) *ahead of* new development, based on identified values, qualities and potential growth;
- prioritise the value of landscape and ‘**green infrastructure**’ (parks, waterways, wildlife corridors etc).³¹

Strategic planning should be done over a period of time sufficient to engage properly with the community, and to commence appropriate studies where knowledge gaps exist. Through early engagement, good strategic planning will help to pre-empt intractable land-use conflicts and court challenges, and guide better decisions. Importantly though, early engagement at the planning stage cannot be seen as a substitute for local-level engagement and information on specific developments; nor should it remove important bulwarks of accountability such as open standing and third party appeal rights.

A number of the aspects described above – including public participation, climate change readiness, cumulative impacts and review and appeal rights – are explored in other Guiding Principles below.

Biodiversity protection and integration of NRM goals in strategic planning

Roetman comments that the biodiversity potential of a new development is influenced by the land-use in surrounding areas: urban, rural, or conservation lands. A landscape-scale view, including the cumulative impacts of new and pre-existing developments is essential in understanding how biodiversity can be maintained or improved. For example, habitat corridors in new developments are of limited value if they do not connect throughout the urban matrix and beyond it. At all levels of government, the development assessment and approval regulations are currently designed to discourage environmental damage rather than promote biodiversity-positive outcomes.³²

³¹ 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>.

³² ‘Biodiversity in urban developments’. *Factsheet* posted 15 Jul 2008 www.yourdevelopment.org.

The EDO supports the greater integration of natural resource management goals into the planning system. Examples of NRM policy goals include:

- maintain or improve the extent and condition of native vegetation
- maintain or improve the conservation status of listed threatened species
- reduce total and per capita water and energy consumption

Once identified, these NRM policy goals should also be a mandatory consideration in strategic planning processes. The application of a ‘maintain or improve’ the environment test is explored further as a Guiding Principle under Development Assessment below.

Strategic planning and green infrastructure

In the context of strategic planning, we also note the *Landscape Principles* of the Australian Institute of Landscape Architects (AILA) and the related concept of ‘green infrastructure’ noted above. We commend the AILA Principles to the Review Panel as a means of integrating planning, development and natural resource management in a holistic, sustainable way. The AILA Principles provide a practical focus on the social, economic and environmental values of ‘green infrastructure’ in increasing the liveability of our cities and towns.³³ The AILA principles call for:

- collaborative mapping of opportunities for green infrastructure networks;
- establishing environmental limits to development, and enhancing environmental connectivity;
- designing and planning infrastructure ahead of development;
- drawing on science, theory and broad expertise to inform urban design and management strategies; and
- providing leadership and capacity-building to inspire local participation.

Recent strategic planning initiatives

Some strategic planning processes are already underway since the March 2011 state election.³⁴ In particular we note the Strategic Regional Land Use Policy to address land use conflicts in the context of mining. While the interaction of the Strategic Regional Land Use Policy and the planning review could be made clearer, the ongoing development of that policy does not impede future strategic planning. Rather, the lessons learnt from the process can be fed into the template for future processes. Provided they are done well, the regional land use plans should be recognised under law at their completion.

As part of its Strategic Regional Land Use Policy, the Government has committed to “triple bottom line” assessment in strategic land use planning; improved monitoring and compliance for mining operations; and tougher interim assessment measures for mining.³⁵

³³ See AILA, *Landscape Principles*, at <http://www.aila.org.au/landscapeprinciples>

³⁴ The NSW Government has also released a new overarching State Plan (September 2011) containing whole-of-government goals not limited to planning. See www.2021.nsw.gov.au: “NSW 2021 is a 10 year plan to rebuild the economy, return quality services, renovate infrastructure, strengthen our local environment and communities and restore accountability to Government.”

³⁵ See NSW Liberals & Nationals policy, “Strategic Regional Land Use...”, at <http://grip.org.au/documents/doc-47-strategic-regional-land-use-policy---document.pdf>. See also the Hon Brad Hazzard MP, Minister for Planning and Infrastructure, media release, “NSW Government Adopts Rigorous Strategic Approach to Regional Land Use Planning”, 21 May 2011, available at

To date, it is clear that the tenor of the Policy privileges agricultural protection, as opposed to environmental protection, notwithstanding their interdependence. Biodiversity protection and full-cost accounting for ecological values must be seen as key pillars of any “triple bottom line” approach to planning law. These and other ESD principles need to be given effect in broader strategic planning processes in the new planning system.

Guiding principle – Genuine, appropriate and timely public participation

Public participation is fundamental to good planning and development assessment. Accordingly, many of the comments under this principle are relevant to both the plan-making and development assessment stages. Real community engagement asks the community what sort of built and natural environment they want to live in. It seeks to implement a system to achieve those aims at various scales, while maintaining that engagement throughout. Unfortunately there has been a trend, in NSW and several other States, away from emphasising public participation and transparent decision-making in state and local planning processes.

I don't understand why governments are so worried about public consultation. Public consultation is not the problem. It's avoiding it that's the problem. The more of it they do the less problems they'll have with the public.

- EDO/TEC 'Reconnecting the Community' consultations 2010, Moruya participant

In addition to fostering an inclusive and democratic society, public consultation and participation leads to better decisions by assisting decision-makers in identifying public interest concerns. For example, while few would argue that “liveability”³⁶ of our communities is a key indicator, community engagement is required to develop a shared and practical understanding of such concepts. This is important at the strategic planning stage. Studies also suggest that meaningful community engagement is often central to resolution of difficult problems, such as delivering increased resource efficiency or urban density.³⁷

The community must therefore be able to participate in a genuine and meaningful manner in relation to all aspects of the planning system – ranging from plan-making to development assessment and post-approval monitoring, review and enforcement.

Noting the level of dissatisfaction with Part 3A and other reforms to the EP&A Act that impeded public participation, it is important that the new planning system does not reproduce these mistakes. Moreover, merits review and appeal rights for objectors should be reinstated for all major projects, and should be broadened in line with ICAC recommendations.³⁸

<http://www.nsw.liberal.org.au/news/planning/nsw-government-adopts-rigorous-strategic-approach-to-regional-land-use-planning.html>

³⁶ ‘Liveability’ has been defined as “the way the urban environment supports the quality of life and well-being of communities.” See Australian Government Department of Infrastructure Discussion Paper, *Our Cities – building a productive, sustainable and liveable future* (2011), p 42.

³⁷ ADC Forum, *ADC Cities Report 2010 – Enhancing Liveability*, available at http://www.adcforum.org/assets/files/City%20Summit/ADC_Cities_Report_part_1.pdf.

³⁸ Explored below under C. Administrative Procedures. In 2007 the ICAC recommended that several new categories of merits appeals should be introduced, including developments where a council is the applicant and the consent authority; major and controversial developments (such as large residential flat

A 2010 study by the Grattan Institute entitled *Cities: Who Decides?*³⁹ refers to the decision making arrangements in eight cities comparable to those in Australia. Essentially it asked “in successful cities, who made the decisions and how?” In such cities:

*it became clear that where hard decisions had been implemented, there was early, genuine, sophisticated and deep public engagement [and that]... if we want to face our hard decisions in a way that makes our cities better places to live, involving residents is not optional.*⁴⁰

The Grattan report concluded that, “as we try to manage growth – and make effective choices that actually stick – our best bet is to give city-dwellers a real say.”⁴¹ This is consistent with the view of the Moruya workshop participant above. In contrast, there may be a tendency to avoid, delay or limit public engagement from both development proponents and bureaucrats, and to create a legal framework that reflects this, as did Part 3A. By contrast, the *Cities: Who decides?* Report found that the level of public engagement needs to be “an order of magnitude different from what we have seen in Australia.”⁴² Some brief examples follow.

Deep community engagement – international examples

- In *Vancouver, Canada*, residents worked with developers and builders, and the City Council engaged directly with people to develop a *CityPlan*. The benefits of this structure included: quick action on behalf of Council to implement the changes; strong feedback and response from the community on a series of issues; immediate implementation built credibility in the process.
- *Seattle, USA* established a Neighbourhood Planning Office in 1995. The Seattle Planning Budget placed a strong emphasis on public engagement; funding for resources for neighbourhoods to develop their vision and values; and particular effort on communication (language and technology used). This resulted in a high level of neighbourhood acceptance towards the plan recommendations.
- *Portland, USA* developed a Regional Framework Plan with the assistance of public meetings, household surveys, and collaboration across a broad range of sectors – including activists, city officials, retailers, property owners, neighbourhood groups, and civic organisations. One expert interviewee contrasted the approach to engagement in Portland with that in cities in the UK and Australia, where “there seems to be a culture that consultation is about telling people what the planners have decided”.⁴³

Also important for the current review was something the Grattan Institute did *not* find. The report concluded there was no dominant ‘model of development’ – that no particular structure such as a governmental authority was present, and that changing structures does

developments); and developments which are the subject of planning agreements. See Independent Commission Against Corruption (2007), *Corruption Risks in NSW Development Processes*.

³⁹ Available at: http://www.grattan.edu.au/pub_page/report_cities_who_decides.html.

⁴⁰ Available at: http://www.grattan.edu.au/news/20101018_media_release_cities_who_decides.pdf. Emphasis added.

⁴¹ Available at: http://www.grattan.edu.au/news/20101018_media_release_cities_who_decides.pdf.

⁴² Grattan Institute, *Cities: Who Decides?* media release, at http://www.grattan.edu.au/news/20101018_media_release_cities_who_decides.pdf

⁴³ J. Kelly, *Cities: Who Decides?* (2010), Grattan Institute, pp 37-38.

not in itself result in success. This emphasises that whatever model is adopted for the next-generation NSW planning system, meaningful public engagement at all stages is essential.

There are also local examples of early community engagement to draw on. One example is through a sustainable design competition. After a major project's use or development feasibility has been approved, the brief for the design of the development is put out to a competitive tender. The winner is then selected by a sustainable design committee after a public exhibition.⁴⁴ A similar example is the Western Australian *Enquiry-by-Design* workshop process, "used to bring together major stakeholders at one time and place to discuss, develop and draw possible urban design and planning solutions to specific, place-based problems."⁴⁵

Guiding principle – Making planning law climate change-ready

Climate change and New South Wales

The State of Environment Report 2009 details the projected impacts of climate change on NSW: "It is expected that there will be an increase in temperature and sea levels, and changes to rainfall patterns and evaporation rates in NSW due to anthropogenic greenhouse gas emissions". These impacts of climate change will affect the NSW economy, public health, and the natural and built environment.⁴⁶ For example, rising temperatures are likely to exacerbate rural bushfires, as well as the urban "heat island effect."⁴⁷ Prolonged drought has also had a heavy impact on all NSW water users as well as the environment.

In considering the State's greenhouse gas emissions, about a quarter of NSW emissions come from building and construction activities.⁴⁸ Energy use is also increasing, leading to discussions about the need to increase base load power and build more coal or gas fired

⁴⁴ See, eg, *Central Sydney DCP 1996*, Part 12, which has been used to bring about better design outcomes within the Sydney CBD. Regarding the committee, Part 12.2.12 specifies a competition jury of six, with three members nominated by the development proponent and three nominated by the consent authority. For a more localised example that involves a controversial development site see "Little Manly Beach Exhibition", <http://savelittlemanlybeach.com/little-manly-exhibition-2/>, accessed October 2011.

⁴⁵ See Western Australian Department for Planning and Infrastructure, at <http://www.planning.wa.gov.au/publications/832.asp>.

⁴⁶ 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

⁴⁷ This occurs firstly through the absorption and re-radiation of heat by dark surfaces such as roadways and rooftops (reaching temperatures 10-20 degrees C higher than surrounding air); and secondly because urban areas are relatively devoid of vegetation that would provide shade and cool the air. See: http://www.cdc.gov/healthyplaces/articles/Urban_Sprawl_and_Public_Health_PHR.pdf.

⁴⁸ Centre for International Economics, 'Capitalising on the building sector's potential to lessen the costs of a broad based greenhouse gas emission cut' (Sept 2007), Australian Sustainable Built Environment Council, available at www.asbec.com.au/research. But see also Australian Government Department of Infrastructure, *State of Australian Cities 2011*, at www.infrastructure.gov.au, which reports that since 2006, Australians have been consuming less energy and water while also cutting their household waste. From 2010 to 2011, energy consumption (mainly electricity) fell 1.2 %.

power stations, which will in turn increase emissions.⁴⁹ Transport is also a major contributor to NSW emissions and is one of the strongest sources of emissions growth in Australia.⁵⁰

Against this backdrop, the current NSW planning framework does not adequately incorporate the consideration of the potential effects of climate change. Indeed, climate change is not expressly integrated into the development assessment process under the EP&A Act, either from a mitigation and adaptation perspective. No climate change assessment is expressly required under section 79C,⁵¹ former Part 3A or its successor for State significant development and infrastructure, Part 4 Division 4.1.

Inadequacy of climate change planning in LEPs

Individual LEPs and the Standard Instrument do not encourage emissions reductions or climate-friendly development. Nor does the Standard Instrument enable local innovative planning solutions to climate change. For example, a significant amount of current building is the demolition and rebuilding of existing homes. The resource consumption involved in constantly building new houses significantly contributes to landfill, with the building industry contributing 40% of landfill waste.⁵² The Standard Instrument does not address such issues and does not encourage retrofitting to re-use existing buildings to the extent needed. A range of other environmental issues are not sufficiently addressed in LEPs such as: standard clauses to assist with solar access,⁵³ better building design, bushfire, and water use; although we note that natural resource management provisions for LEPs are being developed to integrate NRM into local planning.

Coastal planning for climate change

The EDO, in conjunction with the Sydney Coastal Councils Group (SCCG) has recently conducted two audits to determine the extent to which climate change and its consequences are incorporated into Australian legislation.⁵⁴ The 2008 report examined federal, NSW and

⁴⁹ Greenhouse gas emissions from NSW's electricity sector increased by 31% between 1990 and 2006. By 2009 the increase was 37.5%. See Australian Government, *Australia's National Greenhouse Accounts – State and Territory Greenhouse Gas Inventories 2004* (2006), pp 16-17; and 2009 accounts (2011), p 18.

⁵⁰ In 2009, transport contributed 83.6 Mt CO₂-e or 15.3% of Australia's national greenhouse inventory emissions. See <http://www.climatechange.gov.au/publications/greenhouse-acctg/state-territory-inventory-2009.aspx>. For 2006-07, 62.7% of all energy used by NSW road transport was for passenger vehicles (Department of Environment, Climate Change and Water, *NSW State of the Environment 2009*, section 3.3).

⁵¹ Section 79C under Part 4 of the EP&A Act sets out the list of factors that consent authorities must take into account when determining a development application.

⁵² See, eg, K. Clarke, "Old houses are environmentally friendly", 4 January 2010, available at <http://www.smh.com.au/opinion/society-and-culture/old-houses-are-environmentallyfriendly-20100103-1n83.html>.

⁵³ See Adrian J Bradbrook, "Solar Access Law: 30 Years on" (2010) 27(1) *EPLJ* 5. In his review of solar access in NSW LEPs, Bradbrook found that while many LEPs had provisions to protect overshadowing, few were designed to clearly protect solar access for energy generation devices such as solar panels. Only some LEPs limited overshadowing at various parts of the day, and the *Sydney LEP 2005* sought to regulate overshadowing on a percentage basis. He contrasted this with the approach taken in the USA where some States has specific solar access property rights and legislative protections such as the *Solar Access Act* of 1981 in Wisconsin. He concluded that there was a need for law reform in this area.

⁵⁴ NSW Environmental Defender's Office, *Coastal Councils and Planning for Climate Change: An Assessment of Australian and NSW Legislation and Government Policy Provisions Relating to Climate Change Relevant to Regional and Metropolitan Coastal Councils* (2008); NSW Environmental Defender's Office, *Audit of Sea Level Rise, Coastal Erosion and Inundation Legislation and Policy* (December 2010). See <http://www.sydneycoastalcouncils.com.au>.

local legislative instruments to identify instruments that contained the words ‘climate change’, ‘sea level rise’ and ‘greenhouse’, and then determined the responsibilities these instruments placed on local councils. That report found the EP&A Act does not contain any reference to ‘climate change’, ‘greenhouse’, or ‘sea level rise’. However, five LEPs contained provisions directly relevant to climate change impacts in the coastal zone. The report found that these LEPs place no direct obligations on decision-makers in relation to coastal adaptation. These merely contain climate change factors in objects clauses or as matters for consideration which can be given minimal weight at the discretion of decision-makers.⁵⁵ Since 2008 a number of laws and policies have been developed and amended in an attempt to address sea level rise, coastal erosion and inundation.⁵⁶ However, provisions are generally weak or aspirational, and councils’ ability and resources to apply, enforce and monitor this plethora of instruments has become a significant issue.

Planning laws must deal better with climate change mitigation and adaptation

The new planning system needs to promote the *mitigation* of greenhouse gas emissions in ways that the current EP&A Act does not. The EP&A Act’s failure to incorporate climate change into planning or development assessment means the consideration of the climate change impacts of new projects is currently ad hoc (see case law below). For example, it may occur through a general requirement to consider environmental impacts and the public interest under s 79C,⁵⁷ or under discretionary Director-General’s environmental assessment requirements. It is clear that a more systematic process is needed.

Similarly, the new planning system must require the explicit consideration of *adaptation* to climate change impacts. Recent studies show that even if greenhouse gas emissions are significantly reduced today, temperature increases and sea level rise are almost certain to occur over the next 50 years due to the time-lag effect of climate change.⁵⁸ There is therefore a need to establish an adaptation framework in preparation for these impacts, and avoid risky development, especially on the coast and in bushfire-prone regions. Despite this identified need for clear adaptation laws, an examination of the current statutory framework in Australia reveals that there is no mandatory consideration of adaptation issues.

Case law examples

A number of recent cases have sought to demonstrate the importance of climate change as a planning and development consideration.

In *Minister for Planning v Walker*⁵⁹ the NSW Court of Appeal overturned a favourable Land and Environment Court ruling that held a concept plan approval invalid on the basis that the Minister had failed to consider whether the flood risk present on the site in question would be exacerbated by climate change.

⁵⁵ *Ibid.*

⁵⁶ Eg, the *Coastal Protection Act and Other Legislation Amendment Act 2010 (CPAOLA)*; *Coastal Protection Act 1979*; *Coastal Protection Regulation 2011*; *NSW Sea Level Rise Policy Statement*; *Coastal Planning Guideline*; *Coastal Risk Management Guide* and *Flood Risk Management Guide*.

⁵⁷ See, eg, *Aldous v Greater Taree Council* (2009) 167 LGERA 13.

⁵⁸ Tom Wigley, ‘The Climate Change Commitment’ (2005) 307 *Science* 1766; Gerald Meehl et al ‘How Much More Global Warming and Sea Level Rise?’ (2005) 307 *Science* 1769.

⁵⁹ [2008] NSWCA 224

*Ned Haughton v Minister for Planning and Macquarie Generation*⁶⁰ challenged the concept plan approvals for two new coal-or gas-fired power stations by the former NSW Minister for Planning. A significant ground for challenge was the contention that the Minister failed to consider the projects' impacts (alone or together) on climate change, as a matter of public interest. Amongst other things, the plaintiff challenged the Minister's reliance on advice from the Director-General, that it was not the role of the Department of Planning to regulate greenhouse gas emissions.

The case of *Hunter Environment Lobby v Minister for Planning and Ulan Coal Mines Ltd* (which the EDO is involved in) concerns the approval of new coalmining activities near Mudgee, that will double Ulan's approved production rate to up to 20 million tonnes of coal per year; with consequential environmental impacts on groundwater, biodiversity and greenhouse gas emissions. Amongst other things the plaintiff has sought a condition requiring Ulan to offset its scope 1 and 2 greenhouse gas emissions. The *Ulan* case also placed additional focus on so-called 'scope 3' emissions from coalmines – the projected emissions from the burning of coal overseas.⁶¹

Compounding the lack of specific reference to climate change in the EP&A Act, to date, it is understood that the Department does not have a published policy on how it will assess climate change impacts of proposed developments. Both cases above demonstrate the need to vastly improve and clarify the requirements for environmental assessment of greenhouse gas emissions in a new planning system, particularly for major projects (public and private).

In summary, it is apparent that the NSW planning system is currently inadequate to consider the impacts of climate change both from a mitigation and adaptation perspective. It is therefore clear that new legislation needs to accommodate climate change in a fulsome and robust manner into the planning system.

How should the new planning framework address climate change?

Climate change mitigation should begin at the strategic planning stage. Furthermore, a new Planning Act needs to provide that climate change impacts are a mandatory consideration for decision-makers. Importantly, this consideration must be accompanied by mandatory guidelines that codify a comprehensive process for assessing projects that are likely to generate significant emissions, such as new coal mines and power stations. The guidelines should, for example, include criteria that require new plants to use best practice technology; and also prescribe mitigation measures and appropriate conditions that must be considered before a project can be approved. The guidelines should be given legislative force, either through the new Act directly or in a State Environmental Planning Policy.

To deal with coastal hazards and adaptation, the planning framework needs to adopt a consistent and more prescriptive State-wide approach (rather than an ad hoc approach which depends on LEPs). As the EDO has previously submitted, robust laws could

⁶⁰ See http://www.edo.org.au/edonsw/site/casework_key.php#bayswaterb.

⁶¹ See EDO website on *Ulan* case, http://www.edo.org.au/edonsw/site/casework_key.php#hunter. Note also Principle 14 of the *Rio Declaration* (1992): *States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.*

include planned retreat policies in especially vulnerable areas, buffer zones in local planning policies, restrictive zoning, setbacks, resilience building measures (such as dune re-vegetation), early warning systems and emergency response plans. Recent policy documents such as the NSW *Sea Level Rise Policy Statement* (2009)⁶² and *Coastal Planning Guideline*⁶³ provide some guidance. However, as they have no statutory force, these policies do nothing in real terms to revise the decision-making framework for development in coastal zones. Requiring such measures to be undertaken through the use of legally enforceable legislation will go a long way to ensuring a precautionary approach to coastal climate change impacts around Australia.⁶⁴ Mapping and planning must also occur in relation to increasing bushfire risk and water access.

To aid both mitigation and adaptation, the EDO would support the development and implementation of new climate change standards. For example, at the time of writing, Standards Australia is exhibiting a draft *Principles-based Climate Change Adaptation Standard for Settlements & Infrastructure*.⁶⁵

Of course, the planning framework is not the only area of law that needs to better accommodate climate change. The EDO has done extensive work on identifying the important federal and state laws initiatives that are necessary to address climate change in a holistic manner.⁶⁶ However, the planning system, with its linkages to most NRM systems, is a crucial element that is currently under-utilised.

The Queen's Chain (NZ)

New Zealand provides a novel reference point for the creation of public space that has grown in significance in the era of climate change. Since 1840, by royal instruction, chain-wide strips (about 20 metres) around coastlines were not “to be occupied by any private person for any private purpose,” but reserved for “the recreation and amusement of the inhabitants” of New Zealand, and where it “may be desirable... for any other purpose of public convenience, utility, health or enjoyment.”⁶⁷ This has been the cornerstone of subsequent laws which provide for the setting aside of Queen’s Chain strips as New Zealand has been settled, either by sale of Crown land or further subdivision of private land.

⁶² The 2009 Policy Statement provided limited guidance to councils for assessing new developments through planning benchmarks which project sea level rise. However, it has been criticised for failing to prohibit certain developments, or propose rezonings in areas clearly vulnerable to inundation.

⁶³ See NSW Department of Planning, <http://www.planning.nsw.gov.au/PlansforAction/Coastalprotection/AdaptingtoSeaLevelRise/tabid/177/language/en-AU/Default.aspx>

⁶⁴ R. Ghanem, K. Ruddock and J. Walker, ‘Are our laws responding to the challenges posed to our coasts by climate change?’ (2008) 31(3) UNSWLJ Forum, pp 40-46.

⁶⁵ “The Standard provides a general and widely applicable approach and framework for decision makers in all organizations that play a role in the design, planning, approval, construction, maintenance and operation of settlements and infrastructure. This will guide them in managing climate change risks and lead to implementation plans for suitable and effective adaptation (treatment).”

⁶⁶ See, eg, EDO NSW, *Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis* (2009), at <http://www.edo.org.au/edonsw/site/publications.php#ccnsw>; see also EDO Model Climate Law Project – Discussion Paper (2008), at http://www.edo.org.au/edonsw/site/pdf/pubs/model_climate_law_project080417.pdf.

⁶⁷ *Irish University Press. Series of British Parliamentary Papers. Colonies: New Zealand. 3. 1835-42, pp 156-164. “Instructions : Victoria R.”*

While the Queen's Chain was not created as a response to climate change, it gives New Zealand space along its foreshore to deal with rising sea levels. At the same time it has removed some of the difficult policy decisions regarding public and private property rights that are likely to arise in Australia. However, this may be an area where New Zealand's laws could be progressively adapted for our own coastal management practices, in response to the growing threats of sea level rise, coastal erosion and inundation.

C. DEVELOPMENT ASSESSMENT

Guiding principle – Transparency and accountability for all development, including major public projects

Since 2004, there has been a trend of reform proposals for streamlining development assessment processes, cutting 'red tape', reducing the regulatory burden on business and improving the efficiency and expediency of planning processes. This trend can be clearly linked to industry lobbying as well as wider government reforms including at the Council of Australian Governments (COAG) level. As a result, the planning regime in NSW has been significantly amended to 'speed up' and 'simplify' development assessment processes, and reduce perceived bureaucratic hurdles to development.

This has led to a privileging of economic considerations at the expense of community consultation and comprehensive environmental assessment. It has been noted that, rather than aiming to strengthen the role of sustainable development in decision-making, recent trends in planning reform both in Australia and overseas appear to prioritise short-term economic growth, while reducing environmental concerns to secondary considerations.⁶⁸ Commentators have argued that opportunities to better implement ESD have been missed, that there has been a reduction in the capacity of planning systems to properly deal with complex contemporary land use issues, and that this has caused planning to deviate from its chosen paradigm.⁶⁹ This is particularly evident regarding major project assessment processes such as former Part 3A.

The EDO's *State of Planning in NSW* report (December 2010) provides a detailed overview development assessment under the various parts of the EP&A Act extant at that time. It includes specific problems and case studies on Part 3A, Part 4 and Part 5 of the Act. We will not attempt to canvas those matters in detail here. Rather, we highlight some aspects of transparency and accountability relevant to a new planning system.

⁶⁸ Cowell, R. & Owens, S. (2006) 'Governing space: planning reform and the politics of sustainability', *Environment and Planning C: Government & Policy*, 24(3), pp: 403-421; Baird, M. (2008) 'Proposed Amendments to the Environmental Planning and Assessment Act 1979 (NSW)', *Local Government Law Journal*, 14, pp: 5-7; and Ghanem, R. (2008) 'Amendments to the NSW planning system – sidelining the community', *Local Government Law Journal*, 14, pp: 140-149.

⁶⁹ Gleeson, B. & Low, N. (2000) *Australian Urban Planning: New Challenges, New Agendas*, Allen and Unwin, St Leonards; Hamnett, S. (2000) 'The late 1990s: competitive versus sustainable cities', in S. Hamnett & R. Freestone (Eds.), *Australian Metropolis: A Planning History*, Mansell, London; and Williams A, (2010) *Ecologically sustainable development, planning reform and the role of planners: NSW – A case study*. Planning Dissertation, University of Sydney.

Further issues of accountability in the environmental assessment process are covered in under the next Guiding Principle.

Greatest impacts deserve the greatest scrutiny

The EDO believes that development proposals with the greatest environmental, economic and social impacts should have the greatest level of environmental assessment and public scrutiny. However, as noted above, in *Minister for Planning v Walker*, the NSW Court of Appeal confirmed that a failure to consider ESD did not necessarily invalidate the Minister's decision to grant approval under former Part 3A.⁷⁰ This sent the counter-intuitive signal that sustainability principles may not apply to those projects that are likely to have the greatest environmental impacts.

Consultation periods should be adequate and scalable

Feedback from the *Reconnecting with the Community Report* showed the community became very concerned about limited public participation for major projects. Such projects are usually large in scope and accompanied by much technical documentation. In such cases, 30 days is insufficient for the community to be able to provide meaningful comment. Members of the community do not generally have the technical or financial resources to comprehensively assess the proposed project in such a short period. Also, it is often impossible for community groups to engage experts to assist within that period. We offer the following suggestions here:

- the minimum times for consultation and assessment of development applications should reflect the significance of the likely impacts.
- minimum time periods should be expressed in business days and should exclude the days from 24 December to 1 January inclusive.
- The consent authority should have the power to extend the prescribed time limits for consultation and assessment of development applications which are likely to have a significant impact on the environment or where the impact is uncertain.

Better quality data needed on impacts, costs and benefits

Greater accountability is also required through better publication of data, including in relation to the environmental costs of development not merely the economic benefits. It is clear that the current reporting focuses very much on economic outcomes.⁷¹ What is missing in the development monitor is any indication of the environmental and social costs of Part 3A projects. For example, a description of the impacts of converting farm land to mining in rural communities, and the impacts that Part 3A projects have on biodiversity, habitat loss and water extraction and pollution. Reporting should also include more analysis (for example, not just the total number of submissions received, but include a breakdown of how many submissions were in favour or opposed to a proposal, and key responses). This is consistent with ESD and triple-bottom line

⁷⁰ *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.

⁷¹ For example, the Department of Planning and Infrastructure's "Major Development Monitor". See EDO, *State of Planning in NSW* (2010), 'Case study – Part 3A reporting by the NSW Department of Planning', pp 25-26.

reporting. The EDO would also support more stringent requirements for quality and accuracy of data provided in development applications and environmental assessments; including stronger offences for providing false or misleading information (recklessly or knowingly).⁷²

Limit exempt and complying development, and better regulate private certifiers

The Department of Planning established a target of 50% exempt and complying development for NSW. We believe that this target should be revisited. The figure is arbitrary and may not be suitable in all circumstances. Uniform housing codes rolled out in recent years have also been problematic.⁷³ We submit that exempt and complying development categories should only be determined at a localised scale, taking into account particular characteristics of local government areas, and should not be determined by a quantitative target. Moreover, the prohibition on exempt and complying development in environmentally sensitive areas should be reimposed.⁷⁴

EDO has been notified of many community concerns about where the Exempt and Complying Code is not appropriate in local areas. For example, a house known as ‘Tilba’ – which was not heritage listed but was of significance to the Burwood community – was exempt development, and got demolished under the new Codes. In this case, the locally significant house was demolished for a yet-to-be-approved block of units, with no opportunity for the community to explain the significance of the house.

EDO has also been made aware of problems with community and private certifiers failing to act on breaches of complying development certificates, etc. This is a common problem reported on our public enquiry line whereby private certifiers or councils won’t take enforcement action even if they can in theory do so.

Guiding principle – Improving the objectivity, credibility and cumulative impact review of Environmental Impact Assessment

More independent environmental assessment and verification

Environmental impact assessment provisions in the NSW planning system need strengthening to ensure that planning decisions are informed by rigorous and independent environmental assessment processes. The EDO has produced a range of submissions and reports noting the inadequacy of environmental assessment across a range of sectors.⁷⁵ A systematic and more impartial process for capturing the true

⁷² See, eg, section 489 of the EPBC Act (Cth).

⁷³ *Sydney Morning Herald*, “DA codes to be rewritten”, October 16 2008.

⁷⁴ This was previously found in s 76A of the Act.

⁷⁵ See, eg, EDO *State of Planning in NSW Report* (2010); *Mining Law in NSW Discussion Paper* (2011); *Ticking the Box – Flaws in the Environmental Assessment of Coal Seam Gas Exploration* (2011) –Appendix 1 of the EDO’s Submission to NSW Legislative Council Inquiry into CSG; *Submission on the Review of the Threatened Species Conservation Act 1995* (2010), pp 17-21. All available at <http://www.edo.org.au/edonsw> under ‘Policy’ or ‘Publications’.

environmental impacts of development is needed. This could be achieved through the following:

- Establishing a **pool of environmental assessors** accredited by the Department of Planning and Infrastructure. Proponents would be allocated an assessor at random who would conduct the required environmental assessment. This would ensure that consultants are independent and objective.
- Implementing **external auditing and quality assurance requirements** through a Peer Review Panel or new government authority, such as the Canadian Environmental Assessment Agency. Its role would include assessing the accuracy of environment impact statements, species impact statements and assessments, ensuring that ongoing management conditions are complied with and assessing mitigation measures. There is currently no feedback or accountability loop.
- The agency or panel should report to the Minister for Planning, who would be required to table an annual report in Parliament providing statistics and updates on environmental assessments. Any such reports should be publicly available.

Integrating objective decision-making tools into planning laws

Efforts have been made under related environmental laws to develop objective decision-making tools to better integrate environmental considerations into land-use planning. For example, such tools underpin the Biocertification and BioBanking schemes under the *Threatened Species Conservation Act 1995 (TSC Act)*. However these are currently voluntary initiatives and are attracting limited developer interest. Consequently, there is a danger of those tools being progressively weakened.⁷⁶

Another science-based decision support tool is the *Environmental Outcomes Assessment Methodology* under the *Native Vegetation Act 2003 (NSW)*. The Methodology underpins any approvals and property vegetation planning under that Act. The tool requires an objective application of environmental assessment which has overcome many problems of subjective inconsistent decision-making under the previous regime.⁷⁷ The application of the assessment tool is mandatory and is based on objective scientific criteria.

To date, the integration of such assessment tools in the planning system is not yet established. The NV Act methodology only applies to rural land and not urban development; and the current assessment tools for Biocertification and BioBanking are only voluntary, and are constantly at threat of being weakened to have more appeal to developers, such as by the removal of strict “like for like” offset requirements.⁷⁸

In relation to other tools, the EDO would support the improvement and expansion of the BASIX building sustainability tool; and the implementation of new climate change standards at the strategic planning stage, including in LEPs.⁷⁹ There are numerous ways the BASIX

⁷⁶ See EDO, *State of Planning in NSW* (2010), ‘Case study: Alternative assessment tools under NRM legislation’, pp 45-46.

⁷⁷ *Native Vegetation Conservation Act 1997*.

⁷⁸ For EDO submissions on the native vegetation, biobanking and biocertification methodologies, please see: <http://www.edo.org.au/edonsw/site/policy.php#2>.

⁷⁹ For example, at the time of writing Standards Australia is exhibiting a draft *Principles-based Climate Change Adaptation Standard for Settlements & Infrastructure* (Sept-Nov 2011).

system can be improved. One of its main shortcomings is that it only requires significant reductions of 50% energy and water use for new houses and small blocks of units. Despite its prevalence, multi-unit housing has much weaker targets of 20%.⁸⁰ Renovations costing less than \$50,000 are also excluded. The BASIX system is also based on trade-offs that may over time reduce its benefits, by allowing for example solar-powered appliances to trade off against weaker building standards.⁸¹ Another significant problem is that the relevant SEPP declares invalid any Local Environment Plan or Development Control Plan that seeks to impose improved standards for energy or water consumption.⁸²

Mandatory consideration of cumulative impacts

The EP&A Act does not sufficiently consider the cumulative impacts of major projects. In fact, to date there has been no overarching strategic planning framework by which this can be done. This was a key impediment to achieving sustainable outcomes under Part 3A. The Act adopts a project-based process that assesses individual projects in isolation. The net result is an ad hoc, patchwork approach with adverse impacts on the ground. For example, where three mines are proposed for a State forest in the Boggabri area; and in Camberwell, where a study found no cumulative impacts, despite a village being surrounded by mining operations on two sides, and a third proposed mine to the south.⁸³

At the major project level, most ministerial approvals contain an assessment of the climate change impacts but justify the project (such as mines and power stations)⁸⁴ on the basis of the value of the development and the jobs created. This is because any one project will not necessarily contribute significantly to climate change on a global scale, even though cumulatively each of these projects is contributing to the problem. The failure to consider cumulative impacts is broader than just climate change, but also occurs in relation to cumulative impacts on biodiversity under Part 4 as well as for major projects.

To best deal with cumulative impacts from a legal perspective, the following is required. *First*, the assessment of cumulative impacts needs to be focussed at the strategic planning stage to head off impacts and land use conflicts. This process is currently in train through the Strategic Regional Land Use Policy, but needs to be based on the best available science, and full cost accounting for environmental values.

Second, decision-makers should be required to consider cumulative impacts in deciding whether to approve a project (under any new equivalent to section 79C of the EP&A Act). This should also include considering whether there are feasible and prudent

⁸⁰ Nixon, S, “High-rise Residents Big Energy Guzzlers”, Sydney Morning Herald, 30 May 2006.

⁸¹ Amelia Thorpe and Kristy Graham, “Green buildings – are codes, standards and targets sufficient drivers of sustainability in New South Wales?” (2009) 26 *EPLJ* 486, 489.

⁸² State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

⁸³ Available on the Department of Planning website at:

<http://www.planning.nsw.gov.au/Development/Independentplanningassessmentandreviewpanels/tabid/70/language/en-US/Default.aspx#camberwell>.

⁸⁴ Currently Part 3A and in particular the critical infrastructure requirements regulate all new gas and coal fired power stations.

alternatives for the proposed project that will lead to fewer environmental impacts, including less clearing of vegetation and fewer greenhouse gas emissions.

Third, there needs to be tighter controls over project modifications and variations, which may otherwise evade sufficient scrutiny.

Finally, there needs to be ongoing monitoring and mitigation of environmental impacts during the life of a development and its closure (for example, a mine). Without these measures, a true picture of cumulative impacts cannot be developed, nor strategies to deal with them.

Guiding principle – Ensuring integration with other environmental legislation

Planning laws like the EP&A Act form the centrepiece of natural resource management (NRM) in NSW. This is because all actions that may affect natural resources including biodiversity, water, mining and coastal resources are regulated, either directly or indirectly, through the planning system. A new Planning Act must therefore ensure that all potential impacts and NRM issues are considered by decision-makers in making new plans and determining development applications that may affect these resources. Despite this important role, the Act as it currently stands fails to adequately ensure the protection of these resources.

Of course, the planning system does not operate in isolation, but is intricately linked with environmental protection legislation. Related NSW legislation includes:

- *Threatened Species Conservation Act 1995*
- *National Parks and Wildlife Act 1974*
- *Native Vegetation Act 2003*
- *Coastal Protection Act 1979*
- *Mining Act 1992*
- *Water Management Act 2000*
- *Protection of the Environment Operations Act 1997*
- *Heritage Act 1977*
- *Contaminated Lands Act 1997*.⁸⁵

However, in recent years the planning system has undermined the ability of related environmental legislation to effectively protect the environment. This is due to the move away from the *integrated development* approach (ie, requiring concurrences from other agencies⁸⁶) to the fast track approval approach. This approach was most notable under

⁸⁵ Whilst they are beyond the scope of this review, for various submissions on the operation of these Acts please see: <http://www.edo.org.au/edonsw/site/policy.php>.

⁸⁶ The process of integrated development was introduced into the EP&A Act in 1997. Section 91 provides that integrated development is development which, in addition to development consent, requires one or more approvals from other Government agencies. For integrated development, the normal assessment and notification procedures are followed, but the consent authority must also ask the authority responsible for giving the other approval in advance whether it will consent to the proposal, and if so, on what terms. Integrated development was a welcome introduction as it requires expertise from other agencies and allows them to veto developments that are inappropriate on environmental and technical grounds, or to ensure

Part 3A, which effectively ousted other legislation for major projects.⁸⁷ Unfortunately the recent changes to the major project assessment regime have retained this approach – many legislative authorisations either do not apply to, or must be granted consistently with, State significant development and State significant infrastructure projects.⁸⁸ This significantly limits the role of Government agencies outside Planning in the regulation of major projects.

Other examples of planning law overriding NRM law can be found in the related Acts themselves.⁸⁹

The overriding of integrated approval requirements for major projects and other specific areas has been a retrograde step. These approvals constitute important safety nets, and help ensure that all potential impacts of a development are adequately considered by the decision-maker. By overriding environmental and natural resource management legislation, the EP&A Act does not achieve integrated planning or natural resource management. This is contrary to effective implementation of ESD, and undermines community confidence in the rule of law.

A new Planning Act needs to ensure that referrals relating to the environment, threatened species, native vegetation etc. are included as part of an integrated NRM approach. Referral agencies have the relevant expertise to ensure that developments are ecologically sustainable and do not have unacceptable impacts, especially in light of the ever increasing risk of climate change. We strongly recommend that these additional approvals be reinstated for major projects. Indeed, these approvals should be required regardless of the consent authority or category of development, to ensure that relevant government expertise informs decision-making.

In making this recommendation we appreciate the need for government efficiency and the avoidance of unnecessary delay in concurrence. The Panel may wish to consider novel ways to best coordinate approval from multiple agencies, such as an one-stop-shop or all-in-one approach to natural resource licensing. It is important that such an approach meets the original aims of integrated approvals and does not sacrifice good planning for efficiency.

Integrating Catchment Action Plans

Finally, the new planning framework needs to better integrate Catchment Action Plans (**CAPs**). These plans are made by Catchment Management Authorities (**CMAs**) in partnership with local communities. CAPs are intended to facilitate community action and government investment in natural resource management; and to prescribe on-the-ground actions for preserving natural resources in partnership with local communities and private landholders. However, a 2008 report by the NSW Natural Resources Commission found that the NRM policy environment is not sufficiently integrated into the planning system for

that appropriate conditions are attached to any approval. It also streamlines the process for proponents who did not have to approach each agency individually.

⁸⁷ See EDO, *State of Planning in NSW* (2010), 'Case Study: EP&A Act sections ousting other legislation', pp 44-45.

⁸⁸ See EP&A Act, ss 89J-K (State significant development) and ss 115ZG-ZH (State significant infrastructure).

⁸⁹ For example, amendments to the Schedule of the *Native Vegetation Act 2003* have been made to provide that the Act does not apply to land under the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors Living SEPP). This means even where a seniors' living development is proposed for a bushland area, the ban on broadscale clearing does not apply.

CMA to implement Catchment Action Plans effectively.⁹⁰ As a result, Local Environmental Plans (LEPs) and policies can often undermine initiatives in CAPs, as there is no legal requirement to consider CAPs when making LEPs or when assessing development applications. A new Planning Act should address this imbalance in order to achieve integrated catchment management under the planning system.⁹¹

Guiding principle – Applying a meaningful ‘maintain or improve’ test to key developments

Biodiversity decline and protection in NSW

According to the World Conservation Union (IUCN) *Red List of Threatened Species*, Australia now has the highest rate of species extinction of any developed nation. Almost one in five mammal species are facing extinction and there are over 800 plants and animals which are listed as threatened.⁹² The State of Environment Report 2009 highlights the dire situation of NSW’s biodiversity. Since European colonisation, 26 of 138 mammal species (19%) in NSW are now extinct. In addition, 35 species of plants, 12 species or subspecies of birds, and one species each of reptiles, fish and invertebrates are also now listed as presumed extinct under threatened species legislation.⁹³

NSW and the Commonwealth both have laws protecting threatened species. In NSW, threatened species are protected under three Acts which operate in conjunction with each other, including the EP&A Act.⁹⁴

More integrated approaches are needed

Farrier et al note that despite the common reform themes relating to offsets and biobanking, the interrelationship between the planning system and the natural resource management system remain to be clarified. The coordination of the priorities and objectives developed in a local context for strategic land use plans and catchment plans is imperative.⁹⁵ Different standards are already emerging in decision-making about development on urban land (to which the EP&A Act would apply), and rural land to which the *Native Vegetation Act 2003* (NSW) is relevant. For rural land, the test is to ‘improve or maintain environmental

⁹⁰ Natural Resources Commission, *Progress Report on Effective Implementation of Catchment Action Plans*, November 2008. Found at: <http://www.nrc.nsw.gov.au/content/documents/Progress%20report%20on%20effective%20implementation%20of%20CAPs.pdf> (3 March 2009).

⁹¹ See, eg, Planning Review Panel, ‘Notes of Planning Review Meeting with Natural Resources Commission’, 18 August 2011, via www.planningreview.nsw.gov.au.

⁹² See www.iucnredlist.org.

⁹³ NSW Government, *State of Environment Report 2009*, Chapter 7, Found at: http://www.environment.nsw.gov.au/soe/soe2009/chapter7/chp_7.2.htm#7.2.13

⁹⁴ *The Threatened Species Conservation Act 1995* (TSC Act) deals with the listing of species, the declaration of critical habitat, recovery plans, threat abatement plans, licensing, biodiversity certification and biobanking. The *National Parks and Wildlife Act 1974* contains additional licensing provisions, and provisions for criminal offences. The *EP&A Act* imposes obligations on developers and consent authorities to assess and consider the impacts of proposed development on biodiversity generally and threatened species in particular during the development assessment process (e.g. by requiring a species impact statement in some circumstances).

⁹⁵ See also ‘Integrating Catchment Action Plans’ below, under *Guiding principle – Ensuring integration with other environmental legislation*.

outcomes'; whereas under s 79C of the EP&A Act there is no attempt to give priority to conservation in urban areas. Decision-makers are left with broad discretion in balancing environmental, social and economic objectives.⁹⁶

The Australian Government accepts that the best approach to reverse biodiversity decline is to adopt flexible and innovative management practices, and manage natural assets on a whole-of-ecosystem scale, mindful of interactions and connections across landscapes and seascapes. This means taking account of all environmental assets in an area – including habitats, species, ecological communities, geographical features, native vegetation, heritage values, and water supplies. In other words, it means investing more in strategic approaches such as regional environment plans and strategic assessments. In the long run, identifying and avoiding likely environmental harm early in the process will be much more cost effective than trying to fix damage after it has occurred.⁹⁷

Local governments agree that environmental outcomes can be enhanced when planning for conservation is carried out at a landscape scale, and that it is essential that this process is aligned with the strategic land use planning process. The main concern of local governments is the apparent lack of incentives for councils to use the biodiversity certification process at the planning stage. Biodiversity certification at the LEP stage would also have the benefit of reducing tension between local government, developers and the community at the development assessment and approval stage.⁹⁸

The EDO has noted its support for the development of a transparent and repeatable methodology to apply the “improve or maintain” biodiversity values test for areas that are proposed for biodiversity certification. More broadly, the EDO supports the development of tools to conserve biodiversity more strategically, and address cumulative impacts at a landscape scale, particularly in light of the inability of the *Threatened Species Conservation Act* to address biodiversity loss on a site by site basis.⁹⁹

Finally, in the context of biodiversity offsetting, we note that a more positive standard of “net environmental benefit” has been put forward in Western Australia and Victoria.¹⁰⁰ The policy intent of this standard ‘recognises that the environment has been significantly compromised in the past and that halting and reversing the decline of the environment is now a priority’.¹⁰¹ The EDO would also support further consideration of a test of ‘net environmental benefit’ or ‘enhancing environmental quality’ test in NSW planning and NRM systems. This could translate as ‘putting in’ more than a development ‘takes out’.

⁹⁶ Farrier, David, Mooney, C and Kelly, A. ‘Biodiversity Conservation and Natural Resource Management in NSW: Complexity, Co-ordination and Common Sense’.

⁹⁷ *Australian government response to the report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999* (August 2011), available at <http://www.environment.gov.au/epbc/reform/index.html>.

⁹⁸ Local Government and Shires Association, *Submission on the draft Biodiversity Certification Assessment Methodology* (July 2010).

⁹⁹ EDO *Submission on draft Biodiversity Conservation Methodology 30 July 2010*

¹⁰⁰ Environment Protection Authority Victoria, *Discussion Paper: Environmental Offsets* (June 2008), available at [http://epanote2.epa.vic.gov.au/EPA/publications.nsf/2f1c2625731746aa4a256ce90001cbb5/cfa2d441a0e31fb7ca2574670004b739/\\$FILE/1202.3.pdf](http://epanote2.epa.vic.gov.au/EPA/publications.nsf/2f1c2625731746aa4a256ce90001cbb5/cfa2d441a0e31fb7ca2574670004b739/$FILE/1202.3.pdf)

¹⁰¹ Environmental Protection Authority Western Australia (January 2006) *Environmental Offsets, Position Statement No 9*

D. ADMINISTRATIVE PROCEDURES

Guiding principle – Recognising the pre-eminent role of the Land and Environment Court

Importance of the Land and Environment Court

NSW is fortunate to have a specialist court, the Land and Environment Court (LEC), to deal with land, planning and environmental law matters. A key theme to the reforms that created the Court and the EP&A Act was the general public's right to participate in environmental planning process.¹⁰² One of the great strengths of the LEC is its powers to grant civil remedies such as injunctions and declarations in response to breaches of environmental laws. This has enabled public interest litigants to protect the environment by bringing such matters before the Court.¹⁰³ Through its public advice line, the EDO provides legal advice to a range of LEC users. This includes individuals who are lodging small development applications, to those concerned with the lack of Council and Government enforcement of breaches of the law, to residents and environment groups who wish to challenge Council and Government decisions.

The LEC has been an innovative model for environmental protection,¹⁰⁴ and a model for other similar Courts in Queensland and South Australia.¹⁰⁵ The Court has also been an important catalyst for Australian environmental jurisprudence, including on the precautionary principle and ecologically sustainable development.¹⁰⁶

Notwithstanding these advances, there is still room for improvement to access to justice and the quality of citizen participation in environmental decision-making through the LEC.¹⁰⁷ The main way that access could be improved is through reforms to the costs system,¹⁰⁸ although that is beyond the scope of this review. A related and more directly relevant matter

¹⁰² See Chief Justice Stein, "A Specialist Environmental Court: An Australian Experience" in Robinson and Dunkley (ed), *Public Interest Perspectives in Environmental Law*, 1995, pg. 258 who reproduced part of the Second Reading Speech.

¹⁰³ See for example- *Corkhill v Forestry Commission of NSW (No. 2)* (1991) 73 LGRA 126, and *Brown v Environmental Protection Authority* (1992-1993) 78 LGERA 119, and *Leatch v National Parks and Wildlife Service & Shoalhaven City Council* (1993) 81 LGERA 270, and *Timbarra Protection Coalition Inc v Ross Mining NL* [1998] NSWLEC 19, and *Coalcliff Community Association v Minister for Urban Affairs and Planning No. 40047 of 1996* [1997] NSWLEC 94, and *Gray v Minister for Planning & Ors* (2006) 152 LGERA 258.

¹⁰⁴ See papers of Chief Justice Preston, "Ecologically Sustainable Development in the Courts in Australia and Asia" (Wellington, New Zealand, 29 August 2006); "Role of Judiciary in promoting Sustainable Development: the Experience of Asia and the Pacific" (Kenya, 17 April 2006).

¹⁰⁵ Chief Justice Pearlman, "The Role and Operation of the Land and Environment Court of NSW", pg. 18 and Stein, "A Specialist Environmental Court: An Australian Experience" in Robinson and Dunkley (ed), *Public Interest Perspectives in Environmental Law*, 1995, pg. 268

¹⁰⁶ Chief Justice Preston, "Ecologically Sustainable Development in the Courts in Australia and Asia" (Wellington, New Zealand, 29 August 2006); Chief Justice Preston, "Judicial Implementation of the Principles of Ecologically Sustainable Development in Australia and Asia" (Sydney, NSW 21 July 2006).

¹⁰⁷ Michael Jeffery, 'Intervenor Funding as the Key to Effective Citizen Participation in Environmental Decision-Making: Putting the People Back into the Picture', (2002) 19 (2) *Arizona Journal of International and Comparative Law* 643, 643

is the fundamental importance of appeal rights, and the ability for the community to exercise those rights on an equal footing to developers.

Importance of appeal rights

There are well documented benefits of having judicial review rights in the planning system.¹⁰⁹ Allowing people to exercise review rights has not ‘opened the floodgates’ for vexatious litigants.¹¹⁰ However, under former Part 3A, the widespread use of concept plans and public hearings means that objectors who were dissatisfied with a Minister’s determination could not appeal to the LEC on the merits of poor decisions. As a result, the community expressed strong concern about appeal rights during consultations for the TEC/EDO *Reconnecting the Community* project in 2010.

The *State of Planning in NSW* Report documents several case studies to demonstrate the practical value of merits appeals. While merits review might not overturn a decision, stricter environmental conditions can be imposed on the project, leading to better environmental outcomes. The *Beemery* cotton-farming case showed the potential for good decision-making, sustainable development and accountability to the community.¹¹¹ The *Hub Action Group* waste facility case showed the potential for major project provisions to subvert the merits review process.¹¹²

Under the current system, the community’s ability to appeal to the LEC on either the merits or legality of an approval remains significantly limited for State significant development (SSD) and infrastructure. For example, for SSD, objector appeal rights are limited to those matters that would have been otherwise ‘designated development’ and do not go to a public hearing as part of a Planning Assessment Commission (PAC) review.¹¹³

Addressing imbalances in Court accessibility – improved appeal and mediation

There is a need to consider revisiting planning appeals to the Land and Environment Court.

¹⁰⁹ Preston CJ of the Land and Environment Court has identified a number of benefits of environmental litigation including that it can: help to realise a truly democratic process; enforce legality in governance, maintain institutional integrity and ensure executive accountability; assist in the principled and progressive development of environmental law and policy; expose weaknesses in the law and suggest law reform; improve the quality of executive decision-making; explicate and give force to environmental values; promote environmental values by putting a price on them; ensure rational discourse on environmental issues and disputes; encourage society to debate public values, national identity and a sense of place; have positive social effects; foster environmentalism and environmental consciousness in society; and promote achievement in other areas of endeavour. See: “The role of public interest environmental litigation” 23 *EPLJ* 337.

¹¹⁰ According to the Local Development Monitor, in 2008-09: there were 15 class 1 appeals brought by third parties or objectors. 85% of these appeals were successful. These represented only 3% of total class 1 appeals, and there were 12 class 4 appeals brought by third parties or objectors. See: McClellan, The Hon Justice Peter “Access To Justice In Environmental Law: An Australian Perspective” Commonwealth Law Conference 2005, London, 11-15 September 2005;

¹¹¹ See EDO, *State of Planning in NSW* (2010), pp 29-30.

¹¹² *Hub Action Group v the Minister for Planning and Orange City Council* [2008] NSWLEC 116; . See EDO, *State of Planning in NSW* (2010), p 30.

¹¹³ For Part 3A projects, merits appeals were only available if the project would otherwise be designated development under Part 4. Moreover, there was no merits appeal right for objectors if a concept plan has been approved for the project, or for critical infrastructure projects, or where the PAC had held a public hearing (former s 75L, EP&A Act). This essentially removed merits appeal rights for objectors for the majority of Part 3A applications. To date only a handful of Class 1 cases have occurred.

At present there is an imbalance in the system, whereby proponents have merits appeal rights to the court (Class 1 – a ‘no costs’ jurisdiction), and the community has only judicial review rights available (Class 4 – ‘costs’ jurisdiction). There are few community groups able to mount Class 4 judicial review proceedings, in contrast to developers who regularly appeal decisions when a Council rejects their proposal. The new planning laws need to redress this imbalance and ensure that merits appeals are available to the community where the proponent has not complied with the relevant development standards.

In 2007, the Independent Commission Against Corruption (**ICAC**) made a recommendation to the NSW Government that third party merits appeal rights should be extended, to improve transparency and accountability of council development approval processes.¹¹⁴

ICAC recommended the following categories of development should be accompanied by third party merits appeal rights:

- Developments relying on significant SEPP 1 objections;
- Developments where council is both the applicant and the consent authority, or where an application relates to land owned by a council;
- Major and controversial developments, including for example large residential flat developments; and
- Developments that are the subject of planning agreements.

The EDO would continue to support equivalent appeal rights in the new planning system, for the various reasons and benefits described above. The EDO would also support the review Panel’s consideration of broader mechanisms for conciliation, mediation, neutral evaluation, review or appeal within the scope of the LEC framework.

Guiding principle – Regular review of the Act

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

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

Similarly, regular review clauses should be required in related plans and instruments. Review periods should be appropriate to the significance and intended period of application of the plan or instrument, and consider whether the relevant aims are being achieved.¹¹⁵

¹¹⁴ See Independent Commission Against Corruption (2007), *Corruption Risks in NSW Development Processes*. ICAC noted: “Merit-based reviews can provide a safeguard against the corrupt decision-making by consent authorities as well as enhancing their accountability. Consequently, the extension of third-party merit-based appeal rights may act as a disincentive for corrupt decision-making by consent authorities.”

¹¹⁵ See, eg, former cl 15 (‘Review of Policy’) of the SEPP (Major Development) 2005. This clause was recently repealed by the SEPP (State and Regional Development) 2011.