Nature Conservation Council
Environmental Defender's Office
Total Environment Centre

Submission on the NSW Planning System Review Issues Paper

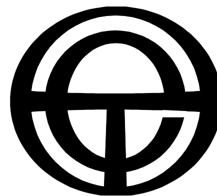
ANNEXURES

1. Environmental Defender's Office NSW and Total Environmental Centre, *Reconnecting the Community with the Planning System* (August 2010)

2. Ghanem, R and Ruddock K*, "*Are New South Wales' planning laws climate-change ready?" (2011) 28, *Environmental and Planning Law Journal* 17

RECONNECTING THE COMMUNITY WITH THE PLANNING SYSTEM

August 2010



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Contents

Executive Summary 3

Part One: Project Description and Method 9

1. Reconnecting the Community with the Planning System - Discussion Paper
2. Workshop and surveys
3. Feedback on the process

Part Two: Workshop and survey feedback - Key themes 14

1. Consultation as a legislative requirement
2. Information versus consultation
3. How consultation is done
4. Who is consulted
5. What is consulted on
6. Timeframes for consultation
7. Resourcing for community participation
8. How community input is processed
9. Local considerations
10. Consultation feedback

Part Three: Best Practice Community Consultation 37

1. Models for Best Practice community consultation
2. Benefits of Best Practice community consultation

Part Four: Recommendations for Reform 47

Appendix: Specific Discussion Paper Questions 52

Executive Summary

One of the objects of the *Environmental Planning and Assessment Act 1979* (EP&A Act) is "to provide increased opportunity for public involvement and participation in environmental planning and assessment."[1] The deliberate use of the words "involvement" and "participation" suggest an active and constructive role for the community in the NSW planning system. However, there have been a series of reforms to the Act over recent years, with major changes in environmental assessment, local and regional planning, provision of information and public consultation, which have impacted upon the way community involvement and participation is achieved. It is essential to review whether the reformed planning system is still achieving the public participation object enshrined in the Act and make necessary changes if the community is to feel connected to the planning system.

The aim of this report is to provide the Department of Planning (DoP) with an informed assessment of how people view the current planning system and recommend ways that the DoP can reconnect the community with the planning system. The Total Environment Centre[2] (TEC), funded by the DoP, engaged the NSW Environmental Defender's Office[3] (EDO) to assist in the workshop and report writing components of the project.

The main conclusion of this project is that the community generally feels disconnected with the planning process, deeply cynical about whether it is worthwhile to engage, and extremely frustrated about the current system. During the process of conducting workshops in key parts of the state and seeking feedback on the planning system, community members gave a few specific examples of good consultation processes, many examples of inadequate processes where they felt excluded, and made suggestions for reform.

This report sets out the project description and describes the methods by which feedback was sought in **Part One**.

Part Two discusses 10 key themes that became apparent through the workshop process and from on-line survey responses, and includes transcript quotes noting both concerns of participants and suggestions for reform. The key themes identified are: 1. Consultation as a legislative requirement; 2. Information versus consultation; 3. How consultation is done; 4. Who is consulted; 5. What is consulted on; 6. Timeframes for consultation; 7. Resourcing for community participation; 8. How community feedback is processed; 9. Local considerations; and 10. Consultation feedback.

Part Three discusses models of best practice community consultation, and the benefits of such community consultation.

Part Four makes recommendations for reform. These are summarized below.

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[1] *Environmental Planning and Assessment Act 1979* Section 5(c).
[2] TEC has been campaigning for environment protection in the city and country, changing government policy, advising the community and challenging business since 1972.
[3] The EDO is an independent non-profit community legal centre specialising in public interest environmental law.

It is apparent from the feedback that community consultation needs to be improved in **three** key areas.

First, in relation to dealing with change at a local level, community consultation processes regarding **local development** applications need to be improved in terms of information quality, timeframes and resources to engage, and particularly in relation to independence and transparency of the decision-making process. Clarity is urgently needed regarding what environmental planning instruments apply to a local development, and how the various instruments and decision-making bodies interact.

Second, in relation to **major development** and consulting on change at the broader level, there needs to be legislative reform to reinstate guaranteed public participation processes for the largest developments with the most significant impacts. Further legislative reform is needed to ensure comprehensive independent expert information is available to the public at an early stage (beyond what is currently in a concept plan), and that early engagement does not result in a forfeiture of review rights. The more significant the project, the more time and effort there needs to be put into comprehensive, detailed and iterative consultation with communities.

Third, in relation to consultation on **law reform** and **future strategy**, while there have been some examples of good community engagement on strategic planning (for example, in relation to some of the Regional Strategies), there is a clear requirement for improved community consultation on law reform more broadly. This would involve early identification of interested communities and groups, and early and effective engagement on proposed planning reforms. It is necessary to inform and educate regarding the incremental changes made to the system over recent years that have had a significant impact on community consultation, but also to instigate an improved process regarding future far-reaching planning law reforms.

We make recommendations to improve community consultation that impact in these three areas. Our specific recommendations focus on: quality of information, early provision of information, the range of consultation techniques used, targeted and broad community consultation, independence of experts preparing information for the community, realistic timeframes and adequate resourcing for community engagement, and guaranteed requirements for iterative consultation processes and feedback loops.

Recommendations for reform

The following recommendations are based on workshop and survey feedback as well as our research into best practice relating to the ten key areas of concern discussed in **Part Two**.

1. Consultation as a legislative requirement

Recommendation # 1: Establish minimum mandatory consultation requirements under the EP&A Act that guarantee genuine community involvement in plan making and development assessment procedures.

2. Information versus consultation

Recommendation # 2: Develop protocols that clearly delineate and operationalise the distinction between information and consultation when engaging with the community (for example, providing information prior to consultation sessions and restricting the information component of consultation sessions).

Recommendation # 3: Ensure that consultation is only undertaken by people who have the confidence of the community that their views will be accurately given to government.

Recommendation # 4: Undertake further consultation with users on how the DoP website appears and ways of making it more user-friendly.

Recommendation # 5: Consider engaging more "people who can translate the law" in consultation sessions.

Recommendation # 6: Consider facilitating a legal inquiries process, similar to the ATO.

Recommendation # 7: Establish a comprehensive community information program, using a variety of techniques to provide plain-English information, to provide updates on legal and policy developments and address confusion about the current system.

Recommendation # 8: Complement the community information program with free annual or biannual consultation workshops around NSW on proposed changes by government.

3. How consultation is done

For law reform

Recommendation # 9: Place public notices information about the relevant parliamentary timetable in the newspaper at the start of a Parliamentary session.

Recommendation # 10: Undertake a targeted communications strategy to relevant state and local interest groups depending on the type of legislation proposed.

Recommendation # 11: Identify priority groups with an interest in the law reform that could have a role in broader notification and information sharing about law reform, with the capacity to facilitate feedback to the relevant Departments or MPs.

Recommendation # 12: Establish a register of interested people and groups who wish to be alerted of any relevant law reform.

For proposals under existing law

Recommendation # 13: Consider adopting a range of notification methods including: Sydney Morning Herald, local papers, local library displays, EDO bulletin, Council newsletters, community notice boards, TV advertisements, radio, other media (including

the 'blogosphere'), letter drops, and brochures given to new residents.

Recommendation # 14: Develop interactive websites where users can give their email address and be provided with further information.

Recommendation # 15: Provide hard copy documents (or discs) on request.

Recommendation # 16: Engage a small Secretariat ("someone on the end of the phone") to respond to community inquiries and supply information.

Recommendation # 17: Use emerging media and techniques such as social networking tools (eg updates via blogs, Twitter etc) and "dialogue circles" to engage more immediately and directly with the community

Recommendation # 18: Adopt a range of consultation techniques to engage more effectively with different communities, including:

- Workshops with agreed summaries in lieu of written submissions;
- More visual plan information to address differing literacy skills and cater for people who process information more visually than in written form;
- More oral hearings to allow marginalised people to participate without requiring long written submissions;

4. Who is consulted

Recommendation # 19: Consider two-tiered consultation sessions – one for the experts (eg stakeholder groups) and another for the grass roots community – in appropriate circumstances.

5. What is consulted on

Recommendation # 20: Amend that EP&A Act to ensure independent experts prepare environmental assessments for consultation.

Recommendation # 21: Provide Councils with funds to commission environmental assessments from independent experts.

Recommendation # 22: Limit the earnings a consultant can derive from one developer or government department per year.

Recommendation # 23: Bar former Council planners from operating as consultants in their own areas for 5 years after they resign from Council.

6. Timeframes for consultation

For law reform

Recommendation # 24: Adopt the consistent practice of providing adequate prior notice and time to consider law reform proposals.

For proposals under existing law

Recommendation # 25: Enshrine community consultation rights under the EP&A Act to operate from the beginning of both plan-making and development assessment processes.

Recommendation # 26: Amend that EP&A Act to ensure that early engagement and consultation does not result in forfeiture of review rights at a later stage.

Recommendation # 27: Provide more detail to facilitate genuine consultation on concept plans and planning proposals.

Recommendation # 28: Undertake a review of existing timeframes with a view to adopting minimum timeframes, but not maximum timeframes, to ensure more equality between the time developers spend discussing proposals with planning officials and the time the community gets to discuss a proposal.

Recommendation # 29: Extend major project consultation timeframes beyond 30 days to ensure genuine consultation with community groups.

7. Resourcing for community participation

Recommendation # 30: Provide funding for independent groups (such as NGOs, universities and local government), and general assistance, to facilitate consultation.

Recommendation # 31: Establish a fund (with, say, contributions from developers) to facilitate professional assistance for to the community in preparing submissions.

8. How community feedback is considered

Recommendation # 32: Reinstate fixed minimum mandatory criteria for environmental assessment to assure the community that all relevant factors have been considered.

Recommendation # 33: Amend the EP&A Act to ensure that large infrastructure projects have more and clearer standard criteria around decision making and better consultation and review provisions than the current Part 3A, with comparable environmental assessment requirements to those under Part 4.

Recommendation # 34: Repeal the category of critical infrastructure under the EP&A Act.

Recommendation # 35: Provide clear and consistent information to Councils and the

community about what instruments impose mandatory requirements and which documents are 'guidelines.'

Recommendation # 36: Create a specific planning ombudsman or an independent authority to assist the community to overcome inconsistencies in interpretation by Councils, perceptions of bias etc.

Recommendation # 37: Ensure decision-making bodies are subject to ethical planning principles and transparency requirements to address potential bias and to properly hear and process community input.

9. Local considerations

Recommendation # 38: Undertake more site visits, locally based seminars and more facilitated meetings in local communities.

10. Consultation feedback

Recommendation # 39: Implement measures to ensure that community input is properly considered and mandatory feedback loops are embedded in the system to show how input has been considered with explanations to the community why their recommendations have been refused or amended.

Recommendation # 40: Ensure that there are mandatory public hearings for major projects.

Part One: Project Description and Method

There were three essential elements to the *Reconnecting the Community with the Planning System* project:

1. Defining the key points of community interaction with the NSW planning system: Release of a **Discussion Paper**
2. Ascertaining the views of the community: Undertaking **Workshops and Surveys**
3. Producing this **Report** with recommendations.

1. *Reconnecting the Community with the Planning System* - Discussion Paper

In order to identify the key points of community interaction with the system and generate discussion at the workshops, the EDO prepared a Discussion Paper. The Paper involved an overview of the NSW planning system: describing plan making (strategic plans, SEPPs, LEPs, Regional Strategies and the Sydney Metropolitan Strategy); and outlining development assessment processes (under Parts 4, 5 and 3A of the EP&A Act). Opportunities for public participation were identified relating to each of these processes. The Discussion Paper then reviewed community consultation processes in relation to planning law reforms generally (providing case studies of the 2005 and 2008 reforms), plan-making and development assessment. The Paper included key questions (reproduced below) and a number of specific questions relating to each different processes.

Key Questions

The NSW Government has declared that it is working towards implementing Australia's best planning system.[4] What would be the features of a best practice planning system? If you could change anything about the current system, what would it be? Here are some questions to guide you.

1. Planning Law

- How important is it for you to know about the law and how to access particular provisions?
- Where would you like to be able to access information about planning laws?
- Can the Department of Planning do anything to help you understand how the law works and what right you have regarding planning decisions?

2. Strategic Planning

- Does the Department of Planning adequately explain the role of strategic planning in the overall planning system? For example, the significance of LEPs, SEPPs, Regional Strategies and Metro Strategies and how they interact?

[4] Department of Planning, 2009, *Improving the Planning System,* DOP website at http://www.planning.nsw.gov.au/PlanningSystem/ImprovingthePlanningSystem/tabid/68/Default.aspx

- Is the strategic planning framework as straightforward as it could be?
- Can you think of ways that the strategic planning framework could be simplified?
- Is there more the Department of Planning could do to help the community understand how strategic planning works?

3. Development Assessment

- If you were to lodge a development application, would you know what type of development you were proposing and what type of assessment would be required?
- Who should the decision-maker be?
- Do you think the current development assessment process results in good planning outcomes?
- Can you identify areas of the development assessment process that are confusing or causing problems?
- Does the development assessment process strike a balance between economic, social and environmental interests? Can you explain your answer?

4. Community Consultation

- Do you think the Department of Planning does enough to consult the community on planning matters?
- What matters should the community have a say in?
- What is the best way for the Department to consult the community?
- Are you aware of when and in what manner the Department is obliged to consult the community?

The specific questions included in the Discussion Paper and asked at the workshops are reproduced in the **Appendix**.

Transcripts of the workshops will be provided to the DoP on **CD** to accompany this report.

2. Workshop and surveys

In order to ascertain the views of the community, the workshop program was designed to achieve broad geographical reach (rural and regional as well as metropolitan) and demographic groups (including 'mums and dads', community groups, Indigenous people, and youth).

The workshops were organised by the TEC and presented by EDO lawyers. A representative of the Department of Planning (DoP) was invited to attend as an observer to each workshop. The role of the EDO was to present information for discussion purposes, and not necessarily to "correct" any misunderstandings that the community members raised. An essential part of seeking feedback is to identify areas of confusion and where the need for improved community education is greatest.

The first phase of workshops were conducted in November 2009, and are shown in the following table.

DATE	CITY	VENUE	TIMES	Attendance
Sat 14/11	Wollongong	Aboriginal Cultural Centre - 22 Kenny St Wollongong	1pm - 5pm	12
Mon 16/11	Newcastle	Skylight Room, Panthers – Cnr King & Union Newc. West	5pm - 9pm	12
Wed 18/11	Sydney	Sydney Mechanics' School of Arts, Mitchell Theatre, Level 1 280 Pitt St Sydney	5pm - 9pm	23
Sat 21/11	Moruya	Moruya High School- 97 Albert Street, Moruya	10am to 1pm	7
Thu 26/11	Ballina	Richmond Room- 5 Regatta Avenue, Ballina	5:30pm to 8.30pm	19
Sat 28/11	Coffs Harbour	Cavanbah Centre- 191 Harbour Drive, Coffs Harbour	1pm to 5pm	11

Total attendance at workshops was **84**. Groups and organisations represented were: Ballina Environment Society, Trains on our Tracks (TOOT), Murwillumbah Ratepayers & Residents Association, Mullumbimby Community Action Network, Valley Watch, Hastings Point Progress Association, Tenterfield Shire Council, Community Action Network (Lismore), Lismore Council Watch, Friends of the Koala Inc., Tucki Community Against Mega Quarry Inc, Sustainable City Inc., Coffs Harbour City Council, Port Macquarie Hastings Foreshore Protection, Port Macquarie Conservation Society, Three Rivers Group, Nambucca Heads LALC, Regional Alliance for Sustainable Planning (RASP), Coffs Bellingen National Parks Association, New Lambton Residents Association, Gwandalan/Toukley/CVB Coal Alliance, Chain Valley Bay resident, Parks & Playgrounds Inc, West Wallsend Action Group, Precinct Committee (Newcastle), Blackalls Against the Mine (BAM), Central Coast Community Environment Network (CCCEN), DECCW - NSW Office of Water, Waverley Shire Council, Pittwater Climate Action, Bunyah LALC, Legal Researcher, NSW LALC, Lake Wollumboola Protection Association Inc., Australian Native Orchid Society, Shoalhaven's Unwanted Tip (SHUT), Shoalhaven City Council, Wollongong

Against Corruption, Illawarra Greens, Australian Conservation Foundation (Shoalhaven), Kiama Greens, Illawarra Community & Environment Connection (ICEC), Landcare, Coastwatchers Association Inc., Eurobodalla Shire Council, and Friends of Durras.

In addition, representatives attended from: DoP Grafton, DoP Newcastle, DoP Sydney (Media Unit), and DoP Wollongong.

In order to capture feedback from people unable to attend workshops, an on-line survey form of the key questions was provided and individual interviews conducted. To date, **36** surveys have been received electronically and in the mail. These responses were from a range of areas.[5]

Total participants, not including TEC and EDO staff, was **120**. A number can be characterised as the more aware and active members of the community – however they are also opinion leaders and non government groups have a high credibility rating and are in touch with the broader community.

3. Feedback on the process

There was generally a very positive response to the workshops. While there was a lot of concern and frustration about the current planning system discussed at the workshops, there was general appreciation that this project was endeavouring to collate real community feedback. Participants generally indicated that they were willing to spend time on weeknight evenings and weekends to attend the workshops as they thought the issue of community consultation was extremely important and that there had been a lack of forums where they could provide feedback.

There was also positive feedback about the Discussion Paper. While some participants thought some of the specific questions posed were confusing, it seemed that the Paper generally helped provide relevant background information to facilitate discussion.

Participants seemed to be comfortable that the workshops were facilitated and delivered by independent organisations, although a couple of survey respondents wanted to know why the DoP wasn't doing the workshops. While some noted that it should be the DoP putting the effort into listening to the community, others felt the workshops provided opportunity to raise a wide range of concerns. DoP representatives attended workshops as observers and generally only provided clarifications on request which participants found useful. One exception to this was the Sydney workshop, where the interference of the DoP representative in the discussion led participants to feel inhibited, frustrated and some left early.[6]

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[5] Each survey response included the respondent's post code. To date, survey replies that included a code have been received from the following area codes: 2489, 2337, 2450, 2536, 2790, 2211, 2011, 2422, 2103, 2579, 2094, 2400,, 2261, 2480, and 2604.

[6] This is illustrated by the following survey response extract:
I attended the Sydney workshop… I left early because the meeting degenerated after the Department of Planning refused to refrain from commenting on people's opinions despite being reminded of its inappropriateness and were asked not to. I recognised this frustration in many other participants who also showed this by leaving. It was a good example of how the Planning Department is unwilling to include the community but prefers to tell them that they don't understand and couldn't possibly understand and

Many people used the on-line survey to provide feedback. Collation of this feedback indicated some very strong common themes including: a general agreement that it is very important for the community to be able to find out about, and participate in, planning and law reform; and there is widespread concern about current methods of community consultation, with particular concerns around community views being constantly overridden by economic considerations.

Many participants thought there should be more workshops and forums on this topic. This is discussed further in **Part 4**.

therefore they must do it all for us. It's not just undemocratic it's anti democratic. Thank you for the discussion paper and opportunity to participate.

Part Two: Workshop and survey feedback - Key themes

A number of common themes arose during the first phase of the project and in survey responses to date. These relate to the following general stages and elements of current consultation processes:

1. Consultation as a legislative requirement
2. Information versus consultation
3. How consultation is done
4. Who is consulted
5. What is consulted on
6. Timeframes for consultation
7. Resourcing for community participation
8. How community input is processed
9. Local considerations
10. Consultation feedback

These are discussed in turn below with relevant extracts from workshop transcripts and survey responses provided.

1. Consultation as a legislative requirement

As noted in the introduction, increased community participation and involvement is an object of the EP&A Act. However, the extent of community consultation and involvement depends on what the legislation requires in relation to specific plan-making and development assessment processes. Currently, there is no standard set of mandatory requirements for community consultation, and as a result of various planning reforms, the type, method and extent of consultation depends very much on the type of project or plan and the discretion of the relevant decision-maker.

When asked whether community consultation should be a legal requirement, the participants in the workshops and survey respondents overwhelming said yes. There was general consensus that clear participation processes should be enshrined in legislation and must not be amenable to variation or avoidance. Concern was raised in survey responses that the current planning system has departed from the original aims and intent of the EP&A Act.

Various processes were discussed at workshops in terms of opportunities for public participation. These are discussed further throughout this Part.

Generally, in relation to **development assessment**, there was an extremely high degree of dissatisfaction with community consultation opportunities under Part 3A, and strong feedback that minimum consultation requirements must be clearly set out in the Act and not discretionary. It was felt that without clear minimum legislative requirements, the community has no guarantee of being consulted as required by the object of the Act.

In relation to **plan making**, it was also agreed that there needs to be clear legislated rights to public participation. For example, there was strong support for legislative requirements around 5 yearly reviews of LEPs, and even a suggestion that large Part 3A proposals in an area should be considered as part of these reviews (Wollongong).

It was also suggested that in addition to clear legislative requirements for community consultation, greater legislative weight be given to the products of good consultation processes:

> *community consultation requirements certainly should be set down in law. Regional Strategies should be another aspect of the legislation, at the higher level. They must be another planning instrument, in my view, and the requirements set down as to how they should go about it and not be done on an ad hoc basis and a very strong emphasis on involving the community. In fact the community should be determining the direction that future planning is going in their regions.* (Wollongong)

It was felt by some participants that documents such as Regional strategies that actually had good community input should have legislative force reflecting their role as a vehicle for the community to play a strategic part in shaping regional planning (ie, at the strategic stage and not just at a later stage when a development proposal already has momentum). Furthermore, it was felt such strategies should build on existing conservation plans to avoid the situation where the community is initially involved, but that previous community input is disregarded in new plans (Newcastle).

One Moruya participant noted:

> *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.*

Based on the project feedback to date, it would seem that the first step to reconnecting the community with the planning system is to clearly set out minimum mandatory consultation requirements in the Act that guarantee that the community has a genuine opportunity to be involved in any plan making or development assessment relevant to their local area.

2. Information versus consultation

Currently, requirements for public participation vary throughout the planning system, and it became apparent from workshop and survey feedback that the community and DoP seem to have different views on what consultation is. This is particularly in relation to whether a requirement to consult can be discharged by simply providing information.

A common theme raised at a number of workshops was the difference between information sessions and actual iterative consultation. Participants at Wollongong noted:

> *one problem with the EP&A Act, it pays lip service to community consultation - but what it really needs to do is deal with community participation. I've long said there is a difference between*

consultation and participation. And the community in a democracy must participate not just be told, asked and then ignored…

the meaning of what participation is should be defined. So it gives guarantees that the ordinary citizen will be involved.

Similarly, at Moruya:

I'd like to challenge the word consultation. It's not consultation, it's presentation. It's not real consultation.

Ballina participants stated:

But can I also just say something about the word consult, because there is often the sense, well, if we've come and told you something well then we've consulted with you. But there is never the sense that consulting actually means we are then going to listen to what you are saying and then make any changes based on what you've told us. So if its just an information getting out there process then it's interesting and should be still done but it's not really what I would call consultation…The intention of community consultation as it has been done in the past is simply as an information presenting mechanism. If they truly want to empower the community to actually make a difference to their own situations and to their own communities then the definition of empowerment is to listen and act on what it is that the community is saying.

Consultation should only be made by people who have the power to take up what they are told and make that happen. And quite often consultation is being told by a very low bureaucrat the things that they can't do.

Community consultation doesn't mean asking the community it means telling the community what they are actually planning to do.

and in relation to the 2008 reforms:

The department of planning held a seminar here and we attended but it really was mostly information giving. We were invited to write a comment but it didn't go anywhere. We didn't even get acknowledgment of it.

It was well articulated and clearly presented and the presentation and articulation took up virtually all the time and when we were just getting to the warm up stage where we had some interesting questions to ask it was all over.

Was that meant to be a workshop was it? It was speaker after speaker making presentations and there was absolutely no opportunity that I saw for workshopping anything.

We commented in writing afterward. I can sort of remember doing something sort of close to Christmas. It's usually Christmas time when that sort of request is made.

In terms of providing **information**, it was recognised that providing the community with accurate and relevant localised information at an early stage prior to consultation is essential. For example, a participant at the Wollongong workshop noted:

> *However, I would have to say that Shoalhaven City Council at one stage issued a pamphlet giving guidance to people as to how they could put in a development application that was basically taking account of the Jervis Bay Regional Environment Plan and I thought that was a useful document. But I think since then things have become much more complicated. I think there's a great need for community education in this whole area.*

While one individual thought the DoP website had clear and straightforward information, another Sydney workshop participant noted:

> *When something is going to impact on the community of course there should be consultation. We represent an Aboriginal membership and we've gone through a process recently of trying to translate information about how the planning system works in a community context and even those of us with legal training struggle with, when the government has chosen to consult about something or has produced factsheets to try and help the community to understand what's going on, finding that information on the DoP website is very difficult. And some of the stuff on there is great it's just very rare in my experience that government's consult. They say they're going to put stuff on the web but they don't tend to consult about what the website looks like or who uses it or how many sections it's got. You'll get one little bit of consultation that's not linked into a bigger picture about the way that it's supposed to work.*

The need for community education was clear, mainly due to the perceived complexity of planning laws, high level of discretion creating less consistency, the large number of instruments, and the newer instruments designed to fast-track and override other controls (Newcastle). At the Newcastle workshop it was noted that a local group had to put in significant time and effort to determine which 'rules and regulations' applied to an area of land, and what could be overridden by mining exemptions. In this situation, the group had to seek professional advice. Information is also needed to clarify instances where the community has been given incorrect information by developers or planning officers – this was raised at the Newcastle workshop regarding zoning and compensation. It also became apparent in some workshops that the community did not fully understand that their review options could be limited after certain consultations had concluded (for example in relation to concept plans – Ballina).

Similarly, several on-line survey responses identified the need for better plain-English information about planning law, with one respondent calling for more "people who can translate the law" for the community. A further suggestion was for the DoP to facilitate a legal inquiries process, similar to the ATO. Another suggestion was for more "plain English flow-charts" to illustrate processes. One response suggested:

> *DoP needs to provide for Local Governments and their communities, clear, concise and plain English summaries of the relationships between these and to indicate clearly what each new set of amendments means for local communities.*

In relation to the specific questions about planning instruments that were posed at each workshop and raised in the Discussion Paper, there was a general understanding of what SEPPs, LEPs and Regional Strategies were, but a high degree of confusion regarding how the different instruments interact. It was suggested at Moruya:

> *When we do an LEP we should do it on the understanding that SEPPs are reflected in it. And when new SEPPs come out I think the mechanism for community consultation should be the LEP – the local government area. We need Master Plans. The way to engage with the community is through local government.*

It is clear from feedback that DoP needs to clarify what is an information session and what is a consultation process. Community education programmes using a variety of techniques to provide plain-English information would be beneficial in addressing confusion about the current system. These should be conducted separately to community consultation processes. In relation to actual consultation, relevant information should be provided to a community *prior* to a consultation process, and not in lieu of consultation.

3. How consultation is done

The first step for effective community engagement is **notification**. This was discussed in relation to development assessment, plan and strategy making, but also in relation to law reform. Various examples of both good and bad consultation processes were discussed.

Some of the suggestions from Wollongong for notifying about law reform included:

> *…public notices in the newspaper and perhaps general advertising at the start of a Parliamentary session – what's planned and coming up. And that can either be in general notices or as an article in the local papers. I think it's the best way in my mind - the papers. And the details and focusing down on the legislation through the internet.*

> *… I think there should be a targeted communications strategy, depending on the type of legislation that's proposed and which interest groups in the general community.... some identification of the priority groups that would have an interest in the issue. I think it's a really good idea that government agencies are prepared to have interactive websites where you can give your email address and be provided with information. I think that's a really good thing. I'd like to see Shoalhaven City Council do that rather than have a policy that only notifies a very small group of neighbours of developments. I think there's a whole host of strategies that could be used but I think there has to be a formal communications strategy for any changes of law.*

Sydney and Coffs Harbour workshop participants indicated that they generally found out about planning law reforms from local conservation groups and environment networks rather than through the Government. In relation to broader law reforms it was noted at Wollongong that services such as the Environment Liaison Officer (funded by the main environment groups) have played a role in notifying and informing the community about law reform, and facilitating feedback to the relevant Departments or MPs.

In Ballina, it was suggested that targeted groups could have a role in broader notification and information sharing:

> *One suggestion would be that the local councils generally know which green groups or which community groups exist in the LGA and perhaps it could be through local councils that there's a requirement for information to be distributed in that way.*

One suggestion for improving notification of law reform was to establish a register of interested people and groups who wish to be alerted of any relevant law reform (Wollongong).

Regarding notification of proposed developments, the major projects tracking system was generally thought to be a useful service, for example in Moruya it was stated:

> *I find the website really good and I find their contact officers, when you ring them, really helpful.*
>
> *I agree with that. I don't ring them I just check online. It's a good way to find out where things are at.*

And in relation to the DoP website more generally:

> *I've recently used the NSW planning department website and click into their 'on exhibition'. I've found that interesting and I've actually posted comments on a few of them.* (Ballina)

With some concerns noted:

> *There are a litany of examples where apparently all of the information that is required under the various planning legislation is just missing; it hasn't all been posted. And yet the clock's ticking in terms of the consultation process.* (Wollongong).

Concerns were raised about: processes where notification was perceived as discretionary, where the onus was on the community to find out information, and where it was perceived that officials were reluctant to provide information to the community. For example:

> *Council uses discretion to advise people of what's going on. In the Mullaway example there was no advice from Council formally whatsoever. We wrote, as many others did, to Council and DoP and they responded. When finally the application went in for the site and Site Compatibility Certificates there was no formal advice until we wrote again. We'd ring up and they'd say you've got to write for that. I then asked to be advised and they said you'd have to write again for the determination.*

A range of notification methods were discussed in each workshop. For example in Moruya, the participants thought notification should be through: Sydney Morning Herald, local papers,[7] local library displays, EDO bulletin, Council newsletters, community notice boards TV advertisements, radio, and a range of media including the 'blogosphere.' One participant at Coffs Harbour stated:

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[7] It was noted in Coffs Harbour that advertisements must be in the most widely read paper (daily) as opposed to a weekly paper with a smaller circulation.

I come from a technology background. Especially with younger people it's about open data sets. I've already started canvassing Council about this type of thing. If a land parcel is on sold and all the identifying information gets pumped out onto the web through a blogging type system so landowners can say X, Y, DP is my next law. They can actually monitor that or put a Google alert for instance that if this lot is on sold or an application's lodged, straightaway they're informed.

Another participant stated:

Personally I don't have confidence in any of the spin that any member of the NSW Government releases. Councils are pretty well placed provide to (not just computer literate but) to all members of the community materials that are readily interpretable. Single 'What does this mean for me?' sheets, workshops to engage community, direct mailouts … There's a whole lot of measures that can get through to a far greater proportion of the community than we're currently seeing but none of those are really employed. Budgets need to be allocated, particularly in the case of LEPs. Spot rezonings are not as important but when a LEP is going to be in place for 15-20 years everybody in the community has a stake. They need to be educated as to what that means, the full implications of it, and given whatever opportunities they can. No holds barred … However, whenever, wherever. Publicity, promotion, education the lot. Coffs Council is a classic example. We have all sorts of professional staff who have great skills in education, publicity, digital design … but these talents aren't being used to get good public participation really.

The need for hard copy documents (or on disc) was noted for people in smaller villages or without internet access, or where reading lengthy documents on-screen may be difficult without broadband. In relation to environmental assessment information, it was noted at Coffs Harbour:

Often there are numerous appendices of a very complex nature. For example hydrology or traffic assessment – traffic impact statements and the like. A lot of that material is beyond the layperson. In order to gauge and to seek public input there is a need for a summary in lay terms of the more complex elements of an impact assessment.

[We need] An ordinary person's summary.

Sometimes the appendices are not available and, even if they are available, if you haven't got broadband they're inaccessible anyway. Too big, maps … things like that.

Probably a standard format in what's presented would be good, a web savvy version (not too glossy) because I always get timed out or my computer freezes. Too many pictures.

In regional areas you're at the mercy of your internet connection. Government publications are renowned for some big glossy image that they never optimise and is a couple of megabytes in itself and if I've got to pass that information I just rip it out. The Government needs to create a no fills version for country people.

A survey respondent also suggested letter drops, another suggested the Land and Environment Court website, while a further suggestion was that brochures be given to new residents, and television ads be considered. It was also commonly suggested that it is

necessary for DoP to have "someone on the end of the phone" who could answer community inquiries and information requirements. A Coffs Harbour workshop participant suggested:

> *Generally the idea of writing a submission is beyond a lot of people. They still care but a lot have apathy when it comes to being proactive. They may have negative thought about a development but may feel they can't express them or too intimidated to express them. Any development over a certain m² or dollar value, e.g. new shopping centres, aged care facilities, large developments, perhaps we should make the proponent build a 3D model and put it in the middle of a shopping centre and have someone there explain it to people with their comments videoed and those comments taken as a public submission. Sometimes proponents put things in over Christmas when all of us are on holidays. If we take it to the shopping centres people may or may not want to look at it. Those who do will have an opinion.*

The **form** the consultation takes is crucial:

> *Workshops is one way. Where you have butchers paper all over the walls and people can ask questions and write answers. Rather than have to go through a very formal submission writing process. I think if you want to engage the wider community, not just those people who have got a detailed knowledge of planning and environment issues, I think you've got to look at alternative means of consultation.* (Wollongong)

In relation to consultation on broader law reforms, one case study of a consultation method that was discussed was the 'New Ideas for Planning' forum in 2007. The idea of charging the community to attend was strongly opposed:

> *I just want to talk more on the process because when you were in there with the working groups it seemed like the ideas were pre-ordained. You couldn't just put your hand up and say 'well I've got this new original idea' and I thought that was a bit stifling and not what I was there for. The other thing too was that it was expensive and that would have ousted people from the process. And while there were people such as myself who eventually got in for no cost that wasn't known right at the beginning for a lot of people. So I think you would have had more people who would have attended if they had known.* (Wollongong)

One survey respondent suggested free annual workshops should be run by DoP statewide, and another suggested targeted regional workshops to update the community on new and upcoming law and policy reforms. Other participants strongly preferred workshops facilitated by independent organisations, such as by the EDO and TEC.

In relation to early notification and form of consultation, a Coffs Harbour participant stated:

> *I represent an Aboriginal land Council. I have a few issues with Government. When they advertise they don't use common language. They tend to have meetings where people have to travel either by bus or car and generally rural or remote areas get left out. They don't find out about it until after it's already happened and then they don't understand the ramifications of what are essentially words to what is physically going to happen over a piece of land. It's never before, it's always after.*

Examples of inadequate consultations were discussed, for example:

With the Stockland development there never was at any time any public meetings whatsoever. They had a series of consultations where they hired the auditorium at the high school and there was a lot of projects and development sections all around the room but never at any time could you ask a question and get an answer that somebody else might hear and comment on. So there was never actually a public question and answer session. There was a series of people put around the hall but it was not public. There were members of the public there and it was in a public building. And the developer controlled every session of this system. Nobody could hear what anybody else was saying You could ask individual questions and get individual answers but never at any time could anybody else in the room hear what you were saying.

I was involved in another one to do with the Shoalhaven River. We had great arguments about 'public hearings are no good; they are just a slanging match. You don't get anywhere, you don't get any communication. This is the best way – a one on one. You go and ask your question and you get answer'. But as said, there's a very important process in group interaction. You don't always think of the relevant question to ask. But somebody else might. You learn something from that question and you learn something from hearing the answer. Having experts talk one on one with the community has got its values but so has the public meeting. So has the workshop situation. Often I think the answer is to try a whole range of things. Plus the opportunity to put in a submission, plus the opportunity to have an interactive thing through the internet – a question, answer type of thing that way too. There are just so many ways of doing it and I know it's complex and it's involved and it takes time and when it's the developer running the show it's even worse. That's putting the fox in charge of the chicken house.

Newcastle participants raised the need for more visual plan information to be provided for consultation purposes to address differing literacy skills and cater for people who process information more visually than in written form. Similarly, Ballina participants suggested more oral hearings to allow marginalised people to participate without requiring long written submissions. Similarly, one survey response suggested regular "dialogue circles."

It was also noted that how consultation and negotiation is done can be ad hoc and informal in some regional areas, and while there may be some public consultation undertaken, there is a high degree of cynicism about what is negotiated privately. For example, in relation to the Standard instrument consultation process, workshop participants noted:

What do you think about the Standard Instrument?
There's a 2030 Vision, which is setting community ideals. There's been very good work done on the environmental values, corridor and key habitat work. There have been an awful lot of negotiations between individual landholders, proponents and Council staff, very little of which is provided to elected representatives.

Yes. I'd have to agree with that remark. …So there are a lot of negotiations entered into which the community is not having a knowledge of or an input into and that will translate into some very poor planning outcomes …There's a lot going on behind the scenes that isn't going to lead to a good Standard Instrument. The Standard Instrument in itself is quite good. It irons out inconsistencies across the state, it establishes some good parameters or benchmarks for a given landuse zone but it's the negotiations or deals beforehand that lead to a really atrocious outcome.

My shire council has got a draft LEP. Standards may very well work in bigger areas. In rural areas a lot of people are related to each other, meet at the pub, have children who work for someone that they know. What happens on handshakes (still to this day) is that they sneak things into the LEP. It's decided at an 18th birthday party or a 21st or … It sounds like it would never happen but it does. If you try and fight this, at some time you get tired. You step away and that's when they jump in.

In contrast, some positive feedback was received regarding the role of precinct committees:

Some LGAs have precinct committees but they don't always utilise them as they should. I'm involved with setting up a DCP for our area, which took an awful lot of time to get through. It was worthwhile because all those people now know what's going on. They had input into it through surveys and good stuff came through setting up that DCP.

Similarly, there was some positive feedback about the independent consultation process for Regional Strategies. This is discussed further below.

One suggestion to overcome a range of concerns was proposed at Ballina:

perhaps the Department should pay the salary of a local government officer whose job is to facilitate participation of the community in development matters.

Furthermore, it was suggested in Ballina, that early consultation should be more focussed on reasonable constructive discussion:

if [Councils, developers and community] *could actually be encouraged to come together in a positive way then there could possibly be solutions. It shouldn't necessarily be adversarial.*

One survey respondent, when asked "What is the best way for the Department to consult the community?" concluded:

Slowly, honestly, professionally, genuinely. It must avoid tokenism in consultation. It needs to ensure that it is serious about and seen to be committed to genuine consultation. Avoid using consultants known to serve developer interests. Maybe use university or NGO staff and entities to run consultations.

4. Who is consulted

Where the broader community is not notified, it is often the case that the relevant Department has opted for targeted **stakeholder or reference group** consultation. This was discussed at each of the workshops, and comments included:

it's great that we're here today but there have been other processes in which the government seem to be selective on the types of groups they want to a particular meeting on a particular issue, so you miss out on that…And even if 3 people from the public turn up at least it means that you can say you opened it up.

In Ballina, it was stated:

> *I don't think its appropriate that the government consult with stakeholder groups and reference groups. The reason for that is because I think a stakeholder group has the inference that you are somehow part of a confederacy, that you have a united set of opinions in each of those groups and that may not be the case. As far as reference groups are concerned, I don't think that any single group of individuals can represent the views of an entire community because of the variance of views in that community. So I don't think its appropriate. I think a forum like this where all of the public are invited to attend is more appropriate.*

Similarly, it was noted in Coffs Harbour:

> *I also think the stakeholder groups and reference groups tend to be very selective and when they say the word "community" they have representatives of the community but it's not really the wider community that tends to be selected. You tend to have a lot of industry types, government types, influence groups but not the real community. You have a token environmentalist sometimes ... one out of twenty perhaps.*
>
> *I don't think the selection by the Government instils much confidence across the community in the outcomes of those processes. It should be open to complete involvement. Anybody who has the desire should be able to offer input.*
>
> *I think an example of that bias in selection is the recent selection of the community reference panel for the joint DoP / Coffs Harbour Council planning exercise for the city Jetty and Park Beach. I believe there is only one community group represented on that Community Reference Panel but we there seems to be a lot of friends or relatives or associates of the developers or significant landholding interests but there's one community rep, a representative of the Jetty Action Group, and I'm it. There was a call for applications. I know some community reps who nominated but weren't selected, I know some associates of developers who were selected but didn't nominate. There's not a lot of confidence based on that example. I think there are ways of doing community consultation and ways of not doing it. The DoP doesn't have a very good track record of doing it very well I don't think.*

There was strong criticism of current stakeholder consultation expressed by two participants who had travelled a significant distance to attend the Sydney workshop:

> *Hawkesbury Harvest has never been invited to a DoP consultation meeting yet we have been working on the issue of farm survival and food production in the Sydney Basin for decade.*

A suggestion was made at the Sydney workshop to address such concerns:

> *It's OK for government to convene stakeholder groups and reference groups but there has to be two-tiered consultation. That's for people that are directly involved – he knowledgeable people. But there are a lot of people who are interested and concerned but who have not heard about it and have not had a chance to be consulted. It would improve transparency if there was two-tiered consultation – one for the experts and another for the grass roots community.*

'Invitation only' consultation processes were also criticised (Wollongong).

5. What is consulted on

Many participants raised concerns about the quality of information that developers provide for the purposes of consultation. This was frequently raised in relation to inadequacy of environmental assessment information. This undermines constructive engagement by the community and raises questions of independent expertise and transparency of process.

Many also raised concerns about perceptions of bias and a lack of transparency in the planning system as barriers to genuine community engagement. Some community members felt that developers colluded with the DoP, further frustrating any genuine public participation. Survey responses overwhelmingly thought economic considerations were given far greater weight than environmental or social considerations.

Various recommendations were made for example to address perceptions of bias in relation to consultant reports drafted for developers, and conflicts of interest in the EIA process (Newcastle).

One suggestion made at the Wollongong workshop was to limit the earnings a consultant can derive from one developer or government department per year. It was suggested that increasing independence of reports would increase community confidence that the findings of impact reporting is not influenced or pre-determined by the developer. Similarly, one survey respondent suggested former Council planners should be banned from operating as consultants in their own areas for 5 years after they resign from Council.

In Ballina it was also reported that many environmental assessments exhibited to the community "seem to be desk top jobs," and even where members of the community spend significant time analysing enormous reports, there is the general perception/experience that the decision-makers simply "take the word of the developer" even where there are obvious flaws in the assessments. Instances of Council reports written by developers were also raised – illustrating problems around bias and lack of objectivity and transparency. It was suggested that:

> *It would be good if the developers had to pay the council to get their environmental assessments done and then the council undertook to pass that money on to an independent, credible, qualified person to do it.*

It was also noted that the community has a vital role in supplementing Council expertise on an issue where Councils are in need of further information. As one survey response noted:

> *Most councils lack the skills needed to properly assess proposals, especially in terms of being able to determine what the ecological impacts are and whether an applicant's consultant has done a credible job of assessing impacts on especially threatened biota. Councils should be required to demonstrate to the Minister that they have the necessary staff and expertise to meet their obligations in terms of threatened biota assessment. Many have no ecologists on staff, and those that do tend to have one junior officer whose views are readily subsumed by senior staff who usually lack ecological knowledge.*

In relation to major projects assessment it was noted at Wollongong that:

The problem is that it's the proponent that's assessing the public comment. There has to be some impartial process. You just cannot get a high quality environmental assessment out of a development proposer. The whole system is skewed.

Similarly, it was stated at Coffs Harbour:

In some cases developers shop around for a favourable consultant. It needs a rigorous and robust, legally enforceable set of standards and until that happens the community and our environment are going to be sold out.

When asked how an ideal system would look, a Wollongong community member stated:

Experts running it with no conflict of interest, there for the best wellbeing of the community. And put the system around that.

In addition to what information is consulted on during the development assessment process, workshop participants also discussed other topics for consultation. It was acknowledged at the Coffs Harbour workshop that there is generally no consultation on SEPPs, and that sometimes this has lead to good interim environmental protections, but it was also pointed out that there is no real way the community (and sometimes local government) can contribute to making and amending SEPPs. Communication problems between local government and DoP regarding mapping information were raised, and ideas for new SEPPs (for example on Aboriginal cultural heritage and climate change) were suggested. One participant noted:

Should the community be consulted on SEPPs?
Yes. We've consulted with DoP on many occasions. It's a brick wall. There has to be processes to minimise rorting. There were a couple of cases with SEPP 14. Large wetland areas were taken out (even when Bob Carr was Planning Minister). But there also needs to be measures of adding new areas in light of mapping errors or new information. As well as a consultative process to establish them, there also needs to be a process to maintain the as current.

Ballina participants also recommended more regular reviews of SEPPs to make them more useful.

6. Timeframes for consultation

A general concern raised in the workshops was that consultation must be as early as possible in the process and allow adequate time to respond. Wollongong participants stated:

Consultation can occur at any time and generally consultation means we will talk to you, we'll tell you and we may even let you comment and we may or may not take notice of your comments. It's got to be a real democratic process in which the community participates. It has to be upfront. The opportunities to get involved should be maximised and that can only start at the planning stage.

It needs to be at beginning, not near the end.

I do believe the earlier the public is involved in these things the better because then they can have their say and they may even come up with a decent suggestion.

However it should be noted that not only should the consultation be at an early stage, but there must also be sufficient detail to consider. For example, concept plan consultation is at an early stage, but was roundly criticised by workshop participants due to the lack of detail made available and the fact that by ticking off concept plan consultation, community rights of review were then limited. Concerns were raised about the significant barriers to providing genuine feedback on concept plans at Coffs Harbour, for example:

What about the idea of concept plans?
You do need better detail up front. Say in Port Macquarie where the Lands Department was looking at leasing an area and they came to town and they had a concept plan and they do a fly-through Powerpoint presentation. The buildings were out of proportion to each other. All the detail was going to be provided later. That was supposed to be submitted to the government under Part 3A. You have to do a lot of homework to get to the detail for instance where they were going to put a boat stacker on this land and they're saying 'it's not that big' but when you looked at the detail it was a huge industrial shed being put the foreshore. Their fly-through and their pictures in the paper looked like this lovely building with these people that were 40 feet tall. It's not reality. People can't come in with a final plan but there has to be some parameters or guidelines. If you're going to have a concept plan it must be something that looks close to like it will actually be. Which is difficult I know.

Similarly, in relation to the LEP gateway process, it was noted in Newcastle:

One problem is that the Minister has complete discretion as to the level of public consultation. Because it's a discretionary matter, that's something you can't challenge in the court if he or she decides a level that is inappropriate in the community's view. Another aspect is that the actual planning instrument that results, as opposed to the planning proposal, materialises pretty late in the process. In fact, well after the public participation process. So what actually eventuates from the process could be completely different from what was actually put out to the public. I think that's a matter that's going to remove public confidence in the whole process.

Similarly, it was noted in Ballina that the gateway process puts all the power in the 'person who closes the gate' and limits community engagement once the 'gate is closed'.

When asked what the ideal consultation time for LEPs is, Moruya participants stated:

It needs a lot of time. It is a key document and it's in everybody's interests to get it right so it requires a whole lot of background work and community consultation. Personally I'd like to see a minimum of 3 months, if not more.

I think 3 months is about the right time frame. One month is an insult. If it's going to be informed consent, I mean community groups usually meet once a month so you need to allow time for informing them and then for them to get together and come back with valuable contributions. If you talk about one month you're not serious about community consultation.

The longer timeframe is important if you are in a shire where a lot of ratepayers don't live here. One month is too short for those who don't live here to get a hold of it and get their heads around it.

Ballina participants suggested a minimum consultation period of 6 weeks for LEPs, but that the 6 week period not be over Christmas. It was suggested that there could be minimum timeframes, but not maximum timeframes and that there should be more equality between the time developers spend discussing proposals with planning officials and the time community gets to discuss the proposal. Similarly, Coffs Harbour participants thought 90 days would be appropriate, and not over the Christmas holiday period.

It was thought that 2 weeks to comment on the LEP gateway process was "woefully too short" (Wollongong), and participants consistently criticised exhibition periods including the Christmas holidays. At Wollongong it was noted:

The community is being asked to comment on a concept and so to only allow a short period of time is quite inappropriate because people really have to work hard to work out how the in principle statements apply to their particular sites. I think it should be a set requirement; it shouldn't just be left on a case by case basis and it should be at least 6 weeks because if you're going to do any thorough assessment of proposals it's really important to get expert advice and you can't do that in such a short time…

It shouldn't be up to the Department to decide on a case by case basis so it should be set down in law.

In relation to major project consultation timeframes, it was noted in Moruya:

Is 30 days enough time to comment on a major project?
No (general agreement)
By the time you find the advertisement, download it, read it, talk to other people and get your thoughts together 30 days is not enough.
How much time do you need?
3 months.
Again, community groups meet once a month so 30 days is not acceptable.

In relation to consultation on **law reform**, the response was overwhelmingly that the community would like more warning and time to consider proposed law reforms. As noted by one Wollongong community member:

Yes that consultation might take a little time but given that some of these laws are in for a long long time I think a slight delay would not hurt at all. Considering if they are going to have some impact on people or the immediate environment.

Similarly, a Sydney workshop participant noted:

I think a lot of people would like a whole new planning Act and that would necessarily require very widespread consultation. But I think what is happening at the moment is these incremental changes,

> *some of which are very far reaching, but which are tucked into the Act as amendments or regulations. So part of the problem is that people are not getting the chance to look at the complete picture. We only get told, the Act isn't working in this way and needs to be changed but we never get the chance to say what sort of planning system we want.*

Based on feedback, a review should be undertaken of existing timeframes for different consultation processes under the Act, with a view to extending timeframes. It was made clear in workshops and survey responses that the DoP's stated objectives of reducing time taken to approve development proposals has been a major cause of disconnecting the community with the planning system, and in addition to favouring developers and alienating the community, has resulted in rushed, unsustainable, short-term decisions that do not benefit the community.

7. Resourcing for community participation

The variable and often limited capacity of local communities to engage in the planning system was raised at every workshop. While some areas had well-resourced and extremely well-informed community groups, often with retirees who could devote time to a local issue, many groups struggled to find the time and expertise to effectively engage. Lack of resources (especially in terms of time, expertise, and funds) is a major barrier to public participation and starkly illustrates the difference between community and well-resourced developers in terms of engaging.

Participants at Ballina noted:

> *I think that one of the biggest problems that we've got is that in order to try to counteract any of this stuff at a community level it means that you have to have at least the same level of expertise and understanding of not just planning law but local government law as well to be able to mount any sort of an argument at all which is absolutely unreasonable for people who are operating at a local community level. I mean we have people who have literally been working in this area for 5 years full time. There are 3 of us who have been doing it for 5 years full time in order to get an understanding of how the damn system works so that we can try and do anything about it. Now that's just not reasonable at all and it's even more offensive when people in government come back and say you guys don't know what you're talking about.*

The lack of resourcing for all the hours of effort that community put into trying to engage with the planning system was discussed in Ballina, and suggestions for reform included establishing a fund (contributed to by developers) to pay for professional assistance to the community in preparing submissions, for instance during the gateway process. The fund from developers to assist community consultation was also suggested at Coffs Harbour.

There was some reference to independent groups assisting local communities that worked relatively well, for example, the Total Environment Centre facilitating community consultation on the development of regional strategies. This process involved the DoP providing funding for TEC to facilitate the consultation. This process was strongly supported. However, the Regional Alliance for Sustainable Planning (RASP) in Coffs Harbour noted:

There's still great interest within the RASP network for having a continued involvement in how the region develops. It's very difficult to be effective without keeping the existing networks going. Our funding was provided at arms length from the DoP. We set some clear parameters that RASP was to be fearless and frank in our advice and submissions to the DoP. To date nothing whatsoever has been acted upon and I can say that with all certainty.

It is clear from feedback that in addition to enshrining more clear rights to consultation in legislation, it is necessary to make those rights meaningful by assisting the community to engage. It is necessary to even out the playing field between different stakeholders providing comment on a plan or development proposals, so that the community can re-engage in the planning system with confidence and capacity.

8. How community feedback is considered

Even where there is a legislative requirement to consult - adequate notification is given to the community, consultation is undertaken in a range of forms, the community has sufficient resources to engage, and has met the timeframes to provide feedback (often in the form of written submissions) - the next step of how the community feedback is processed seems to be where the whole process can collapse in credibility. Serious concerns were raised about: the exercise of discretion by decision-makers, the lack of transparency and consistency in decision-making; the disregard of community input, and the lack of guarantees that the community input will be genuinely considered.

A Coffs Harbour workshop participant noted:

What are the challenges of providing public comment on planning proposals?
Detail and the concern you're comments will be taken seriously. Whether you're even respected. There's just been thousands of submissions put into various planning proposals on the North Coast and just no evidence of any detailed consideration of them. There needs to be a response to submissions report. There is in some cases.

The amount of discretion that the DG and Minister have under recent planning reforms was commented on at all of the workshops. Participants felt that the increased discretion has resulted in less consistency and made it much more difficult for the community to engage with any confidence, and get feedback on a list of relevant issues. It was noted at Ballina:

Do you think it is better to set the environmental assessment requirements on a case by case basis?
The fixed list is a far better system and the biggest defect in the whole of this Part 3A is the discretion that is used on a case by case basis. An EIS is prepared and there is a huge list. I've done a few. The list has to be fulfilled. You cannot get around it. You can write something like 'not applicable' but it must be considered. And therefore it's out in the public and open to argument. This case by case thing is... that's the part that stinks.

A strong theme from survey responses and workshop participants was that under the current system, when discretion is exercised, it is exercised in favour of economic interests over and

above social or environmental interests. One survey respondent provided feedback from the perspective of a farmer and expressed frustration that DoP consideration of mining proposals consistently failed to take into account social impacts on rural farming communities, and that economic interests failed despite widespread community objections.

While some participants would prefer one clear assessment system for all developments that the community could understand, a large number of participants thought that it was reasonable to have a separate assessment stream for large infrastructure projects. However, it was consistently suggested that this category should have more clear criteria around decision making and better consultation and review provisions than the current Part 3A. A Moruya participant commented:

> *A few of us are at a loss to know how the biomass burner at Eden came to be called in under Part 3A. It's only a 5 megawatt plant. It beggars belief. It's totally against what I thought major projects were about.*
>
> *The environmental assessment requirements should be the same as under Part 4. They shouldn't have less environmental assessment just because they're called in.*
>
> *There ought to be specific requirements on a case by case basis but there should be some that are mandatory. A minimum standard irrespective of who is making the decision and then case by case ones specific to the development.*

However, a large number of participants opposed the category of 'critical infrastructure'. Coffs Harbour participants suggested that no project should be declared critical until there has been a genuine public consultation process.

A number of workshop participants raised the issue that it is very difficult for the community to engage in the planning process when they get inconsistent advice from different decision-makers, such as local councils regarding the interpretation of environmental planning instruments. This was raised at the Wollongong workshop in relation to notifying those impacted by a decision where the DCP stated one requirement and the General Manager stated another. Confusion arose between the interpretation of "policy" planning instruments as guidelines, compared with mandatory requirements. Similarly Ballina residents got conflicting advice from their local council about whether local planning provisions were requirements or merely 'guidelines'.

Issues of 'buck-passing' were raised in relation to who is ultimately responsible for considering community input, regarding general planning decisions under Part 4 and 5 in Ballina, and regarding the Standard LEP process in Moruya:

> *Councils are using the standard instrument to get changes to their LEP that are unpopular with the community. They are saying – 'that's in because of the standard instrument'. The feeling was it became a handy answer when questions were being asked. It's a concern that it's being used like that. They are relying on the fact that the public hasn't read it.*
>
> *As a concept the standard instrument is perfectly fine but there are a lot of issues with the definitions, with the way the definitions are being used as political footballs and used as a way for*

councils to wash their hands of the process. My experience was that councils had a fair degree of freedom within the definitions to do what they did but my experience is that it's been used to further bigger interests and not the community interests.

A similar experience was reported at Moruya of community members being referred from DoP to DLG or told to write to the Deputy Premier or Ombudsman in relation to concerns about clearing in Woolawaya. The local group had difficulty getting straight answers. Buck-passing between government departments and Ministers was also noted at Coffs Harbour:

I asked Minister Keneally at the $95 per head developer sponsored gig to launch the Mid North Coast Strategy at the Opal Cove Resort, what's happening with the Regional Conservation Plans? She said that's the responsibility of another Government agency and we won't be acting upon that. Minister Knowles, who just before the Far North Coast Regional Strategy was released gave an undertaking it would only be accompanied by an RCP.

In terms of the exercise of discretion, it was stated at Ballina:

All of these processes seem to be based on a phrase "in the public interest' which I think is something we all need to really look at. In the public interest, according to the bureaucracy and governments, is about creating jobs or creating so called jobs. That's nothing to do with the public interest whatsoever and in terms of us addressing this whole issue of development, it seems to be that what we need to do is force the government to redefine what is in the public interest.

Other suggestions from survey respondents to address potential bias at the decision-making stage included that decision-making bodies be subject to ethical planning principles and that there be transparency around appointing truly independent planning panels to hear and process community input.

Another reason for poor community confidence in the planning system related to the independence and expertise of decision-makers that would consider community input. For example, it was noted at the Coffs Harbour workshop in relation to Joint Regional Planning Panels:

There are 2 positions from Council. They can nominate 3 – one's a backup. We have the Mayor, the Deputy Mayor and the General Manager. My understanding is that none of them have any qualification. At a recent meeting I asked the Mayor what qualifications were required and the answer was anything but the answer to the question I asked. I understand in councils such as Tweed after the new system came in for the appointment of JRPPs that the council actually employed someone with environmental planning credentials to sit on that committee. Clearly they're looking in the right direction.

Many participants therefore questioned the use of engaging in a system where: discretion seemed to be exercised in favour of economic interests over community interests; there was a lack of clear decision-making criteria for certain categories of developments; and there was a lack of consistency in how (or whether) community input would be genuinely considered. To address these concerns it is necessary to improve transparency of decision-making process, for example regarding mandatory decision-making criteria.

9. Local considerations

Related to the previous point, a key factor causing the community to feel disconnected from the planning system, is that local considerations are constantly overridden. There was a strong sense in most workshops that inadequate community consultation results in inadequate consideration of local factors. As stated in Ballina:

> *There's an assumption that people in the community don't have the expertise that people in government have around planning and that's a total misperception. People in local communities have a lot more information about local situations, local conditions the appropriateness of local development than people who are in Sydney do and that's the thing that makes us extremely angry.*

A concern was raised at the Wollongong workshop in relation to concept plans under Part 3A:

> *In relation to the criteria, there is a bit of an issue with not having set criteria and just having one person decide instead what issues to deal with because you might miss something in particular if you don't consult with the community who might have a great wealth of information beforehand. We're always at the end of the spectrum rather than the beginning of the spectrum so that's a big issue as well.*

A common theme was that certain instruments (such as the Seniors Living SEPP) and schemes (such as Part 3A) are not designed to adequately consider common sense local information. An example was noted in Moruya:

> *…another one was the aged care [development] at Jamberoo. It was a small community. It didn't even have a pharmacist or a doctor and they were going to put an aged care facility there. It was totally stupid. And it was going on prime agricultural land right on the edge of town.*

In relation to regional strategies it was commented on in Ballina:

> *I know there certainly was a problem with data sets. National Parks kept telling us that they couldn't tell us where the koalas are. We know where the damn koalas are but they couldn't! What ends up in the strategy? I think koalas are mentioned there in passing in a sentence.*

One survey response expressed frustration that large government infrastructure projects can override local consideration and have perverse local outcomes:

> ***Q. Do you think the current development assessment process results in good planning outcomes? Can you explain your answer?***
> *R. No. Ourimbah for example. The RTA can do whatever they like. Local council, and the local community have no say. Residents can no longer travel across the northern railway line, except by car. The community has been split in two. One cannot walk from the school to the sports grounds, from the shops to the university etc. About five years ago, residents fought hard to save a melaleuca biconvexa swamp forest from being cleared for a freeway exit ramp. But then, just a month ago, with*

no warning, no plan, no approvals, they bulldozed the entire remnant for a carpark. Government bodies, like RTA are totally outside any planning assessment framework.

Another common theme raised in the regional workshops and on-line survey responses was that planning reform consultation is Sydney-centric. Participants in Ballina noted many law reform forums are just in Sydney and similarly in Moruya it was noted:

The people in regional NSW don't know what the Department of Planning are thinking. I can't remember the last time a regional department person spoke to the community. They come down regularly to speak to the council but they never some near the community.

My experience of DoP staff is that they are always scared of coming to community meetings. They don't like doing them. They don't do them as a rule. I see all sorts of departmental people but rarely do I see a department of planning person.

Similarly, many survey replies called for DoP representatives to do more site visits, locally based seminars and require more facilitated meetings in local communities.

10. Consultation feedback

Based on workshop and survey feedback, it is apparent that the community and the DoP have different views on what is the 'end point' of a consultation process. Similarly, as the legislative requirements are not comprehensive enough, developers can technically discharge consultation requirements by employing ineffective processes as discussed above. A consistent theme raised by participants was that consultation needs to be iterative. Many participants had the experience of putting a great deal of time and effort into submissions and not even hearing whether their submissions have been received.

There needs to be loops and cycles of consultation (Wollongong)

I think it would help the public to understand the extent to which their comments have been accepted or not and the reasons why. If there was a requirement for a document that did properly assess the public comment that went on an issue by issue basis and gave an explanation of why that point had been accepted or was rejected. I think that could then form the basis of a decision as to whether or not it needed to go back out to public consultation because you'd have a checklist that would add weight to going ahead with it without going back to the public because it would show the public that they're comments had been taken into account. (Wollongong)

Many community members reported feeling demoralised that large developments are presented as 'fait accomplis' (Wollongong), there is no point trying to fight against a 'done deal' (Coffs Harbour), community consultation is undertaken in a "tick a box" manner (Newcastle, Ballina); that community concerns are not taken into account, and decisions are made despite extensive community opposition (Newcastle).

Ballina participants concluded:

The issue is what they do with the information that we give. ..If they ARE serious about listening to genuine submissions that put in with regard to planning proposals then what I'd like to see particularly is how they actually intend to deal with those submissions and suggestions that are put in.

What are some of the challenges of commenting on a major project?
It's obviously a very significant amount of time that needs to be devoted to making a comment. When you feel that it is totally insignificant, your comment, it's a complete waste of time, it's very hard to put aside that time in your life to make a comment which you believe will be totally thrown aside. I don't think any one of us would really believe that anything we've submitted has been listened to, other than attached to the end of a report.

Similarly in relation to plans and strategies, it was noted that there was often a disconnect between the draft (that looked good in terms of reflecting community input) to the final version (which looked good in terms of developer interests), with no further consultation on the final form (Wollongong).

Moruya comments included:

You need to manage expectation so you should be upfront with constraints and let people know early in the process.

I think the key to community consultation is 'no surprises' which is why it's better to have brief consultation early as well as lengthy consultation later on.

Ballina participants also agreed that consultation should be iterative:

When is the right time to consult the public?
The inference in that question is that there is a right time, singular, to consult. And it would make sense in something as important as an LEP that it should be an iterative process. The community should be consulted, go away and work on it, come back to the community and consult again, Did we get it right? go away, work in it again, bring it back until the instrument meets the needs of the community and is relevant. Because it's a piece of legislation it needs to be done correctly. So not right time, but right times and I would say until the process is completed effectively.

I think that we get an opportunity for a very short period of time to provide a submission. Whatever it is, is on exhibition for a very short period of time. And then we never see it again until it's made. So I think it needs to come back to the community to maybe track some of the community input because we never know.

One of the problems with the community is that there are ideas that are put to a council or to a government or whatever. If they are going to reject the majority of suggestions that are put to them, it would be very nice to know why they are rejecting those submissions instead of just saying "oh, well we've narrowed it down now to these final 4 choices that you have to make" when none of those 4 choices were what the community asked for in the first place.

If it's a major project there should be a public hearing because at a public hearing people have witnesses to the points they've raised. There should be someone there skilled in documenting the issues and it then forces that they be pursued and no one is in doubt that they will be.

Further suggestions from the Ballina workshop included:

I think what should happen is that governments should make a little list of the things that they would like to change and round about every 2 years, consult the community about that list. In other words don't keep coming back whenever they like. Stack them up as a list of things and talk to us every 2 years and we'll know that that's the time when we will be able to discuss changes that might be conceivable.

I think also that it would be nice if there was a regular consultation. There are so many changes professionals have trouble keeping up. Let alone the general community who mostly probably don't have a clue.

One example of good feedback was discussed at Ballina:

Has anyone got a story where they have participated in the system and seen your ideas come out in the decision?
What I put in for the Kings Forest submission, just about every aspect that I touched on was actually mentioned in the feedback from the submissions after the event. I was pleased with the way that came out.

If the DoP genuinely wishes to reconnect the community with the NSW planning system then it must implement measures to ensure that community input is properly considered and mandatory feedback loops are embedded in the system to show how input has been considered and explain to the community why their recommendations have been refused or amended.

Part Three: Best Practice Community Consultation

1. Models for Best Practice community consultation

Community consultation and public participation is recognised both domestically and internationally as an important and integral part of environmental decision-making. There are a number of international conventions and documents that require community consultation and engagement in environmental decision making, including, for example:

- *Rio Declaration on Environment and Development 1992* (UN)
- *UNECE Convention on Access to Information, Public participation in Decision-Making and access to Justice in Environmental Matters* (Aarhus, 1998)
- *Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context* (Kiev, 2003)
- *Good Practice in the National Sustainable Development Strategies of the OECD Countries* (2006)

Australian Government legislation and practice reflects international public participation principles[8] and obligations to varying degrees, and each State and Territory have in place various public participation mechanisms under relevant legislation. Various guides from different departments in Australian jurisdictions have been analysed as part of this project to identify current community consultation practices. Similarly, we have analysed the changes in community consultation requirements over the years in NSW.

In its review of the planning system in the 1970s, the (then) NSW Department of Planning recognised there are three levels at which the public can potentially engage in the planning process:[9]

- provision of information to the public during the planning process;
- canvassing public response and opinion, and integrating this into planning decisions; and
- making of decisions by the public.

The provision of information is a prerequisite of meaningful public involvement and information should be provided at three stages of planning or review:

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[8] For example, Principle 10 of the Rio Declaration states: Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

[9] Minister for Planning and Environment, 1974, *Towards a New Planning System for New South Wales: First Report* Nov at 21.

- during the formulation of objectives;
- during the formulation of alternatives; and
- when finalising the plan.

The Department at the time recognised that the planning system must not only provide information to the public, but that the system should allow the community's needs and aspirations to be reflected in planning proposals. Public involvement is not only informing people but also allowing their views to shape the plan.[10]

The same principles can also be applied to the assessment of development applications. Here, full community participation in the assessment process can ensure that all of the impacts of a development are fully assessed and that the best decision is made including, if a development is approved, appropriate conditions to achieve the best possible outcome for the community.

The introduction of the EP&A Act in 1979 following this review broadly reflected these aspirations. The EP&A Act and Regulations have been amended almost countless times since 1979, indeed every parliamentary year seems to include Bills to amend planning laws, and the reforms over recent years have caused an erosion of public participation rights and a departure from the goals and aspirations in the original legislative design.

In determining how the DoP can endeavour to get the EP&A Act back on track and reinstate the central role of the community, it is interesting to examine three models for **best practice community consultation**:

- First, an international model for best practice community consultation;
- Second, a NSW model of best practice principles, and
- Third, a specific example of a model DoP currently uses for consulting on major projects.

(1) The International Association for Public Participation has identified a number of levels at which the community can be participate in decisions and a range of techniques that can be used to foster that participation. The different levels are outlined below.[11]

IAPP: Spectrum of Public Participation

Level 1: Inform
Provide the public with balanced and objective information to assist them in understanding the problem, alternatives, opportunities and/or solutions.
Method: fact sheets, websites, open houses.

[10] Minister for Planning and Environment , 1974, *Towards a New Planning System for New South Wales: First Report* Nov at 22.
[11] International Association for Public Participation, 2007, *IAP2 Spectrum of Public Participation,* Available at www.iap2.org/associations/4748/files/spectrum.pdf

Level 2: Consult
Obtain public feedback on analysis, alternatives or decisions.
Method: public comment, focus groups, surveys, public meetings, online forums.

Level 3: Involve
Work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.
Method: workshops, deliberative polling.

Level 4: Collaborate
Partner with the public in each aspect of the decision, including the development of alternatives and the identification of the preferred solution.
Method: citizen advisory committees, consensus-building, participatory decision-making

Level 5: Empower
Place final decision-making in the hands of the public.
Method: citizen juries, ballots, delegated decision.

The degree to which the DoP is adequately addressing each of the IAPP levels is variable. Regarding **Level One**, feedback from participants in this project suggests that more and better information is needed to educate the community and clarify confusion about the system. Furthermore, much of the material currently presented by DoP is very much focused on economic and employment outcomes with less emphasis on environmental or community outcomes, and would therefore not meet the "balanced and objective" criteria. As discussed in Part Two of this report, the DoP currently convene meetings and seek public comment as suggested in **Level 2**, but participants did not comment specifically on the use of online forums or the use of surveys. Based on feedback (particularly regarding lack of clear legislative minimum requirements, the inconsistent exercise of discretion, and lack of feedback loops) it would seem DoP are not achieving the goal in **Level 3** of ensuring that public concerns and aspirations are "consistently understood and considered" throughout the process. No examples of deliberative polling were raised by participants. While in some examples (such as working on Regional Strategies with DoP), the criteria in **Level 4** are being achieved; in relation to development assessment processes the community certainly does not feel like they are a "partner" in each aspect of the decision. The mechanisms in **Level 5** are not currently used in NSW.

(2) Ten key principles of effective community consultation have been defined by Dr Lyn Carson and Dr Katherine Gelber, and were presented in a paper for the Department of Infrastructure, Planning and Natural Resources in 2001 entitled '*Ideas for Community Consultation: A discussion paper of principles and procedures for making consultation work*'. The principles are outlined below and can provide a benchmark against which the current Planning Department's community consultation strategies can be measured.

Principle 1: Timing
Does the Planning Department provide information in a timely fashion? That is, does it provide the public with information early enough in the process to allow the public's views to influence the outcome?
Is the public given enough time to express its views?

Principle 2: Inclusive
Does the Planning Department consult with a cross-section of the community?
Does it take steps to ensure that information reaches people in a variety of formats, including online and print formats?
Are there any consultation strategies designed to increase the range of people consulted such as people from culturally and linguistically diverse backgrounds, young people, retirees and Indigenous Australians?
According to Carson and Gelber, a random selection of the community should be consulted about planning decisions. Is this a suitable way of consulting the community?

Principle 3: Community-focused
Does consultation focus on individual interests or on wider community interests?

Principle 4: Interactive and deliberative
Does the method of consultation reduce questions to a simplistic either/or response or is the community encouraged to provide detailed answers and consider the big picture?

Principle 5: Effective
Is it clear how the decision will be made? Do the participants know what impact their involvement in the consultation will have?
Although decision-making can strive for consensus, complete agreement is rarely achievable but the decision-maker should be clear about how they will balance competing views so that the process is transparent.

Principle 6: Faith in the process
Is there a strong likelihood that any recommendations which emerge from the consultative process will be adopted by the decision-maker? In other words, is there any point to participating in the consultation process?
If the community feels that the consultation is being undertaken purely as a formality and will have no actual bearing on the outcome, it will be less likely to engage in the process. Faith in the process is important by both the power holders and the participants.

Principle 7: Well-facilitated
Are participants given the opportunity to control the agenda and the content of the consultation? This might involve the community helping to decide *what* is consulted on as well as *how* the consultation takes place.
Involving the community at this level lends credibility and thoroughness to the consultation process. An independent, skilled and flexible facilitator with no vested interest helps to achieve this.

Principle 8: Open, fair and subject to evaluation
Is the consultation method appropriate to the target group in terms of accessibility and how it is pitched?
Did the decision-maker provide feedback to the community after the consultation was over to keep them involved in the decision?
Was the consultation process evaluated to allow for future improvement?

Principle 9: Cost effective
Is the consultation method cost-effective in the circumstances? Does it achieve the aims of the consultation in terms of reaching the intended community and attaining maximum participation while still being efficient in terms of resource expenditure? Costs will vary and are adaptable, but the process selected must be properly resourced.

Principle 10: Flexibility
Is the method of consultation suitable for the community? Does it mix qualitative and quantitative approaches? Does it engage people with special needs (e.g. language, disabilities, the elderly, and the young)?

Again, based on feedback from participants in this project, current community consultation processes meet some of the Carson & Gelber criteria, but do not meet other criteria. For example, in some instances, information is provided in a timely manner to the public in the form of Discussion Papers as per **Principle 1**; and information is often provided electronically and in hard copy; and to specific interest groups through processes of stakeholder consultation as per **Principle 2**. The range of processes used would also meet criteria of **Principle 10** to some extent. However, many workshop participants and survey respondents provided examples of processes that did not meet these criteria. In particular, as noted in Part Two of this report, economic considerations overwhelm community considerations (contrary to **Principle 3**); often consultation did simplify options for communities rather than seek comprehensive feedback (contrary to **Principle 4**); inconsistent use of discretion and lack of feedback loops illustrate a current failure to achieve **Principles 5 and 8**; and the community currently has extremely little faith in the planning system (as required to achieve **Principle 6**.)

(3) The third model is how the Department of Planning currently assesses consultation methods on major projects.

According to the Department of Planning, a consultation process undertaken by a proponent of a major project or concept plan will be considered adequate if it demonstrates that:

1. Those individuals and organisations likely to have an interest in the proposal had enough opportunity to express their views. The community of interest can be broadly categorised into three groups:
    a. Those directly impacted by the project (eg. neighbouring residents or

those located on transport corridors affected by road or rail transport associated with the project)

   b. Individuals and groups likely to have an interest in the local or regional implications of the project (eg. local councils, local members of Parliament and P&Cs, environmental, Indigenous, heritage, business and other community organisations in the area)
   c. Organisations with a State and national interest (eg. State and Commonwealth government departments, peak bodies, infrastructure service providers).
2. Information regarding the nature of the proposal had been accurately and widely distributed. Methods of distribution of information may include, but are not limited to letters to key stakeholders, newsletters, a website, advertisement of consultation events and public displays of the proposal.
3. Community and stakeholder feedback was encouraged and recorded. Methods of capturing feedback may include:
   a. Surveys and feedback forms
   b. Submissions
   c. A database that records issues and comments via 1800 number or similar arrangement
   d. Meeting minutes.

   Methods of discussing issues with stakeholders may include:
   a. Drop-in community information centres, displays or open days with project team members available to discuss issues
   b. Focus groups, community group meetings, feedback sessions, individual and group briefings with key stakeholders and presentations/discussions at organisation meetings.
4. Consultation with community and stakeholders was inclusive and the proponent has:
   a. Got to know and understand the communities it needs to engage
   b. Acknowledged and respected their diversity
   c. Accepted different views, but ensured that dominant special interest groups are not the only voices heard
   d. Ensured that participants are aware of what they can and cannot influence
   e. Aimed for accessibility:
      i. Chose engagement techniques that offer opportunities to participate across all relevant groups
      ii. Considered the timing, location and style of engagement events and strategies
      iii. Avoided notifying and holding events during holiday periods
      iv. Avoided jargon and technical language
   f. Paid particular attention to the needs of groups that tend to be under represented (including Indigenous groups and people from culturally and linguistically diverse backgrounds).

On paper, the specific requirements set out by DoP appear to recognise many of the IAPP criteria and most of the Carson & Gelber principles. In relation to whether the DoP is meeting their own guidelines, the following comment was sent in from a community member in Coffs Harbour:

Major project consultation methods vary from project to project but I would say they "generally" comply with Departmental guidelines. Having said that, the guidelines are very open to interpretation and as a result only certain groups are targeted in the consultation process.

Similarly, in relation to major projects assessment it was noted at Wollongong that:

The problem is that it's the proponent that's assessing the public comment.

Although the policy exists, project participants were fairly critical of how major projects are being approved by DoP. As stated a key concern is that it is up to the proponent to decide on how consultation is done and who to consult and this varies greatly depending on the developer and community involved. There are also issues such as perceptions of bias, over emphasis on economic considerations, and the perception that projects will automatically get approved regardless of the community. These reduce faith in the major projects process. Another crucial issue for participants was the limitation of review rights to challenge development approvals once they have been through initial consultation processes.

Workshop participants were asked to provide examples of best practice consultation processes. One Coffs Harbour participant provided the following example:

It was for the site on the southern slope of McCauley's Headland….A company which was a bit progressive from Brisbane had a right of development subject to planning approvals. They put on a 5-day planning workshop. I think it started on a Thursday evening and people were invited in to talk with the planners. They brought 18 people down including architects and all their planning staff and they set them up at drawing tables. They had introductions on the Thursday night and then you could come in on Friday and have various sessions about various options etc. It was really participatory. Some of the locals were in there for 4 or 5 days. I think by the end of it most of the people who were concerned about the development, i.e. the immediate neighbours, had had their concerns about height and visual issues addressed. There's still some environmental issues, some flooding issues. The vegetation plan allowed them to knock down all the vegetation that they weren't prepared to vary at least at the beginning of the negotiation. Unfortunately our progressive company from Brisbane went broke. It's all dead and it's gone back to the original landowners who've put the bulldozers in. It was an outstanding process and it came from Queensland! It was getting close to best practice.

While community consultation under many development assessment processes is failing to meet community needs or expectations, the DoP does seem to be closer to achieving best practice consultation mainly in relation to making certain plans and Regional Strategies. This was noted at a number of workshops:

Wollongong

I'd have to say that my experience with the input into the Illawarra Regional Strategy was, not my personal input, but was more positive – was a positive story. If we're looking for a positive story out of today. And it's really surrounded the kind of concerns that Kiama Council had at the time to protect the municipality's agricultural land. And I know that the Council, in submissions, and some other groups I'm associated with put in very strong submissions about that and we attended the public meeting in Wollongong. We were able to speak directly to... I can't remember whether Neil McGaffen was there but certainly somebody else was there and our council officers had input. And we know from thinking about the discussions we had and the submissions that we made and then looking at the words in the Regional Strategy that we feel that we supported some of those very positive statements in the Regional Strategy. So in a way I felt really good about that process. So there's bits that work.

I had a very substantial involvement in the consultation process for the South Coast Regional Strategy, as many other people did. In a large part that was because the Department of Planning funded the TEC to employ facilitators and I think that worked with the Hunter region as well as the South Coast. And so that process really generated a great deal of community involvement…I think it was a very thorough process in really trying to get down to grass roots community and gave a very wide ranging response to the Department, I'm sure.

I think what we are talking about here is commenting on the Draft. Kiama Council had a process where there was a major input right at the beginning of the process which in effect gave some direction to the LEP process in Kiama. It was certainly a very positive thing in Kiama. It's an exciting process and I don't know if any other Council has instituted something like this at the beginning of an LEP process.

Newcastle

Lake Macquarie City Council has done 2 draft structure plans – the first one was done for the new town at Morisette (the Morisette Draft Town Structure Plan) which was very good. It overrode the LEP there but there was public consultation, it was worked out intelligently. The have done a similar thing for the new town of Wyee. That's going to have massive development in the next 10-20 years and they've gone and done a Draft Wyee Town Structure Plan which has had community consultation days and also people allowed to put submissions on it. I thought that was an excellent planning process.

Moruya

How did you find out about the regional strategies?

The TEC ran a project across the region. We used local media and had some big meetings in Wollongong, Nowra, Moruya, Batemans Bay and Bega. And we used local networks.

There was a high level of cooperation between the regional office of DOP and the TEC rep down here. The department of planning funded TEC

(everyone liked the model of using TEC)

The meetings brought a lot of people out of the woodwork with really relevant skills to help analyse the scientific basis of the strategy

> ***Submission writing***
> *All submissions should be made public*
> *I think it's important to be able to read submissions as soon as they are lodged.*
> *The NRC do it pretty well. The Feds do it well. There should be a government wide policy on how this is done. It's important to be able to see what other stakeholders are saying. It's a positive thing for the government.*

However, it was noted that while the consultation process for Regional Strategies was a good process, groups were disappointed with the some of the end products. For example, it was stated at Coffs Harbour:

> *By replacing REPs (a statutory document) with Regional Strategies (non- statutory documents) it's a case of the engine that's unwinding. They're absolute disasters. The Lower Hunter was the first and probably the worst. Community groups put in tremendous effort into working out what was the most suitable places for specific activities using databases, distance from transport networks and so on, well beyond what DoP ever did. DECC did a lot of environmental mapping. …Community groups' highly professional work was ignored … didn't even get a look in. DECC's work was shunted off. Planning's work was eventually shunted off by the Minister. A horrible outcome. The others weren't much better.*

> *I was a contractor engaged with others by TEC to initially act on behalf of the Far North Coast community and on the Mid North Coast with the Regional Alliance for Sustainable Planning. Here, we ran two series of public consultation meetings from the Hunter to the Clarence where we workshopped the contents of both draft and final strategies and looked at gauging community sentiments and then developed a really comprehensive submission. We felt this was a blueprint, an alternative to the Regional Strategy in which the area could be developed sustainably. The only thing that occurred as a result of that was that the final release by Minister Keneally actually included some of our words. It didn't act upon them.*

As discussed in **Part Two**, there are a number of reasons why NSW DoP is not currently achieving best practice community consultation. Common themes were raised in workshops up and down the coast and in survey responses. Key problems include, for example: highly variable levels of staff skills in both DoP Sydney, DoP in the regions, and in local government; political pressures created by 3A processes; and a lack of time and resources committed to genuine comprehensive consultation.

2. Benefits of best practice community consultation

In addition to fostering an inclusive and democratic society, best practice public consultation and participation leads to better decisions by assisting decision-makers in identifying public interest concerns. 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.

Public participation forms the cornerstone of the planning system. Planning is about people and communities and their environment, so it is essential that they have a genuine say in the

future development of their areas. Further, the planning system is only workable if the community has confidence in it. This was the prime reasoning behind the *Environmental Planning and Assessment Act 1979* which at the time, was one of the most progressive in the world. There appears to be a current perception that community participation is an administrative and bureaucratic burden rather than a process that can add much value to decision-making.

Indeed, genuine public participation adds significant value to government decision-making. This is for three main reasons.

First, community participation helps to ensure that better decisions are made, as the views of all stakeholders are taken into account. Put simply, community involvement allows decision makers to acquire information about the public's preferences so they can play a part in the decisions about projects, policies or plans. This leads to improved decision-making because the knowledge of the public is incorporated into the calculus of the decision.[12]

Second, public participation ensures the "buy-in" of the community as people are more likely to accept decisions if they have been given a proper opportunity to be heard.

Thirdly, and related to the above, public participation helps to ensure fairness, justice and accountability. In terms of fairness, there are well known reasons why certain groups' needs and preferences can go unrecognised through normal government processes. Such needs may only come onto the radar once an open public participation process occurs. This is particularly the case for environmental interests. Public participation is also consistent with accountability in governance. The Institute of Urban and Regional Development at the University of California gives a good example of this in practice;

> *If a planner can say, 'we held a dozen public hearings and reviewed hundreds of comments and everyone who wanted to had a chance to say his piece,' then whatever they decide to do is, at least in theory, democratic and therefore legitimate.*[13]

Clearly public involvement is essential to the workings of a democratic system of government.

Based on the analysis of different best practice models, and the feedback from workshop participants and survey respondents, recommendations for reform to achieve best practice community consultation are made in **Part Four**.

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[12] J. Innes & D. Booher, *Public Participation in Planning: New Strategies for the 21st Century,* Working Paper 2000-07, University of California at p6.
[13] *Ibid* at p7.

Part Four: Recommendations for Reform

It is abundantly clear from the discussion in the workshops, online survey responses, and analysis of best practice planning models, that the community currently feels disconnected from the NSW planning system. Not only is this contrary to the stated objectives of the EP&A Act, but it also ignores the benefits of good community consultation as discussed in **Part Three**.

The following recommendations are based on workshop and survey feedback relating to the ten key areas of concern discussed in **Part Two**.

Recommendations for reform

The following recommendations are based on workshop and survey feedback as well as our research into best practice relating to the ten key areas of concern discussed in **Part Two**.

1. Consultation as a legislative requirement

Recommendation # 1: Establish minimum mandatory consultation requirements under the EP&A Act that guarantee genuine community involvement in plan making and development assessment procedures.

2. Information versus consultation

Recommendation # 2: Develop protocols that clearly delineate and operationalise the distinction between information and consultation when engaging with the community (for example, providing information prior to consultation sessions and restricting the information component of consultation sessions).

Recommendation # 3: Ensure that consultation is only undertaken by people who have the confidence of the community that their views will be accurately given to government.

Recommendation # 4: Undertake further consultation with users on how the DoP website appears and ways of making it more user-friendly.

Recommendation # 5: Consider engaging more “people who can translate the law” in consultation sessions.

Recommendation # 6: Consider facilitating a legal inquiries process, similar to the ATO.

Recommendation # 7: Establish a comprehensive community information program, using a variety of techniques to provide plain-English information, to provide updates on legal and policy developments and address confusion about the current system.

Recommendation # 8: Complement the community information program with free annual or biannual consultation workshops around NSW on proposed changes by government.

3. How consultation is done

For law reform

Recommendation # 9: Place public notices information about the relevant parliamentary timetable in the newspaper at the start of a Parliamentary session.

Recommendation # 10: Undertake a targeted communications strategy to relevant state and local interest groups depending on the type of legislation proposed.

Recommendation # 11: Identify priority groups with an interest in the law reform that could have a role in broader notification and information sharing about law reform, with the capacity to facilitate feedback to the relevant Departments or MPs.

Recommendation # 12: Establish a register of interested people and groups who wish to be alerted of any relevant law reform.

For proposals under existing law

Recommendation # 13: Consider adopting a range of notification methods including: Sydney Morning Herald, local papers, local library displays, EDO bulletin, Council newsletters, community notice boards, TV advertisements, radio, other media (including the 'blogosphere'), letter drops, and brochures given to new residents.

Recommendation # 14: Develop interactive websites where users can give their email address and be provided with further information.

Recommendation # 15: Provide hard copy documents (or discs) on request.

Recommendation # 16: Engage a small Secretariat ("someone on the end of the phone") to respond to community inquiries and supply information.

Recommendation # 17: Use emerging media and techniques such as social networking tools (eg updates via blogs, Twitter etc) and "dialogue circles" to engage more immediately and directly with the community

Recommendation # 18: Adopt a range of consultation techniques to engage more effectively with different communities, including:

- Workshops with agreed summaries in lieu of written submissions;
- More visual plan information to address differing literacy skills and cater for people who process information more visually than in written form;
- More oral hearings to allow marginalised people to participate without requiring long written submissions;

4. Who is consulted

Recommendation # 19: Consider two-tiered consultation sessions – one for the experts (eg stakeholder groups) and another for the grass roots community – in appropriate circumstances.

5. What is consulted on

Recommendation # 20: Amend that EP&A Act to ensure independent experts prepare environmental assessments for consultation.

Recommendation # 21: Provide Councils with funds to commission environmental assessments from independent experts.

Recommendation # 22: Limit the earnings a consultant can derive from one developer or government department per year.

Recommendation # 23: Bar former Council planners from operating as consultants in their own areas for 5 years after they resign from Council.

6. Timeframes for consultation

For law reform

Recommendation # 24: Adopt the consistent practice of providing adequate prior notice and time to consider law reform proposals.

For proposals under existing law

Recommendation # 25: Enshrine community consultation rights under the EP&A Act to operate from the beginning of both plan-making and development assessment processes.

Recommendation # 26: Amend that EP&A Act to ensure that early engagement and consultation does not result in forfeiture of review rights at a later stage.

Recommendation # 27: Provide more detail to facilitate genuine consultation on concept plans and planning proposals.

Recommendation # 28: Undertake a review of existing timeframes with a view to adopting minimum timeframes, but not maximum timeframes, to ensure more equality between the time developers spend discussing proposals with planning officials and the time the community gets to discuss a proposal.

Recommendation # 29: Extend major project consultation timeframes beyond 30 days to ensure genuine consultation with community groups.

7. Resourcing for community participation

Recommendation # 30: Provide funding for independent groups (such as NGOs, universities and local government), and general assistance, to facilitate consultation.

Recommendation # 31: Establish a fund (with, say, contributions from developers) to facilitate professional assistance for to the community in preparing submissions.

8. How community feedback is considered

Recommendation # 32: Reinstate fixed minimum mandatory criteria for environmental assessment to assure the community that all relevant factors have been considered.

Recommendation # 33: Amend the EP&A Act to ensure that large infrastructure projects have more and clearer standard criteria around decision making and better consultation and review provisions than the current Part 3A, with comparable environmental assessment requirements to those under Part 4.

Recommendation # 34: Repeal the category of critical infrastructure under the EP&A Act.

Recommendation # 35: Provide clear and consistent information to Councils and the community about what instruments impose mandatory requirements and which documents are 'guidelines.'

Recommendation # 36: Create a specific planning ombudsman or an independent authority to assist the community to overcome inconsistencies in interpretation by Councils, perceptions of bias etc.

Recommendation # 37: Ensure decision-making bodies are subject to ethical planning principles and transparency requirements to address potential bias and to properly hear and process community input.

9. Local considerations

Recommendation # 38: Undertake more site visits, locally based seminars and more facilitated meetings in local communities.

10. Consultation feedback

Recommendation # 39: Implement measures to ensure that community input is properly considered and mandatory feedback loops are embedded in the system to show how input has been considered with explanations to the community why their recommendations have been refused or amended.

Recommendation # 40: Ensure that there are mandatory public hearings for major projects.

Appendix

Specific Discussion Paper questions

Environmental Planning Instruments

SEPPs

- Do you understand what a SEPPs are designed to do?
- Do you know which SEPPs apply in your local area?
- Have you ever read a SEPP? If so, did you understand what it meant?
- Do you understand how SEPPs fit into the planning system? For example, do you understand how SEPPs interact with LEPs?

LEPs

- Is the purpose of the new gateway process clear?
- Do you understand the new gateway process?
- What do you think of the new gateway process?
- Is the gateway process an improvement on the old process?
- Are you aware that you have a right to comment on the planning proposal or draft LEP for your area?
- Did you know about the standard instrument and do you know what it means for your area?
- Do you think it is better to have standard provisions in LEPs or do you think that each council should be able to make up its own provisions?
- Do you have any concerns about the contents of the Standard Instrument?
- Do you think it is better to have public consultation requirements set down in law or left to the Gateway to decide on a case by case basis?
- How important is it to you that the process is certain?
- Have you been involved in the gateway process – If so, what was your experience with the consultation stage?
- What do you think is an appropriate time period for community consultation?
- How should planning proposals be notified to the public?
- Where should planning proposals be made available for public access?
- If the Minister were to publish 'community consultation guidelines' what do you think they should contain?
- Do you think that a planning proposals will be easier to comment on than draft LEPs?
- Do you have any concerns about the contents of planning proposals?
- Should the planning proposal be supported by any other document or information in particular?
- What sorts of requirements do you think the Director-General should attach to the preparation of a planning proposal?

- Are you aware of your right to comment on environmental planning instruments?
- Are written submissions and public hearings the best way of seeking community input on environmental planning instruments such as LEPs?
- Can you suggest other ways that the government could seek community input at the plan making stage?
- Have you ever written a submission or attended a public hearing concerning a LEP? If not, why not? If so, please share your thoughts on the experience with us.
- When is the right time to consult the public?
- If changes are made after the consultation period has closed should the public be consulted again?
- Did you know about the right to challenge a LEP in Court?
- Would you consider taking legal action if you believed that a LEP had been improperly made?

Regional Strategies

- Do you understand how Regional Strategies fit into the overall planning framework?
- Did you know there was a Regional Strategy for your area and if so do you understand what the 25-year plan is for your area?
- Should LEPs consistent with Regional Strategies?
- Should Regional Strategies be legally enforceable?
- Have you heard of the Metro Strategy and the ten subregional strategies?
- Do you understand where the Metro Strategy sits within the planning system?
- What status do you think the Metro Strategy should have within the strategic planning process?
- Do you think there should be a legislated right for the public to participate in the making of Regional Strategies?
- Would you prefer the exhibition process for Regional Strategies to be set down in law or do you think it is better for the Department of Planning to develop consultation methods on a case by case basis?
- Did you know the Regional Strategy for your area was being exhibited? If so, how did you find out about it?
- Did you access the Draft Regional Strategy for your area? If so, how did you access it? If not, why not?
- What were your overall views of the Draft Regional Strategy in terms of content? Was it easy to understand what was planned for your area?
- Did the consultation in your area involve any of the extra methods mentioned – such as workshops or meetings?
- Was any other method of consultation used that is not mentioned here?
- To what degree did the final Regional Strategy (if there is one) reflect the Draft Regional Strategy?
- Would you feel confident commenting on a Regional Strategy?
- Do you know how to draft an effective submission? For example, do you know how to structure a submission, do you know what sort of content is appropriate and what style should be used?

- Were you aware of the consultation on the Metro Strategy? If so, did you take part in it?
- Were you aware of the consultation on the subregional strategies? If so, did you take part in them?

Development Assessment

Parts 4 & 5

- Are you aware of the different types of development and the different assessment procedures under Parts 4 and 5?
- If you planned to develop your property do you feel you could identify which type of development your plans would fall under and understand the procedure to be applied in assessing your proposal?
- Do you understand when an environmental impact statement is required?

Part 3A

- Do you think it's appropriate to have a stream of development assessment to deal with major projects?
- Do you think these projects should be 'fast tracked'?
- Should there be a limit on the types of developments that can qualify as major projects?
- Do you think it is better to set the environmental assessment requirements on a case by case basis?
- Did you know about the Government's plans to introduce the Infrastructure Bill (Part 3A) before it was introduced? If so how?
- Do you think there should have been more community consultation about the introduction of Part 3A?
- What sort of consultation would have been appropriate?
- Is it appropriate for the Government to convene stakeholder groups/reference groups to consult on behalf of the community?
- Who should sit on these groups?
- Do you think the law provides sufficient opportunity to participate in the assessment of major projects?
- Have you ever been consulted on a major project before an application is lodged with the Department of Planning?
- Have you ever accessed the Planning Department's major projects tracking system? If so, do you think the system is easy to use? Do you have ideas for how it can be improved?
- What do you think of the amount and type of information made available to the public for major projects?
- Can you think of other ways that the Planning Department could notify the public about major projects?
- Do you support the idea of concept plan approvals?
- Have you ever commented on a major project application? If so, can you tell us some of the challenges, if any, that you faced?

- Have you ever read an Environmental Assessment document? If so, did you understand it?
- Do you trust the information contained in Environmental Assessment documents? Please provide reasons for your answer.
- Do you think that 30 days is enough time to comment on a major project proposal?
- Did you know that you had to be an objector to bring a merits appeal against a major project?
- Did you know that referring a proposed project to a PAC for assessment extinguishes appeal rights later on?
- Do you agree with the restrictions on the rights of objectors to appeal against major project proposals?
- Do you agree with the idea that some projects should be assessed as critical infrastructure?
- Should the public be able to appeal against decisions to approve critical infrastructure projects?

Reform process consultation

- Did you attend the forum? If so, what can you tell us about it? If not, why not?
- Did you know about the Discussion Paper?
- Did you comment on the Discussion Paper?
- Did you attend the workshops?
- If you didn't attend, what was the reason?
- If you did attend, were you satisfied with the opportunity?
- Are workshops a good way of imparting information?

Are New South Wales' planning laws climate-change ready?

Robert Ghanem and Kirsty Ruddock*

The national debate regarding Australia's greenhouse gas emissions has until recently been firmly focused on the Carbon Pollution Reduction Scheme (CPRS), federal renewable energy legislation and international negotiations for a post-Kyoto regime. While such action is critical to addressing climate change, it has deflected focus from key legislative measures that could be implemented at a state level to complement federal and international action. Planning laws are one such area. They have the ability to facilitate effective mitigation through increased regulatory standards as well as ensuring adaptation to imminent impacts through proactive measures in local planning regimes. However, an analysis of the New South Wales planning regime – from the strategic planning phase through to post-consent mechanisms – reveals that it is currently not achieving this potential.

INTRODUCTION

Some local councils in New South Wales have recognised that the national debate regarding Australia's greenhouse gas emissions has deflected focus from legislative measures which could be implemented at State level and are in the process of developing Climate Change Adaptation Strategies for their local government areas.[1] However, despite such encouraging local action, much of the planning framework is initiated by, and depends on, action at a State level. Unfortunately, there has until now been very little concerted effort at a New South Wales government level to ensure that climate change issues are considered across the broad spectrum of laws that affect planning and development. Indeed, the current New South Wales planning framework does not adequately incorporate the consideration of the potential effects of climate change nor does it mandate measures to mitigate emission and adapt to climate change impacts under the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act).

This article analyses the framework of New South Wales planning laws and whether they adequately encourage the mitigation of greenhouse gas emissions and provide for adaptation to climate change impacts. It will consider the whole planning continuum in New South Wales from the strategic phase of planning through to building and construction.

First, the article will examine the strategic planning framework and the extent to which it is informed by climate change. Secondly, it will analyse the incorporation of climate change into development assessment processes; and thirdly, it examines building and constructions standards and whether they encourage climate friendly building and design.

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, inter alia, which areas are to be conserved and which areas are open for future development. The main advantage of strategic planning is that it allows regions to be considered

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[1] Ku-ring-gai Council and Lake Macquarie Council have climate change adaptation strategies and Byron and Shoalhaven Council have draft strategies completed, with many other councils developing such strategies. See the *Cities for Climate Protection Program*, http://www.environment.gov.au/settlements/local/ccp viewed 10 November 2010, which shows that 233 local government areas are participating, covering 84% of Australia's population.

holistically rather than in an ad hoc manner through individual development applications and rezoning instruments which only focus on the site at hand. The authors will analyse the following strategic planning tools in this article:

- New South Wales State Plan (State Plan);
- Metropolitan and regional strategies;
- Local environmental plans (LEPs);
- Standard instrument (Standard LEP)
- State environmental planning policies (SEPPs); and
- Coastal policies and strategies.

New South Wales State Plan

The State Plan is an overarching policy document setting out the goals that the State government will work towards and identifies priorities for government action for the provision of services to the people of New South Wales. The plan focuses on eight key areas of action: transport, supporting business and jobs, education, healthy communities, environment, stronger communities, keeping people safe and better government.[2] The State Plan was first released in 2006 and revised in 2010.

In terms of climate change, the State Plan asserts that "the vision for the future of New South Wales is one in which our energy is clean, our natural environment is protected and we are the leaders in tackling climate change".[3] It also sets out that the State's emissions target is a 60% cut in greenhouse gas emissions by 2050. This would be complemented by a 20% renewable energy consumption target by 2020 in line with the federal government targets.[4] To achieve these targets and to allow New South Wales to undertake adaptation action, the State Plan contains five key actions to combat climate change:

- developing and implementing a detailed *New South Wales Climate Change Action Plan* which sets out climate change priorities and programs over the next five years;
- making households, schools and businesses more sustainable through the $700 million Climate Change Fund;[5]
- helping communities and regions prepare for those predicted climate changes that cannot be prevented (including sea level rise, reduced rainfall, and increased temperature and storm frequency and intensity) through new research, information on regional climate change projections and new policies and programs;
- expanding sustainable transport options, including more public transport, cleaner vehicles and fuels and a new bike plan to make cycling a safer and easier option; and
- making government agencies carbon neutral by 2020.

The State Plan outlines the most detailed climate change response ever proposed in New South Wales. However, while it contains good targets and outlines some robust measures that are critically needed to combat climate change, the success of the State Plan's climate change measures will ultimately depend on political will and the implementation of legislation and programs outside the State Plan. For example, the *New South Wales Metropolitan Strategy*, which through the *Metropolitan Transport Plan 2010* has allocated significant funding to public transport, does not link in with the State Plan to co-ordinate necessary actions such as the integration of public transport with existing infrastructure.[6] New private infrastructure such as the expansion of the Metro Light Rail will not be

[2] New South Wales Government, *New South Wales State Plan* (2010), http://www.nsw.gov.au/sites/default/files/pdfs/chapters/NSW%20State%20Plan%202010_web_0.pdf viewed 16 December 2010.

[3] New South Wales State Plan, n 2, p 5.

[4] New South Wales State Plan, n 2, p 37.

[5] This includes $175 million in residential rebates for hot water systems, hot water circulators, rainwater tanks, dual flush toilets and water efficient washing machines, $30 million for the Public Facilities Program to support water and energy savings initiatives of government, education and community facilities, $20 million for the School Energy Efficiency Program, and $20 million for the Rainwater Tanks in Schools Program.

[6] See New South Wales Government, *Metropolitan Transport Plan* (2010) http://www.nsw.gov.au/metropolitantransportplan viewed 10 November 2010.

part of the integrated ticketing system, which will likely minimise the potential gains in public transport patronage that might occur if the public transport system were fully integrated.

The metropolitan and regional strategies are discussed further below.

Metropolitan and regional strategies

One of the key drivers of planning policy in New South Wales is regional and metropolitan planning. This is accommodated through the *Metropolitan Strategy* and seven regional strategies. The strategies are non-legislative instruments that are designed to set out broad plans for managing population growth in New South Wales. These instruments must be considered by local councils when making a local environmental plan.[7]

A regional strategy is a strategic policy document that sets out a 25-year plan for the future land use of a region and provides for environmental, housing and infrastructure needs. It is an overarching strategic document that implements relevant SEPPs and informs planning decisions, such as the creation of LEPs, land releases and development application assessments. Seven regional strategies have been finalised for the following regions: Lower Hunter, Far North Coast, Illawarra, South Coast, Central Coast, Sydney-Canberra Corridor, and Mid North Coast. Regional strategies are not legally enforceable. However, councils are required to ensure that draft LEPs are consistent with the relevant regional strategy that applies to their local government area.[8] All planning proposals are required to be consistent with the applicable regional strategy, unless the Director-General is satisfied that the inconsistency is of minor significance and the overall intent of the regional strategy is still achieved.[9] However, the Minister can make a LEP that is inconsistent with a regional strategy and there is no right to appeal.[10]

The metropolitan strategy was released in December 2005 and contained Sydney's strategic plan up to 2031. It was entitled *City of Cities: A Plan for Sydney's Future*.[11] It set out the challenges facing Sydney over the next 25 years, including:

- a population forecast to reach six million by 2036;
- an increase of 1.7 million since 2006;
- a need for 770,000 additional homes by 2036; and
- a need to expand Sydney's employment capacity by 760,000 to 2.89 million jobs.

The metropolitan strategy was reviewed in 2010.[12]

Neither the regional strategies nor the metropolitan strategy directly address climate change issues. Indeed, while the strategies recognise the need to incorporate climate change into planning, the strategies are largely silent on how to facilitate mitigation and adaptation action. It is clear that they are firmly focused on accommodating an increasing population and stimulating further economic growth.

For example, the metropolitan strategy recognises that Australia has the highest per capita greenhouse gas emission rate of any developed nation and recommends that action should be taken to increase generation from renewable energy sources.[13] However there is no elaboration on how this will be achieved. Moreover, the metropolitan strategy outlines that a key measure to meet projected population growth is by increasing medium density housing. Some studies have shown that high

[7] The Ministerial directions made under s 117(2) can be found at http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=7CJK_TA6Dqo%3d&tabid=248&language=en-AU viewed 11 November 2010.

[8] Ministerial directions, n 7, cl 5.1.

[9] Ministerial directions, n 7.

[10] *Environmental Planning and Assessment Act 1979* (NSW), s 117(2).

[11] New South Wales Government Metropolitan Strategy, *City of Cities: A Plan for Sydney's Future* (2010), http://www.metrostrategy.nsw.gov.au viewed 14 October 2010.

[12] New South Wales Government, *Sydney Towards 2036* (2010), http://www.metrostrategy.nsw.gov.au/Resources/SydneyTowards2036/tabid/286/language/en-AU/Default.aspx viewed 14 October 2010.

[13] New South Wales Government Metropolitan Strategy, n 11, p 29.

density development is in fact greater in per capita emissions than single lot housing.[14] Research also suggests that households with one or two residents emit two to three times more greenhouse gases on a per person basis than households with four or more persons.[15] This is because while apartments may save on heating and cooling costs, some apartments have little insulation and use electrical appliances rather than gas.[16] Moreover, without careful regulation high rise development can produce mixed efficiencies. Lifts, lighting in foyers, halls and car parks, as well as community facilities such as gyms, heated swimming pools and centralised security systems can often contribute to increased energy demands.[17] Research also suggests that densities affect choice of travel by private car or public transport, with outlying areas of less density and higher car use contributing to greater emissions from transport use.[18]

Obviously the environmental consequences of urban sprawl are considerable, particularly in Sydney where areas such as the Cumberland Plains Woodland, which represent less than 2% of original forest cover, are threatened by future growth in Western Sydney. There are significant operational and energy uses associated with new buildings, particularly large houses. What is clear is that all forms of new housing need to be more closely regulated to ensure they are designed in a way that minimises emissions. Considerable work is also required to improve the efficiency in the bulk of existing housing stock. The difficulty with the metropolitan strategy is there is little attempt to consider the implications of how new housing is built and how to best integrate appropriate community infrastructure in urban areas to reduce emissions associated with housing development.

The regional strategies are similarly deficient on detail. The Far North Coast Regional Strategy discusses the need to avoid natural hazards of climate change in town and village boundaries, and consider sea level rise risks and adequate setbacks in the coastal zones but does not set out steps to address these issues.[19]

The metropolitan and regional strategies are therefore flawed. They represent a missed opportunity to ensure that strategic planning instruments address the challenges ahead posed by climate change. The lack of climate change guidance in regional and metropolitan strategies means that new development can occur in an ad hoc manner without consideration of most of these issues. For example, the Lower Hunter Regional Strategy allows new development in areas that are inappropriate from a climate change perspective. The Strategy incorporated the new Huntlee development near Branxton. The proposal involved building a new town centre in an area that had poor to non-existent public transport, which would significantly increase the future greenhouse gas emissions of its residents as they would have to rely almost exclusively on cars. The proponent advocated that the new town centre would generate local employment – an unproven strategy, particularly when there are existing regional centres nearby and no existing facilities in the area. It was for these reasons that the Huntlee site was rated the least appropriate for new development by the Department of Planning, but despite this it still appeared in the strategy as an area that would be developed to house 20,000 people.[20] Clear guidelines at a State level that require new developments to minimise emissions would assist in preventing inappropriate development in such areas.

[14] See Holloway D and Bunker C, "Planning Housing and Energy Use: A Review" (2006) 24 *Urban Policy and Research* 115. See also Pears A, "Does Higher Density Really Reduce Household Energy Requirements? It Depends…" (2005) 23 *Urban Policy and Research* 367, which cites a study by Taper for the New South Wales Department of Infrastructure, Planning and Natural Resources (2005).

[15] Holloway and Bunker, n 14 at 120.

[16] Pears, n 14 at 367.

[17] Pears, n 14 at 368.

[18] Newman P, *Transport and Greenhouse: Refocusing our Cities for the Future*, Submission to Garnaut Issues Paper 5 (2008): Transport, Planning and the Built Environment; Holloway and Bunker, n 14 at 117.

[19] New South Wales Government Department of Planning, *Far North Coast Regional Strategy* (2006) pp 21-23, http://www.planning.nsw.gov.au/plansforaction/pdf/fncrs_strategy_fin.pdf viewed 14 October 2010.

[20] New South Wales Government Department of Planning, *Lower Hunter Regional Strategy* (2008) p 27, http://www.planning.nsw.gov.au/regional/pdf/lowerhunter_regionalstrategy.pdf viewed 14 October 2010.

To design effective regional and metropolitan strategies it is necessary to consider how to design sustainable communities in order to minimise emissions and avoid imminent climate change impacts. This would involve considering where it is appropriate to place new development in terms of the climate footprint of various options. Strategic planning must consider how to maximise public transport, encourage bicycle use and pedestrian friendly areas, as well as reduce car use. It also needs to ensure new development is located away from coastal and bushfire hazards, minimises clearing of existing vegetation and ensures efficient water use and reuse. New communities should also incorporate co-generation and alternative renewable energy strategies, minimise waste, and encourage recycling and green building techniques.

State Environmental Planning Policies

A SEPP is an environmental planning instrument which addresses environmental planning issues of state significance. A SEPP may address any matter that, in the opinion of the Planning Minister, is of State or regional environmental planning significance. There are currently about 40 SEPPs in New South Wales.

SEPPs vary considerably in their scope and function. Some SEPPs prohibit certain types of development in local government areas (LGAs), some require the Minister for Planning's consent authority for certain types of high-impact development or development in sensitive areas, others relate to specific issues such as Coastal Wetlands, Development Standards and Seniors Living. SEPPs are a very important part of the planning system, as they usually override LEPs.

SEPPs are currently developed in a rather ad hoc fashion at the discretion of the Minister for Planning. There are no formalised community consultation and environmental assessment procedures.[21] Moreover, in making a SEPP, the Minister for Planning does not have to consider the effects that the SEPP will have on climate change issues. For example, the *State Environmental Planning Policy No 70 – Affordable Housing* does not require affordable housing to minimise emissions. In contrast, it allows for higher densities for low cost housing which are likely to increase emissions. Likewise, policies such as the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* do not encourage sustainable and low emissions seniors living as they relax many of the standards required in other developments.

It is clear that SEPPs need to be amended to encourage climate friendly development. Accordingly, there needs to be an audit of all SEPPs in New South Wales to determine whether they are consistent with the need to minimise greenhouse gas emissions.

Local Environmental Plans

Making a local environment plan (LEP) is an opportune time for councils to attempt to minimise greenhouse gas emissions in their LGAs and to encourage appropriate development that can withstand the impacts of climate change. Despite this, there are very few references to climate change in New South Wales' LEPs.

In 2008, the Environmental Defenders Office of New South Wales (EDO), in conjunction with the Sydney Coastal Councils Group (SCCG) conducted a legislative review to determine the extent to which climate change is incorporated into Australian legislation.[22] Specifically, the report examined federal, State (New South Wales) and local legislative instruments to identify instruments that contained the words "climate change", "sea level rise" and "greenhouse" and then determined the responsibilities these references placed on local councils. Only five LEPs contained provisions that referred to climate change. No LEPs were found to contain appropriate mitigation provisions. That is, no LEPs codified strategies for reducing emissions from projects or required an in-depth assessment of emissions from a proposed development.

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[21] *Environmental Planning and Assessment Act 1979* (NSW), Div 2, Pt 3.

[22] New South Wales Environmental Defender's Office, *Coastal Councils and Planning for Climate Change: An Assessment of Australian and New South Wales Legislation and Government Policy Provisions Relating to Climate Change Relevant to Regional and Metropolitan Coastal Councils* (2008).

The report found that the few times that climate change was referred to in LEPs was within aspirational objects clauses, who are not of themselves enforceable, or as matters for consideration which can be given minimal weight at the discretion of decision makers.[23] For example, under the standard local environment plan (discussed below), a council must recognise and accommodate coastal processes and climate change in its consideration of development in the coastal zone.[24] Specifically, a council can not grant consent to a development unless it has considered, inter alia, the effect of coastal processes and coastal hazards, including sea level rise, on the development. However, this does not prevent development from being approved as long as councils can show sufficient consideration of potential climate change impacts.

A similar audit of LEPs was conducted by Adrian Bradbrook in the context of solar access.[25] He found that while many LEPs contain provisions to protect overshadowing, few were designed to clearly protect solar access for energy generation devices such as solar panels. Only some LEPs limit overshadowing at various parts of the day, and the Sydney LEP 2005 regulates overshadowing on a percentage basis.[26] Bradbrook contrasted this with the approach taken in the United States where some states have specific solar access property rights and legislative protections such as the *Solar Access Act 1981* in Wisconsin.[27] He concluded that there was a need for law reform in this area.

In the authors' opinion, it is important that LEPs reflect the local challenges in an area and contain specific requirements to do so. To this end, there should be clear requirements for councils to consider the climate change vulnerabilities of their areas when preparing their LEPs. Outside of legislative prescription work is already progressing along these lines. For example, the SCCG has commissioned research on the risks to their member councils from coastal climate change impacts.[28] The report identified the known low-lying areas around Warringah and Rockdale as being at particular risk, but also highlighted other areas of risk that were not in low-lying coastal areas. Hornsby Shire Council was identified as having a moderate degree of vulnerability to climate change, associated with bushfire, due to its extensive areas of forest and bushland.[29] Much of the Hornsby area and its important rail and road infrastructure could be easily isolated by bushfires, which are likely to become more intense and frequent as a result of climate change. It is vital that such information is incorporated into LEPs and zoning decisions and is specifically considered in relation to new developments.

Standard LEP

In 2007, the Department of Planning introduced a Standard Instrument: Principal Local Environmental Plan that was designed to ensure that all LEPs were uniform[30] and that standard zonings and terms were used throughout the State.

In relation to coastal climate change impacts, there is a mandatory clause in the Standard LEP that requires consideration of the *New South Wales Coastal Policy*, biodiversity along the coast, coastal processes and hazards amongst other matters. In particular when assessing development in the Coastal

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[23] New South Wales Environmental Defender's Office, n 22.

[24] New South Wales Government, *Standard Instrument: Local Environmental Plans* (2006) cl 5.5.

[25] Bradbrook AJ, "Solar Access Law: 30 Years On" (2010) 27 EPLJ 5.

[26] Bradbrook, n 25 at 11.

[27] Bradbrook, n 25 at 17-18, 20-21.

[28] Preston BL, Smith T, Brook C, Gorddard R, Measham T, Withycombe G, McInnes K, Abbs D, Beveridge B and Morrison C, *Mapping Climate Change Vulnerabilty in Sydney Coastal Councils Group* (2008), prepared for the SCCG by the Commonwealth Scientific and Industrial Research Organisation (CSIRO) Climate Adaptation Flagship, http://www.csiro.au/files/files/pk2x.pdf viewed 14 October 2010.

[29] Preston et al, n 28.

[30] New South Wales Government, *Standard Instrument: Principal Local Environmental Plan* (Standard LEP) 2006, http://www.planning.nsw.gov.au/LocalEnvironmentalPlans/StandardInstrument/tabid/247/language/en-AU/Default.aspx viewed 16 December 2010.

Zone, councils must take into account "the effect of coastal processes and coastal hazards and potential impacts, including sea level rise on the proposed development and arising from the proposed development".[31]

Despite this, the Standard LEP does not adequately address coastal risks associated with climate change. Although cl 5.5 of the Standard LEP provides a relatively detailed list of objectives for development in the Coastal Zone, including to "recognise and accommodate coastal processes and climate change", the LEP does not mandate that development must be consistent with, or promote, the objectives set out in this clause, nor indeed more generally the objectives of the LEP.[32] Moreover, as discussed above the mere requirement to consider the impact of climate change on coastal development does not prevent development from being approved as long as councils can show sufficient consideration of potential climate change impacts.

While the *Standard LEP* is important in adopting a consistent approach across the State, there is also the need to preserve some flexibility to tailor planning controls to local conditions. That flexibility would include the ability for councils to implement controls that 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. Requiring such measures to be undertaken through the use of legally enforceable legislation will go a long way to ensuring that a precautionary approach to coastal climate change impacts is taken throughout Australia.[33]

In terms of mitigation, and the need to reduce greenhouse gas emissions, there is nothing in the Standard LEP to encourage energy efficient or climate friendly building beyond the existing requirements for new residential development under the *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004* (BASIX). Much of current building is the demolition and rebuilding of existing homes. The building industry and the resource consumption involved in constantly building new houses from scratch significantly contribute to landfill, with the industry contributing 40% of landfill dumps. The building industry also produces up to 40% of emissions to the air.[34] The Standard LEP does not address such issues and does not encourage retrofitting that uses existing buildings as much as possible.

The Standard LEP is couched in language that only requires a consent authority to "consider" various issues before granting consent. This is quite different from LEPs that previously required councils to be satisfied or consistent with provisions of their LEP.[35] The Standard LEP also places some constraints on councils by limiting the additional provisions that can be included in Principal LEPs.[36] Additional provisions may only be included if they are "not inconsistent" with the mandatory provisions. This clause ostensibly prevents local councils from including objectives in their zonings that are more restrictive than the Standard LEP.

The inability for councils to be flexible and develop appropriate standards for their area to deal with climate change will have significant ramifications for councils attempting to address climate change. For example, the Byron Shire Council had a planned retreat policy in place for several years. This policy involves not allowing new permanent structures, and planning for the staged removal of existing buildings and other structures in areas likely to be inundated during peak events, with stricter controls the closer land is to the existing erosion impact line. It also includes a blanket prohibition for new development within the 20m coastal erosion area.[37] However, it may not be possible for this

[31] New South Wales Government, n 24.

[32] See discussion below under coastal policies and strategies.

[33] Ghanem R, Ruddock K and Walker J, "Are Our Laws Responding to the Challenges Posed to Our Coasts by Climate Change?" (2008) 31(3) UNSWLJ Forum 4046.

[34] Clark K, "Out with the New and in with the Old Houses", *The Sydney Morning Herald* (4 January 2010).

[35] See *Conservation of North Ocean Shores Inc v Byron Shire Council* (2009) 167 LGERA 52.

[36] New South Wales Government, *Standard Instrument (Local Environmental Plans)*, n 24, cl 5.

[37] Byron Shire Council, *Development Control Plan* (2002), Pt J – Coastal Erosion Lands.

policy to be incorporated into the new Byron Principal LEP, as it will likely conflict with the Standard Instrument, which does allow development in the Coastal Zone as long as certain matters are considered. Similarly, it may be difficult for a council to impose additional standards in LEPs that require bike or pedestrian friendly development at the expense of cars and car parking, or cogeneration or solar power instead of conventional generation. The limitation on additional provisions also poses issues for councils who wish to minimise bushfire risks or ensure that new developments will utilise public transport links or reduce water usage.

The Standard LEP may therefore operate to stifle innovative and proactive climate change action by councils. To address this, the *Standard Instrument (Local Environmental Plans) Order 2006* should be amended to allow councils to adopt provisions that impose tighter regulation than the Standard LEP. This will encourage councils to adopt best practice approaches and allow them to adapt their LEPs to their specific climate change risks.

Coastal policies and strategies

New South Wales has had specific coastal protection legislation – the *Coastal Protection Act 1979* (NSW) (CP Act) – since 1979 as well as an overarching State policy, the *New South Wales Coastal Policy*, since 1997.[38]

The CP Act (NSW) is the principal piece of legislation that applies to the New South Wales Coastal Zone. It aims to provide for the protection of the coastal environment of the State "for the benefit of both present and future generations".[39] This Act contains provisions relating to the use and supervision of the coastal zone, the carrying out of development within the coastal zone and the preparation of the coastal zone management plans (CZMPs). CZMPs must address the following:

- the protection and preservation of the beach environment and beach amenity;
- emergency action to be taken during periods of beach erosion; and
- continuing and undiminished public access to beaches and waterways.[40]

The New South Wales Coastal Policy 1997 is the principal New South Wales government policy relating to the management of the coastal zone. The aim of the policy is to promote "the ecologically sustainable development of the New South Wales coastline".[41] The policy aims to facilitate the development of the coastal zone in a way which protects and conserves its values. This includes recognising and accommodating natural processes and protecting beach amenity and public access. Councils must take the *New South Wales Coastal Policy* into account when assessing development under Pt 4 of the CP Act (NSW).[42]

Despite the presence of the CP Act (NSW) and *New South Wales Coastal Policy*, coastal planning was up until recently primarily dealt with by individual LEPs. Some of these LEPs contained specific coastal land use zonings in order to meet the challenges imposed by coastal hazards. However, as above, none of these LEPs contained robust climate change adaptation provisions. This contrasts with some local planning instruments in South Australia that have enabled decision makers to refuse inappropriate development along the coast by looking at the sea level projections in 100 years in assessing whether an area was appropriate to develop.[43]

[38] At a federal level, there are no overarching coastal protection or management laws. However, recently the house standing committee on climate change, water, environment and the arts, in its *Inquiry into Climate Change and Environmental Impacts on Coastal Communities* called for the federal government to co-operatively manage the coastal zone and provide leadership on this issue. In particular the committee recommended a consistent methodology for vulnerability assessment and the establishment of a national coastal zone. It further recommended an intergovernmental agreement on the coastal zone between state, territory and local governments and in co-operation with community and coastal stakeholders, and the independent national coastal advisory council.

[39] *Coastal Protection Act 1979* (NSW), s 3.

[40] *Coastal Protection Act 1979* (NSW), s 55C.

[41] *New South Wales Coastal Policy* (1997), p 17, http://www.planning.nsw.gov.au/plansforaction/pdf/CPPARTA.PDF viewed 14 October 2010.

[42] *Environmental Planning and Assessment Regulation 2000* (NSW), reg 92.

[43] See *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 58 at [17], [22].

The *New South Wales Coastal Policy* and CP Act (NSW) were not designed to deal specifically with sea level rise arising from climate change, but were focused on natural coastal erosion processes. As a result, there has been pressure placed on the New South Wales' government to update these statutory instruments to incorporate measures that address coastal climate change impacts.[44] Guidance was also sought as to what sea level rise scenario local councils in New South Wales should incorporate into their coastal planning frameworks.

The New South Wales government finally responded to these calls in 2009 by releasing the *New South Wales Sea Level Rise Policy Statement* (NSW SLR Statement).[45] It provides guidance to local councils by prescribing the projected sea level rise for the State and projects for sea level rise of up to 40 cm by 2050, and 90 cm by 2100 for the New South Wales coastline. The NSW SLR Statement aims to encourage adaptation to sea level rise so as to minimise disruption, economic costs and environmental impacts. The goal is to ensure development can appropriately accommodate projected sea level rise through appropriate site planning.

In addition to the Statement, the Department of Planning has released a guideline entitled *New South Wales Coastal Planning Guideline: Adapting to Sea Level Rise*[46] to assist local councils in planning for the expected impacts of climate change on coastal communities. It provides some guidance to councils on how to take into account sea level rise impacts when undertaking strategic planning and development assessment. The guidelines adopt six coastal planning principles:

1. Assess and evaluate coastal risks taking into account the NSW sea level rise planning benchmarks
2. Advise the public of coastal risks to ensure that informed land use planning and development decision-making can occur
3. Avoid intensifying land use in coastal risk areas through appropriate strategic and land-use planning
4. Consider options to reduce land use intensity in coastal risk areas where feasible
5. Minimise the exposure to coastal risks from proposed development in coastal areas
6. Implement appropriate management responses and adaptation strategies, with consideration for the environmental, social and economic impacts of each option.[47]

Some of these principles clearly suggest that in coastal risk areas, development should be discouraged. In addition, the recently released *Coastal Risk Management Guide* provides guidance to councils for updating their immediate hazard lines to take into account the sea level rise projections.[48]

Although these are welcome developments, these policy documents are not legally binding but only serve as guidelines to assist councils. Hence, as they have no statutory force, these policies do little in real terms to revise the framework for decision-making for development in coastal zones. Indeed, the New South Wales government has made it clear that the intent of the NSW SLR Statement and the *Planning Guideline* is not to restrict or prohibit development, even in high risk areas. One of the stated objectives of the Statement is in fact to encourage appropriate development on land projected to be at risk from sea level rise.[49]

The New South Wales government also introduced the *Coastal and Other Legislation Amendment Bill 2010 (No 2)* (NSW) into Parliament in September 2010 and it was passed on 21 October 2010. This Bill amends the CP Act (NSW) to, inter alia:

[44] See New South Wales Environmental Defender's Office, n 22.

[45] New South Wales Government, *New South Wales Sea Level Rise Policy Statement* (2009), http://www.environment.nsw.gov.au/resources/climatechange/09708sealevrisepolicy.pdf viewed 14 October 2010.

[46] New South Wales Government, *New South Wales Coastal Planning Guideline: Adapting to Sea Level Rise*, http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=VYjmQirQlAk%3d&tabid=177&language=en-US viewed 14 October 2010.

[47] New South Wales Coastal Planning Guideline: Adapting to Sea Level Rise, n 46.

[48] Coastal Risk Management Guide, http://www.environment.nsw.gov.au/resources/water/coasts/10760CoastRiskManGde.pdf viewed 14 October 2010.

[49] New South Wales Sea Level Rise Policy Statement, n 45, p 3.

- Permit the erection of emergency coastal protection works on an owner's land or public land (through the use of sand or sandbags) in erosion "hot spots" around NSW in certain circumstances;
- Establish a new NSW Coastal Panel to provide advice to the Government about coastal climate change issues and to act as a consent authority in certain circumstances;
- Require additional matters to be addressed by CZMPs, including the impacts from climate change on risks arising from coastal hazards;
- Permit the Minister to make CZMPs where a council has failed to do so; and
- Permit the construction of long term emergency works, such as sea walls and groynes, with consent.

The Bill has been the subject of criticism.[50] The Local Government and Shires Association of New South Wales has given only provisional support to the Bill.[51] The predominant focus of the Bill appears to be the protection of property and the paramountcy of property rights. It represents a missed opportunity for the New South Wales government to institute a proactive response to coastal climate change impacts that balances economic, social and environmental factors.

The key principle that should inform all future coastal planning is first, do no more harm.[52] It is therefore important not to compound the significant problems already faced by coastal communities by making further inappropriate planning decisions which ignore impending biophysical realities. To address adaptation issues, including sea level rise, in a proactive manner, there should be a mandatory clause included in the Standard LEP that applies to all coastal risk regions in New South Wales, including the areas of Sydney currently excluded from the coastal zone. This should go beyond the existing provision in cl 5.5 which simply requires the consideration of sea level rise impacts. This new clause should require a level of satisfaction in the consent authority before development can be approved in coastal risk areas. This would necessitate a requirement for councils to have clear evidence that a development appropriately avoids or minimises exposure to coastal processes before it may be approved.

However, given that an updated hazard line will identify areas at immediate risk from sea level rise and coastal erosion, all further development *should be prohibited* in areas seaward of this line. Although there is significant growth expected in coastal communities, there are no practical, ecologically sustainable, long-term means of avoiding or minimising exposure to coastal processes in those areas at imminent threat from coastal processes. Any mandatory clause should therefore require the *refusal* of all development applications for proposed new permanent dwellings and other developments that are located seaward of the area that is identified as being at immediate risk. This should apply regardless of whether the development is under Pt 4, Pt 5 or Pt 3A.

Such an approach would be consistent with the need to consider the precautionary principle, which has been used in Victoria to reject perceived high risk developments in coastal areas.[53] If the New South Wales government does not take action in this policy area, it may leave itself vulnerable to litigation, particularly when the impacts of climate change become more manifest. This has already become a trend in the United States, where in *Comer v Murphy Oil* the courts have allowed a negligence case to proceed in relation to hurricane damage from Hurricane Katrina.[54]

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[50] See Crawford B, "Battle Lines in the Sand Over New Laws", *Sunday Telegraph* (19 September 2010), http://www.dailytelegraph.com.au/news/battle-lines-in-the-sand-over-new-laws/story-e6freuy9-1225926000748 viewed 14 October 2010.

[51] See http://www.governmentnews.com.au/2010/09/27/article/LGSA-welcomes-new-coastal-protection-laws/LCTVJADEJD.html viewed 14 October 2010.

[52] Australian Network of Environmental Defender's Offices, *Submission on the Inquiry into Climate Change and Environmental Impacts on Coastal Communities* (7 June 2008) http://www.edo.org.au/policy/climatechange_coastal080610.pdf viewed 14 October 2010, p 27.

[53] *Gippsland Coastal Board v South Gippsland Shire Council* [2008] VCAT 1545.

[54] *Comer v Murphy Oil USA* 607 F 3d 1049 (2010).

DEVELOPMENT ASSESSMENT

The process for development assessment in New South Wales has a number of flaws that reinforce and even magnify the problems outlined above. In particular, none of the three sections of the EPA Act that deal with assessing development require the explicit consideration of climate change issues by consent authorities.

The following section will analyse the current requirement to consider climate change under Pt 4, Pt 5 and Pt 3A of the Act. Thereafter key impediments to making "climate friendly" decisions under Pt 3A will be highlighted.

Consideration of climate change in development assessment processes

Part 4 of the Act sets out the procedure for assessing and approving the majority of development applications. There are various categories of development under this Part and different processes for development assessment and approval apply to each category. Councils are the consent authorities under Pt 4 in the majority of cases. In assessing development, councils are bound by the provisions of LEPs and SEPPs and must consider all the factors listed in s 79C of the Act.

Part 4 does not adequately incorporate the consideration of the potential effects of climate change into development assessment, from both a mitigation and adaptation perspective. Most critically, no climate change assessment is expressly required under s 79C which sets out the list of factors that consent authorities must take into account when assessing a development, including environmental, economic and social impacts. The consideration of the climate change impacts of development is currently occurring in an ad hoc manner under a general requirement to consider environmental impacts. In assessing development applications under Pt 4 there is therefore no *explicit* obligation to consider climate change, no requirement to assess the climate change implications of various design options and no assessment of the impacts that climate change will have on proposed developments, such as sea level rise and increased coastal erosion.

The second category of development under the EPA Act is Pt 5. Part 5 of the Act contains a "safety-net" which sets out a separate environmental assessment procedure that applies to activities where no development application is required under Pt 4. Certain development, such as the construction of roads or electricity infrastructure by public authorities, and some activities, such as mining exploration, do not require development consent under any environmental planning instruments (EPIs). In these cases, decisions on whether to proceed with development are made internally by public authorities. No formalised development application (DA) process is required. Similarly to Pt 4, there is no explicit requirement to consider climate change when assessing activities under Pt 5. However, there are requirements to consider all the environmental impacts of a particular development which would arguably require the consideration of climate change, although there are as yet no cases to test this proposition.

The final, and most controversial, category of development assessment in the EPA Act is Pt 3A. Part 3A projects are projects that, in the opinion of the Planning Minister, are of "State or regional environmental planning significance".[55] Development (or a category of development) can be declared to be subject to the Pt 3A assessment process under a SEPP or a Ministerial Order of the Planning Minister. *SEPP (Major Development) 2005* states that Pt 3A applies to developments that, in the opinion of the Minister, are of a kind described in Schs 1, 2, 3 or 5 of the SEPP.

Part 3A projects are often large government infrastructure projects, such as roads, pipelines, desalination plants and dams, but also often include private developments which range in size from minor subdivisions to major urban renewal projects.[56] Part 3A now also regulates all new coal mines and power stations as well as major infrastructure, major tourism, coastal and large subdivision

[55] *Environmental Planning and Assessment Act 1979* (NSW), s 75B(2).

[56] *Environmental Planning and Assessment Act 1979* (NSW), ss 75A, 75B(2).

development.[57] The main effect of Pt 3A is that it removes major projects from assessment and approval under the Pt 4 and Pt 5 assessment process, and gives control of these projects to the Planning Minister.[58] All major projects, which include a sub-category of critical infrastructure projects, are assessed and approved under Pt 3A provisions.

If a project has been declared a Pt 3A project, the Minister can make an additional declaration that the project is also a "critical infrastructure project" if the Minister is of the opinion that the project is essential for the State for economic, environmental or social reasons.[59] Projects which have been declared to be critical infrastructure projects include the Kurnell Desalination Plant and new electricity infrastructure over 250MW.[60]

As with Pts 4 and 5, there is no mandatory requirement to consider climate change under Pt 3A, both from a mitigation and adaptation perspective. The Minister is only required to consider the Director-General's assessment report of the project, any advice provided by a public authority and any findings or recommendations of the Planning Assessment Commission following a review of the project in determining whether to approve a project.[61]

The Act's failure to incorporate climate change in its development assessment processes has led to an increased reliance on the Courts to interpret the EPA Act in an expansive way in order to incorporate the consideration of climate change. For example, the Land and Environment Court has found that the requirement to consider the public interest in s 79C of Pt 4 requires the consideration of the principles of ecologically sustainable development (ESD) which would, in turn, necessitate the consideration of climate change.[62]

In terms of Pt 3A, the courts have held that there is only a clear requirement to consider the public interest when assessing major projects. A New South Wales Court of Appeal decision, *Minister for Planning v Walker*, has confirmed that a failure to consider ESD, including the impacts of climate change and sea level rise on a proposed Pt 3A project does not necessarily invalidate the Minister's decision to grant approval under Pt 3A.[63] That is, there is no mandatory requirement to consider ESD and climate change under Pt 3A. Despite this, the Court of Appeal stated that sometime in the future ESD and climate change would be so manifestly a part of the public interest that the Minister will be required to explicitly consider them but that in 2008 that time had not yet been reached.[64]

This consequence of the *Walker* decision is that there is no mandatory requirement for the Minister to consider greenhouse gas emissions of a particular major project, including any viable means of reducing emissions (such as through renewable energy alternatives) or the effects of climate change on the project as part of the Minister's approval decision (although often a climate change assessment does occur as part of the environmental assessment). Even if we have reached the time where climate change and ESD must be explicitly considered under Pt 3A, as long as there is a passing reference to climate change and ESD in the Director-General's assessment report the courts are likely to find that this is enough to show the Minister did consider the issue. There is therefore no need for a comprehensive assessment of emissions and how they can be reduced. ESD is meant to be an overarching concept that requires decision-makers to ensure that environmental, social and

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[57] New South Wales Government, *State Environmental Planning Policy (Major Development)* (2005), http://www.majorprojects.planning.nsw.gov.au viewed 12 November 2010.

[58] The Planning Assessment Commission has been granted the role of determining project applications under Pt 3A in some limited circumstances, including where the proposed project is in the Minister's electorate or where political donations have been made.

[59] *Environmental Planning and Assessment Act 1979* (NSW), s 75C.

[60] New South Wales Government, *State Environmental Planning Policy*, n 57, cls 6-6A, Sch 5. There are others listed in the SEPP.

[61] *Environmental Planning and Assessment Act 1979* (NSW), s 75J.

[62] *Aldous v Greater Taree Council* (2009) 167 LGERA 13.

[63] *Minister for Planning v Walker* (2008) 161 LGERA 423.

[64] *Minister for Planning v Walker* (2008) 161 LGERA 423; *Aldous v Greater Taree Council* [2009] 167 LGERA 13.

economic considerations are integrated into decision-making to reach the best outcome without privileging economic factors over the environment. It is therefore imperative that there is an express requirement to consider ESD under Pt 3A. The Act should be amended to facilitate this.

However the mere requirement to consider ESD does not necessarily mean that ESD is given its true effect or that climate friendly decisions are made.[65] In order for climate change to be properly addressed it will be necessary for the Act to be amended to ensure there are particular standards that require development to consider the need to minimise greenhouse gas emissions and climate change hazards. In particular, the introduction in 2005 of the major projects provisions in Pt 3A will require significant reform because of their role in approving emissions intensive developments. At this stage, the only attempt made to address climate change impacts occurs in one SEPP where cl 14(1)(c) of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* refers to the need to ensure "that greenhouse gas emissions are minimised to the greatest extent practicable". The provision is hardly a strong requirement to minimise emissions and is untested in its application.

The inaction in New South Wales contrasts with proactive developments in other jurisdictions. Requirements have been introduced in countries such as the United Kingdom that specifically consider climate change and require it to be mitigated. As these provisions are fairly new it is still yet to be seen whether they will be applied in a way to reduce emissions from major projects. However, they indicate that other countries are quite a few steps ahead in their readiness to tackle the difficult task of incorporating climate change considerations into development assessment processes. For example, the *Planning Act 2008* (UK) creates a new development application process for "Nationally Significant Infrastructure Projects", which includes the construction or extension of generating stations, development relating to underground gas storage facilities, pipelines, harbour facilities, highways, airports, railways, dams and reservoirs, waste water treatment plants and hazardous waste facilities.[66] Development consent under the Act is required for all developments that are, or form part of a Nationally Significant Infrastructure Project.[67] Under the Act, the Government may issue national policy statements in relation to specified descriptions of development.[68] In issuing and reviewing such statements, the Secretary of State must (in particular) have regard to the desirability of "mitigating and adapting to climate change" and "achieving good design".[69] These in turn must be considered by the Infrastructure Planning Commission in deciding any development consent.[70]

The *Infrastructure Planning (Environmental Impact Assessment) Regulations 2009* (UK), which entered into force on 1 March 2010, require environmental impact assessments to include a description of the likely significant effects of the development on the environment resulting from, inter alia, the emission of pollutants, as well as a description of the measures envisaged to prevent, reduce, and offset significant adverse effects on the environment.[71] A specific requirement to mitigate climate change could be prescribed by subordinate legislation, or be included in guidance issued by the Government, but have not yet been developed.[72]

The approach in the United Kingdom is one that should set a model for the New South Wales Government to follow in order to place itself at the forefront of climate change action. However, the New South Wales Government should go even further than this as outlined in this paper.

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[65] See *Drake-Brockman v Minister for Planning* (2007) 158 LGERA 349.

[66] *Planning Act 2008* (UK), s 14.

[67] *Planning Act 2008* (UK), s 31.

[68] *Planning Act 2008* (UK), s 5.

[69] *Planning Act 2008* (UK), s 10.

[70] *Planning Act 2008* (UK), s 104.

[71] *Infrastructure Planning (Environmental Impact Assessment) Regulations 2009* (UK), Sch 4.

[72] *Planning Act 2008* (UK), ss 37, 50.

Overriding local planning controls

Part 3A is a major impediment to the making of planning decisions that are climate friendly and incorporate proactive local government action. This is because Pt 3A removes the need to comply with LEPs. Part 3A allows the Minister for Planning to effectively rezone areas that are not currently zoned appropriately in order to allow for new urban development. Although cl 8N of the *Environmental Planning and Assessment Regulation 2000* (NSW) prohibits the approval of Pt 3A development in "environmentally sensitive areas of State significance" and "sensitive coastal locations"[73] if development prohibited by an environmental planning instrument, in reality no such protections exists. This is because Pt 3A can be used to spot rezone areas where development is prohibited that would otherwise be protected by this clause.[74]

A good illustration of this is the proposed rezonings at Catherine Hill Bay.[75] The current LEP prohibited development in the area as it consisted of environmentally sensitive areas of State significance and sensitive coastal locations. However, the Minister circumvented these protections by amending the relevant LEP to rezone the area at the same time that approval was given. Another example that was discussed above is the Huntlee development near Branxton which is a proposed urban development in an area that in unsuitable due to a lack of existing public transport and essential infrastructure such as hospitals or schools to cater for significantly increased population in these areas. There were also significant patches of endangered ecological communities that would be removed by the development. Despite this, the Minister sought to rezone the area to facilitate the development.

The two examples above demonstrate that in practice there are no restrictions on rezoning under Pt 3A. This effectively allows developers to bypass a local rezoning through an LEP process if they can argue that a development will contribute to the State economy.

If regional planning is done well, there should be little role for spot rezonings if a proper process of strategic planning is undertaken. It is therefore vital that Pt 3A is amended to ensure that there is no ability for the Minister to rezone areas simply to facilitate a Pt 3A project that would otherwise be prohibited. Removing this provision would strengthen the ability of strategic planning to address mitigation issues in areas identified for new development.

Consideration of development options

Part 3A only requires the Minister to look at the project application at hand and not to consider whether there are viable and prudent alternatives for the proposed project that will lead to fewer greenhouse gas emissions. For example, there is no requirement to consider other alternatives or the actual need for the development. It is only necessary for a proposal to fall within the scope of Pt 3A. As a result most developments over $50 million are ultimately approved.[76] Nor does the Minister have the discretion to reject inappropriate parts of the development, or approve a reduced development footprint. The Minister's power only extends to approving a development subject to conditions. The imposition of such conditions is completely at the Minister's discretion. As a result of these broad powers most Pt 3A developments are approved. In fact every new coal mine has been approved except the recent refusal of the Bickham Coal mine. The Major Development Monitor also notes that over 98% of all Pt 3A applications are approved.[77]

[73] Defined in *State Environmental Planning Policy (Major Development)*, n 57.

[74] *Environmental Planning and Assessment Act 1979* (NSW), s 75R(3A). This section allows the Minister to amend an environmental planning instrument to remove or modify any provisions of the instrument that purport to prohibit or restrict the carrying out of Pt 3A development simply by publishing an order on the New South Wales legislation website.

[75] See *State Environmental Planning Policy (Major Development)*, n 57, Sch 3, Pt 14 for South Wallarah Peninsula.

[76] The only refusals since Pt 3A commenced are the following projects: Stamford Plaza Double Bay, Somersby Quarry, coastal development in Cronulla, Bickham coal mine, Currawong, Moruya East Village. See major development monitors from 2005-2009 which can be found at http://www.planning.nsw.gov.au/SettingtheDirection/Corporatepublications/tabid/95/language/en-AU/Default.aspx viewed 14 October 2010.

[77] See http://www.planning.nsw.gov.au/SettingtheDirection/Corporatepublications/tabid/95/language/en-US/Default.aspx#Major_Development_Monitor viewed 14 October 2010.

Another major problem in New South Wales that seems to have had little attention is the issue of whether new mines, particularly gold mines such as the expanded Cadia mine, are going to significantly increase pressure on water usage. Many parts of New South Wales, particularly in the Central West, have become more drought prone and are predicted to get even less rainfall as a result of climate change.[78] However existing approvals under Pt 3A do not really examine the cost benefit analysis or future water needs of the community but instead assess the impact of the mine on the economy.

This one-eyed focus is a key impediment to achieving sustainable outcomes under Pt 3A. The Minister should be under a duty to investigate and assess different design options for proposed projects and compare the environmental, social and economic impacts of the various options. To facilitate this, the Act should be amended to require the Minister for Planning to investigate prudent and viable alternatives when determining whether to approve a Pt 3A project and a duty to approve the design that will lead to the least amount of emissions.

Cumulative impacts of development

Most Pt 3A environmental assessment documents contain an assessment of the climate change impacts of a proposed project but justify the major project on the basis of its economic value and the potential and current jobs at stake. For example, the Anvil Hill Coal mine assessment report stated:

> The Department is therefore satisfied that there is a demonstrable need for the Anvil Hill coal project in terms of meeting society's need for adequate, reliable and affordable energy. It must be noted that if the Anvil Hill coal project was not allowed to proceed, the resultant gap in the coal supply would almost certainly be filled by another coal resource either in New South Wales, Australia or overseas. In other words, removing the GHG emissions from the Anvil Hill project would not likely result in any decrease in global CO_2 emissions.

The report goes on to describe the mine as only a small contributor to climate change in a global sense and that therefore the project should not be refused on the basis of GHG impacts. The report states that the consideration of the project application with regard to GHG impacts should be balanced with consideration to:

- the project's contribution to global warming/climate change;
- whether refusing the project application would reduce global GHG emissions;
- the need for the project;
- the benefits of the project, including job creation and its contribution to the NSW economy;
- the objects of the EP&A Act, including the encouragement of ESD; and
- available GHG impact mitigation measures.[79]

These passages highlight the problems associated with a project based assessment of climate change. No project will necessarily significantly contribute to the problem of climate change in and of itself. However, cumulatively each of these projects is significantly contributing to the problem. The failure to regulate them on this basis is therefore a significant issue.

Without considering cumulative impacts, this essentially means that no high-emitting projects such as power stations and mines will be rejected or modified on the basis of their individual contribution to climate change. It is therefore imperative that the Act is amended to require the Minister to consider the cumulative impact of Pt 3A projects, especially mines and power stations, before approving a Pt 3A project.

Concept plans

A significant failing of Pt 3A in relation to environmental assessment is the concept plan process. Part 3A allows projects to be approved as concept plans that need only describe the proposed

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[78] CSIRO, *Water Availability in the Murray-Darling Basin* (2008), http://www.csiro.au/resources/WaterAvailabilityInMurray-DarlingBasinMDBSY.html viewed 14 October 2010, pp 52-53.

[79] See Director-General's Assessment Report for Anvil Hill coal mine (2007), http://www.majorprojects.planning.nsw.gov.au/files/6562/Director-General%27s%20Assessment%20Report.pdf pp 10, 18-19.

development in "broad brush" terms. Detailed information about the development is not needed.[80] A concept plan approval is taken to indicate "in principle" approval of a proposed project, which the proponent can rely on prior to drawing up more detailed plans.[81] Indeed, the Act also allows a single application to be made for approval of a concept plan for a project and approval to carry out the project.[82] This means that projects can be approved on the basis of concept plans without the need for further assessment. This makes the effective assessment of these projects difficult, or even impossible, since the breadth of the environmental effects of the proposed project is unclear. The concept plan process institutionalises unaccountable decision-making and ensures that the true climate change footprint of proposed projects may not be known or investigated sufficiently before approval.

Critical infrastructure

Currently Pt 3A and in particular the critical infrastructure requirements regulate all new gas and coal fired power stations.[83] While the nature of such declarations is being challenged before the Land and Environment Court, the ability to be able to make such a declaration frustrates the ability to promote less carbon intensive energy production.[84] In Pt 3A there are no requirements to minimise the emissions of new infrastructure or consider renewable energy alternatives before approving such infrastructure. This is despite the fact that any new coal fired infrastructure will significantly increase the emissions in New South Wales. Similarly, critical infrastructure provisions were used to approve the desalination plant for Sydney that will significantly increase energy use (albeit using "green power"). The designation of the desalination plant as critical infrastructure did not require the government to consider other water saving measures such as householders using water tanks or stormwater harvesting before making such a decision. It is vital that before infrastructure is considered critical or approved there is a consideration of the climate change impacts and other alternatives to that proposal.

In contrast to the New South Wales regime, in the United States various state governments and agencies have rejected new coal fired power infrastructure and have introduced laws that require them to consider the climate change impacts of these developments.[85]

BUILDING AND CONSTRUCTION

There are significant greenhouse gas emissions generated from the building industry. Building and construction activities in New South Wales produce approximately 23% of greenhouse gas emissions.[86] There is even some suggestion that this figure is an under-representation of the true

[80] *Environmental Planning and Assessment Act 1979* (NSW), s 75M.

[81] When determining whether to approve a concept plan, the Minister must decide what further assessment is required before final approval is given. Final project applications for stages or elements of the concept plan may be determined by the Minister or by the local council.

[82] *Environmental Planning and Assessment Act 1979* (NSW), s 75M(3A).

[83] Declaration of Minister for Planning (26 February 2008) to classify all electricity generation facilities that have the capacity to generate at least 250 megawatts of power as critical infrastructure.

[84] See case of *Ned Haughton v Minister for Planning* which was heard in mid-September 2010. Judgment is currently reserved.

[85] *Friends of Chattahoochee Inc v Georgia Dept of Natural Resources*; *Franklin County Power of Illinois LLC v Sierra Club* (US Sup Ct, 29 June 2009); *Hempstead County Hunting Club v Arkansas Public Service Commission*.

[86] In 2007, the Australian Sustainable Built Environment Council commissioned a report by the Centre for International Economics entitled *Capitalising on the Building Sector's Potential to Lessen the Costs of a Broad Based Greenhouse Gas Emission Cut* (2007). The report states that the building sector accounts for 23% of Australia's emissions and concludes that the building sector as a whole could reduce its share of greenhouse gas emissions by 30-35% whilst accommodating growth in the overall number of buildings by 2050. This can be achieved by using today's technology to significantly reduce the energy needed by residential and commercial buildings to perform the same services. For example, by replacing equipment with more energy efficient models at the natural replacement rate and upgrading the performance of the building shell (p 3). See also Intergovernmental Panel on Climate Change (IPCC), *IPCC Fourth Assessment Report, Climate Change 2007: Mitigation of Climate Change*, (2007) Ch 6, "Residential and Commercial Buildings", p 39.

amount of energy generated from building and construction.[87] As such, there are significant emissions reductions that could be achieved by developing, for example, better building codes and retrofitting existing buildings. However, this is currently a missed opportunity at a planning level.

In 2004, the New South Wales Government introduced BASIX to improve energy efficiency and water use in residential development. It was the first policy to seek to redress the range of issues relevant to ensure climate mitigation occurs across all types of buildings.[88] The original targets that BASIX was based on were modest because at that time these emissions were very high in the State.[89]

One of the main shortcomings of BASIX is that it only requires significant reductions of 50% energy and water use for new houses and small blocks of units. Multi-unit housing have much weaker targets of 20%.[90] Renovations costing less than $50,000 are also excluded. The system is also based on trade offs that may over time reduce BASIX's benefits by allowing, for example, solar powered appliances to trade off against weaker building standards.[91] In addition, one of the biggest problems is that the SEPP declares that any LEP or development control plan that seeks to impose improved standards for energy consumption or water consumption will be invalid.

There are also no State-wide water and energy efficiency standards for non-residential development, which is a significant issue given that many new urban infill developments in areas like Barangaroo will comprise of a mix of high rise residential and commercial developments. BASIX also does not address embodied energy issues, that is energy required to produce materials.[92]

In 2008, the government released *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (Codes SEPP). This SEPP provides State-wide exempt development categories that may be carried out without consent regardless of requirements in individual LEPs (as long as the standards are met). There are currently 41 categories of development identified as exempt development under the SEPP. These include air-conditioning units, pergolas, barbeques, carports, driveways, hot water systems, rainwater tanks and portable swimming pools.[93] The *State Environmental Planning Policy (Infrastructure) 2007* also prescribes some public authority developments as exempt development. The Codes SEPP also introduced State-wide complying development codes. Under this SEPP new detached single and two-storey houses and home alterations and additions on specific lot sizes and in certain zones are classified as complying development. The New South Wales Housing Code, introduced by the SEPP, applies to residential developments including:

- detached single and double storey dwellings;
- home extensions; and
- other related development, such as swimming pools.

There are major issues with these housing codes which are designed to speed up the development assessment process for, inter alia, new housing development. First, the Codes SEPP adopts the current standard of BASIX but goes no further, despite the need to continually improve these requirements as technology improves. Further issues that could have been addressed through the Housing Codes include:

- greater heating and cooling requirements (linked to enhanced energy performance);
- mechanical or natural ventilation;

[87] The accepted figure of 23% has been criticised as being based on erroneous assumptions and it has been argued that the real figure is closer to the United Nation's estimate of 40% or higher. See, eg, http://www.thefifthestate.com.au/archives/2112.

[88] Pears, n 14 at 367, 369.

[89] Thorpe A and Graham K, "Green Buildings – Are Codes, Standards and Targets Sufficient Drivers of Sustainability in New South Wales?" (2009) 26 EPLJ 486.

[90] Nixon S, "High-rise Residents Big Energy Guzzlers", *The Sydney Morning Herald* (30 May 2006).

[91] Thorpe and Graham, n 89 at 486, 489.

[92] Thorpe and Graham, n 89.

[93] *State Environmental Planning Policy (Exempt and Complying Development Codes) (2008)*, Pt 2.

- indoor environmental quality (IEQ), such as the minimisation of volatile organic compounds (VOCs) and formaldehyde;[94]
- use of ecologically sustainable building materials such as sustainable timber, recycled content of materials such as concrete and steel, and PVC minimisation;
- geothermal systems for heating and cooling[95]; and
- sustainable landscape architecture standards.

A particular shortcoming of the new Housing Code is that it allows demolition as exempt development.[96] This ignores the substantial environmental impacts of building new houses from scratch. The housing industry is a significant contributor to landfill, with the industry's material comprising 40% of landfill dumps. The building industry also produces around 40% of greenhouse gas emissions in the air.[97] Neither the new Housing Codes, nor the Standard LEP address such issues. In fact the new Housing Codes are likely to encourage this by making it easier to rebuild houses that comply with the new housing codes. This is further exacerbated by the fact that it is usually cheaper to demolish and rebuild a new house than to renovate an existing one. The planning framework should encourage retrofitting and extensions that re-use existing buildings as much as possible.

The Housing Codes also have large maximum floor areas and no requirements for landscaping to encourage water sensitive design. No attempt is made in the Housing Code to use passive solar design or appropriate urban design. For example, car spaces are required despite the fact that public transport use or car share could be encouraged as an alternative in some areas.[98] Moreover, the Codes SEPP does not promote renewable energy which it could have done by making all renewable technologies exempt development. For example, although rainwater tanks are listed, there are limitations on what type of rainwater tanks the exemption applies to. In contrast, air conditioners are exempt development with less requirements to be fulfilled.[99] Again the Code does little to promote sustainable construction methods and does not incorporate strategies to reduce embodied energy in buildings.[100]

There also needs to be some thought given as to how we are to encourage retrofitting of the existing house stock, particularly in the rental market where energy costs are not a significant driver of change. Given the lack of tax or other economic incentives, direct regulation or similar may be necessary. Movements are being made in this area and amendments to the Building Code[101] are proposed to bring in energy ratings which will need to be disclosed when sales are occurring. The federal *Building Energy Efficiency Disclosure Act 2010* (Cth) requires non-residential commercial buildings with net lettable areas of at least 2,000 square metres to disclose their energy efficiency to potential buyers or lessees. These are promising developments but these measures need to be extended to residential and rental properties.

CONCLUSION

At present, the planning regime in New South Wales is largely silent on climate change. The EPA Act as currently framed is inadequately placed to incorporate climate change mitigation and adaptation

[94] This would allow for reduced ventilations rates which will have an effect on the overall energy improvement of the home.

[95] Residential developments on lots over 600 square metres are highly suitable for geothermal heating systems. These save on long-term maintenance costs and reduce water usage, while providing indoor thermal comfort.

[96] *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, reg 3.5.

[97] See Clark, n 34.

[98] Thorpe and Graham, n 89 at 492.

[99] *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, Subdiv 3, Pt 2.

[100] Thorpe A and Graham K, n 89 at 493.

[101] Under a Council of Australian Governments agreement, all States are currently moving towards adopting the 2010 amendments (volumes one and two). Not all jurisdictions implemented the amendments on 1 May 2010, but implementation will be no later than May 2011, (http://www.abcb.gov.au/index.cfm?objectid=4B5F6900-28B1-11DE-835E001B2FB900AA) viewed 17 December 2010. In New South Wales, the 2010 amendments to the building code commenced 1 May 2010. See http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=SuV4Mu60NO8%3D&tabid=82&language=en-AU) viewed 17 December 2010.

action in a substantive manner from the strategic planning stage through to the building and construction stage. In light of the above, we submit that there is an urgent need for legislative amendment to the EPA Act to ensure there is a robust and meaningful response to climate change. Amendments required include the incorporation of climate change into strategic planning, the establishment of a robust coastal adaptation regime, the introduction of a comprehensive assessment framework of the climate change implications of all development and strong energy efficiency and water standards for building and construction. These amendments must apply to all categories of development, including major projects and critical infrastructure.

If the New South Wales government acts to implement the integrated climate change planning approach outlined in this paper, it will place itself in a strategic and resilient position. Indeed, acting now will allow future emissions reduction targets at a State, federal and international level to be achieved sooner and also enable more robust adaptation to imminent climate change impacts than has occurred to date.