

**NSW**



**DEFENDING THE ENVIRONMENT  
ADVANCING THE LAW**

## **Submission on the draft Environmental Planning and Assessment Amendment Bill 2017**

prepared by

**EDO NSW  
March 2017**

## About EDO NSW

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

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

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

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

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

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## EXECUTIVE SUMMARY

The NSW Government is proposing a significant amendment to the *Environmental Planning and Assessment Act 1979* (**Planning Act**).

Our submission on the draft Environmental Planning and Assessment Amendment Bill 2017 (**the Bill**) draws on over 30 years of legal expertise and community assistance in planning and environmental law matters. Each year, EDO NSW lawyers:

- respond to 1200 calls to our free legal advice line, most from regional and rural NSW;
- run a small number of court cases that raise significant public interest environmental issues;
- deliver free legal education workshops to communities across the State; and
- work with other NGOs and governments to make better environmental laws, inclusive engagement processes and to support the rule of law.

If passed by Parliament the Environmental Planning and Amendment Bill 2017 (**the Bill**) will:

- update the objects and restructure the Planning Act,
- require new Community Participation Plans and local strategic planning statements,
- clarify minimum exhibition periods,
- reform state and local decision-making panels,
- aim to speed up decision-making and information-sharing on large and small development, and
- repeal the Part 3A 'transitional' pathway for modifying major projects (although some provision is to be made in regulations for 'any outstanding concept plans').

This submission is organised under the Government's **10 themes** for reform. We comment on key issues that are in the Bill, as well as identifying missed opportunities that should be addressed before the Bill is introduced to Parliament. Both are summarised in the box below. We make detailed comments and recommendations on other issues throughout the submission.

## Key issues and Recommendations

### The new legislation should:

Establish a primary object to **achieve ecologically sustainable development** – including by the effective integration of short- and long-term environmental, social, economic and equitable considerations in decision-making, and by implementing the principles of ESD.

Require decision-makers to refer to **environmental goals, targets and trends** when they make strategic planning and development decisions. The following measures are also needed to properly integrate environmental considerations in decisions.

Adopt a set of clear, ambitious, state-wide environmental and natural resource management (NRM) **goals and targets** for NSW. These should include ‘SMART’<sup>1</sup> targets that are translated and given effect in regional plans, supported by planning and NRM agencies.

Invest in a program to identify and gather data on **ecosystem services** (benefits to humans provided by nature) – such as a State Ecosystems Assessment – and report on and raise awareness of the importance of ecosystem services for NSW.

Establish **state and regional environmental accounts** to assess progress against ecological baselines and targets. These accounts should assess the extent, condition and trends in environmental assets including biodiversity, native vegetation, carbon storage, soil and water quality.

Include a new **object to respond to climate change** through mitigation and adaptation actions. Mitigation should refer to reducing greenhouse gas emissions from NSW sources, consistent with State and federal targets, global goals and the best available science, to ensure a safe and stable climate. Adaptation should include increasing the resilience of communities and the natural and built environment to the effects of unavoidable climate change and increasing preparedness for natural disasters.

Require planning authorities to **consider climate change in plan-making** under Part 3 and in **development decisions** under section 79C. This should include requiring that strategic plans (SEPPs, regional and district plans and LEPs) contribute to reducing emissions and building-in adaptation across sectors.

Retain concurrence provisions. We do not support the proposal for the Planning Secretary to take the place of **environmental agencies** – such as the Office of Environment and Heritage or the EPA – in giving advice, concurrence or general terms of approval for proposed developments.

Strengthen limitations for development modifications. We strongly support new provisions to prevent planning authorities, including the courts, from approving **modifications** for works already completed. There are, however, broader concerns about scrutiny and misuse of modifications that should be addressed.

Improve code-based assessment safeguards. We welcome increased local council powers, levies and court orders to respond to **non-compliant building work**. Several issues with code-based assessment have not been addressed in these updates, such as certifier governance, and avoiding and accounting for cumulative impacts of code-based approvals, especially on environmentally sensitive areas.

<sup>1</sup> SMART: Specific, Measurable, Assignable (responsibilities), Realistic and Time-related.

Include a power to **update consent conditions** for adaptive management and continuous improvement instead of the Bill's '**transferrable conditions**' proposal. As proposed, transferrable conditions present a number of risks and broad discretion. A more general power would allow primary consent conditions to evolve and take into account technology, other licences, business costs and community expectations. It would also counter-balance developers' ability to request repeated modifications and expansions.

Give legislative effect to measures to improve the quality of **environmental impact assessment (EIA) for major projects**. For example, requiring professional development and accreditation of environmental consultants and agency staff, and a process of arms-length peer review for significant EIA reports. These and other parallel policy changes are critical to public assurance, but the draft Bill does not enact them.

Strengthen the role of **expert environmental agencies** in assessing major projects. Ongoing **exemptions for major projects** from inter-agency referrals and 'concurrent' approvals do not provide that transparency, or public assurance that projects with the greatest impacts receive the greatest scrutiny. Nor does the forthcoming Biodiversity Assessment Method, which will be central to environmental impact assessment in the Act.

Limit discretion to allow '**serious and irreversible**' impacts of major projects; '**discounting**', '**variation**' and **supplementary measures** instead of rigorous offsetting. Serious or irreversible impacts must require refusal, and OEH concurrence for any redesign.

Ensure '**Part 5**' activities<sup>2</sup> (such as local infrastructure) are subject to the BAM and serious or irreversible impact assessment. **Mining and gas exploration** should no longer be assessed under Part 5, but require consent under Part 4 like other private development.

Discontinue Part 3A completely. We strongly support **discontinuing the Part 3A 'transitional' arrangements**, with three qualifications. First, the intent and implications of regulations to preserve 'outstanding' (approved) Part 3A concept plans must be clarified. Second, there is no basis to support a further two months for proponents to lodge new modification applications under the old Part 3A process, if and when this Bill is passed. Such amendments should have effect immediately. Third, future modifications should be assessed on whether the project is substantially the same as the development *originally approved* (as for all other section 96 modifications) instead of 'as modified'. If it is not, a fresh development application should be prepared.

Reinstate third party merits appeals. We strongly oppose the continued **exclusion of merits appeals** following a 'public hearing' by the Independent Planning Commission (currently the 'PAC'). We recommend repealing section 23F of the Act. Public hearings are no substitute for community rights to merit appeals in the Land and Environment Court. **Community access to the Court should be expanded in line with ICAC recommendations**, not curtailed by ministerial discretion.

Ensure equitable access to justice. We do not support the expansion of **developers' rights to seek internal reviews** of decisions about complex 'integrated' developments or major projects. This will allow closed-door negotiations on controversial projects at the expense of local participation. Unfortunately the draft Bill reinforces existing disparities, so that community appeal rights continue to be curtailed while proponents' review rights continue to be expanded.

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<sup>2</sup> Development or works that does not require development consent but is assessed (sometimes self-assessed) by a local or state authority under Part 5 of the Planning Act.

## BACKGROUND TO THE REFORMS

The NSW Government proposes to amend State planning laws in several key ways.<sup>3</sup> If passed by Parliament the Environmental Planning and Amendment Bill 2017 (**the Bill**) will:

- update the objects and restructure the Planning Act,
- require new Community Participation Plans and local strategic planning statements,
- clarify minimum exhibition periods,
- reform state and local decision-making panels,
- aim to speed up decision-making and information-sharing on large and small development, and
- repeal the Part 3A ‘transitional’ pathway for modifying major projects (although some provision is to be made in regulations for ‘any outstanding concept plans’).

In 2013 the NSW Government sought to completely overhaul the planning system. While those Bills ultimately did not pass the Parliament, many of the current updates have been proposed previously in some form.

### ***Aims of the legislative update***

The stated objective of the 2017 updates is to ‘promote confidence in our state’s planning system’<sup>4</sup> by:

- Enhancing community participation
- Promoting strategic planning
- Increasing probity and accountability in decision-making
- Promoting simpler, faster processes for all participants.

The updates have been divided into 10 themes:

- 1. Enhancing community participation**
- 2. Completing the strategic planning framework**
- 3. Better processes for local development**
- 4. Better processes for State significant development**
- 5. Facilitating infrastructure delivery**
- 6. Fair and consistent planning agreements**
- 7. Confidence in decision-making**
- 8. Clearer building provisions**
- 9. Elevating the role of design**
- 10. Enhancing the enforcement toolkit**

This submission is organised into the same 10 themes, but not all themes are covered in detail. For ease of reference we use many of the subheadings from the Government’s *Summary of proposals* document (January 2017).

Before turning to those themes, we consider another key issue arising from the Bill – changes to the Act’s objects.

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<sup>3</sup> See further: <http://www.planning.nsw.gov.au/Policy-and-Legislation/Legislative-Updates>. The community has until Friday **31 March 2017** to comment. The Government will then introduce a revised Bill to Parliament.

<sup>4</sup> NSW Planning and Environment (2017) *Planning Legislation Updates: Summary of proposals*, p. 5. Available at <http://www.planning.nsw.gov.au/Policy-and-Legislation/Legislative-Updates/Key-documents>

## KEY ISSUE: OBJECTS OF THE ACT, ENVIRONMENTAL GOALS AND TARGETS

### *Proposal*

The Bill proposes to update and simplify the current EP&A Act objects (aims and purposes), but with some important changes (Bill clause 1.4). There is a new object to promote 'good design', and another to manage built and cultural heritage, including Aboriginal cultural heritage. Business and employment are emphasised alongside housing (including affordable housing, as now). Existing objects to encourage land for public purposes, utilities, community services and facilities are removed.

### *Analysis & recommendations*

We support references to *good design* and *cultural heritage protection*. The objects should clarify 'good design' is promoted to improve health, wellbeing and sustainable communities.

The revised object to *protect the environment*, including threatened and other native species, should re-insert and include references to 'populations', 'ecological communities' and 'their habitats'. This reflects a contemporary shift to protecting ecosystems, not just species. Referring to *populations* reflects the importance of genetic diversity to biodiversity in general.

## Climate change and emissions reduction

There is no new object to respond to climate change or reduce greenhouse gas emissions. This continues a distinct lack of guidance on how planning authorities, developers and decision-makers are to address this critical issue. The Bill provides an opportunity to update the Act's objects in light of the Paris Agreement and the NSW Government's recent target of net-zero emissions by 2050.<sup>5</sup> We recommend a new object as follows:

*to respond to climate change by way of mitigation and adaptation actions. Mitigation means reducing greenhouse gas emissions from NSW sources, in accordance with NSW and federal emissions reduction targets, global goals and the best available science. Adaptation means increasing the resilience of communities and the natural and built environment to the effects of unavoidable climate change and increasing preparedness for natural disasters.*

This object should be given effect at key decision points such as strategic plan making and development determinations. Mitigation actions should be prioritised where possible, noting that reducing emissions now will also reduce the costs of adaptation later.

For comprehensive recommendations on emissions reduction and the planning system, see our report on *Planning for Climate Change* (2016).<sup>6</sup>

## Ecologically Sustainable Development

Importantly, the Act's current objects include 'to encourage ecologically sustainable development' (**ESD**), defined to include the key principles of ESD.<sup>7</sup> The Bill would change this to:

*'facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment.'* (clause 1.4(b))

<sup>5</sup> NSW Office of Environment and Heritage, *Factsheet - Achieving Net-Zero Emissions By 2050* (Nov. 2016).

<sup>6</sup> Available at [http://www.edonsw.org.au/planning\\_for\\_climate\\_change](http://www.edonsw.org.au/planning_for_climate_change).

<sup>7</sup> Namely the precautionary principle, intergenerational equity, conservation of biological diversity, and the polluter pays principle (internalising environmental costs).

We understand the amended Act would still define ESD with reference to the long-standing ESD principles in NSW pollution law.<sup>8</sup> However, we are concerned the proposed object to ‘facilitate’ ESD will water down what the Act is intended to achieve, by interpreting ESD as a basic ‘triple-bottom-line’ approach to environmental planning and assessment. Rather it should *implement* ESD principles, which are designed to make environmental factors visible in decision-making and correct the historical practice of taking environmental assets for granted.

We acknowledge the value in explicitly including ‘social’ considerations (alongside economic and environmental). This reflects the existing practical application of ESD. Alongside this, we recommend including ‘equitable’ considerations, consistent with ESD principles of inter-generational and intra-generational equity. Equity is about making sure decisions produce fair outcomes. Equitable considerations are important as they consider the distribution of benefits, costs and impacts within and between generations, that arise from decisions made.

We recommend ESD be the overarching object of the Act, instead of one of many equally-weighted objects, as did ‘over 50 per cent of submissions’ to the 2013 planning review.<sup>9</sup> To ensure that ESD principles are effectively applied, we recommend rewriting the object as:

to *achieve* ecologically sustainable development, including by:

- i) *effectively integrating short and long-term economic, environmental, social and equitable considerations; and*
- ii) *implementing the principles and programs of ecologically sustainable development described in section 6(2) of the Protection of the Environment Administration Act 1991*

*in decision-making about environmental planning and assessment.*

Alternatively this primary object could refer to ensuring decision-making is ‘consistent with’ ESD principles, as elsewhere.<sup>10</sup> It should not simply refer to integrating ‘relevant’ considerations.

## **Integration in decision-making needs environmental goals, targets & accounts**

### *Analysis & recommendations*

It is impossible to integrate environmental factors in NSW decision-making without clear environmental goals, targets, and good data to guide natural resource management (including environmental accounts). The Bill misses an opportunity to address these three gaps.

We recommend the planning system require decision-makers to refer to environmental goals, targets and trends when they make strategic planning and development decisions. This is consistent with planning law recommendations of the Biodiversity Review Panel, to ensure biodiversity objectives and priorities are reflected in SEPPs and regional plans.<sup>11</sup>

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<sup>8</sup> The Bill does not remove the definition of *ecologically sustainable development* in the Definitions (s.4). This refers to the list of ESD principles described in s. 6(2), *Protection of the Environment Administration Act 1991*.

<sup>9</sup> NSW Department of Planning and Infrastructure, *White Paper Feedback Report* (2013), p. 18.

<sup>10</sup> As does the *Biodiversity Conservation Act 2016* (NSW), clause 1.3.

<sup>11</sup> See recommendation 15 of the Independent Biodiversity Review Panel report (Dec. 2014). The Government has stated it accepted those recommendations in full:

*15. Ensure that biodiversity objectives and priorities, including priorities identified in a state-wide framework or strategy for conservation or in plans prepared by Local Land Services —are:  
(a) reflected in any new state planning policies prepared under the Environmental Planning and Assessment Act 1979*

## Goals

The NSW Government needs to set clear long-term goals to protect the state environment. Without goals, it is harder for state, regional and local planning bodies to consider environmental and other impacts (as they are required to do under s. 79C of the Act); to establish and pursue complementary policies; or to know if planning laws and policies are working, and what needs to change.

NSW recently set a long-term goal to reduce greenhouse gas emissions to ‘net-zero’ by 2050. But unlike other states and nations - such as the UK, South Australia, ACT, Tasmania, and soon Victoria - it is not given effect in NSW law, and is described as ‘aspirational’ only.

An excellent example of clear environmental goals and accountability in law is the *Environment (Wales) Act 2016*.<sup>12</sup> This wide-ranging act puts ESD at the heart of Welsh decision-making. It includes long-term goals on environmental protection and climate change. Instead of giving ministers wide discretion to apply the law, as happens in NSW, it requires Welsh Ministers to act in ways that achieve the law’s aims. This includes duties to protect Welsh ecosystems from degradation, and to identify species and areas vital to Welsh people’s lives and livelihoods. The Act is explicitly linked to laws on planning, wellbeing and intergenerational equity.

## Targets

To make high-level goals work, they must be supported by specific shorter-term environmental targets. In 2007 the NSW Natural Resources Commission set clear and useful state-wide targets for 2010-2015. They aimed to improve native vegetation health, river and wetland health, biodiversity of fauna, soil health and more. After initial reporting in 2010, these targets have been quietly abandoned. It is unclear what, if anything, has been put in their place, or how the success of NSW environmental performance is measured.

## **Better data, and recognising ‘ecosystem services’**

Reliable data on environmental assets and their condition is a vital input to decisions on strategic land-use planning and development. This is because environmental impact assessments (EIA) and evaluation are key functions of the NSW planning system.

Numerous expert reviews highlight the under-investment in environmental data in NSW, and its lack of integration in planning frameworks. These include the NSW Biodiversity Review Panel (2014), the Chief Scientist and Engineer’s reviews of coal seam gas (2014) and koala population decline (2016) and successive state and federal *State of the Environment* reports. Most recently, the 2015 *State of the Environment NSW* report noted the ‘paucity of data’, and ‘little new information’ since 2009, ‘to evaluate the status and trends of native fauna populations or species distributions generally’.<sup>13</sup>

Work has started on more extensive environmental monitoring and reporting (such as the SEED Environmental Portal), but more systemic integration is needed in planning laws.

Across the world, governments and the private sector are also starting to recognise the importance of data on ‘ecosystem services’ – the benefits that nature provides to humans.

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(b) incorporated in *Regional Growth and Infrastructure Plans and Subregional Delivery Plans*, instead of in separate *Regional Conservation Plans*.

<sup>12</sup> See <http://gov.wales/topics/environmentcountryside/consmanagement/natural-resources-management/environment-act/?lang=en>, accessed February 2017.

<sup>13</sup> NSW Environment Protection Authority (EPA), *State of the Environment New South Wales*, p. 104.

These are often invisible in policy and decision-making.<sup>14</sup> In the UK, US, Canada and elsewhere, agencies are integrating ecosystem services into strategic planning, assessment and land management.<sup>15</sup>

We recommend the NSW Government invest in systems to identify and build-in legal recognition of ecosystem services, functions, values and trends. This could include funding a state-wide ecosystems assessment (as in the UK<sup>16</sup>) and linking to 'environmental accounts'.

### ***Environmental accounts***

Finally, we strongly recommend the NSW Government establish a system of state and regional environmental accounts, to inform decision-makers and communities about long-term planning and cumulative impacts, and ensure decisions are based on robust evidence.

Environmental accounting does not mean simplifying everything to a simple dollar value. That is neither practical nor appropriate. Nevertheless, various expert reviews have recommended establishing a set of national environmental accounts (on a bioregional basis) that track the extent, quality and trend of natural resources such as native vegetation, water, soil and biodiversity.<sup>17</sup> For example, the Wentworth Group's *Accounting for Nature* model uses a scoring system called 'Econds' to measure change in extent and condition of native vegetation, helping to track loss and gain at a regional landscape scale.<sup>18</sup>

Benefits of regional environmental accounts in support of planning laws would include:

- equipping planning authorities, resource managers and local communities with the data they need to make responsible decisions;
- establishing trends about land uses, ecosystems and key regional threats;
- painting a comprehensive picture of landscapes and environmental assets;
- planning and prioritising areas for protection, development and specific land uses.

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<sup>14</sup> See Ontario Biodiversity Council, *Indicators report – State of Biodiversity 2015* <http://sobr.ca/report/>, (p 138).

<sup>15</sup> In 2013 the UK Government issued guidance for policy and decision makers on using an 'ecosystems approach' and valuing ecosystem services. See: <https://www.gov.uk/guidance/ecosystems-services>. The *Environment (Wales) Act 2016* calls for identifying keystone species and areas. In 2015 the US President directed all federal agencies to develop ecosystem services frameworks in forward planning. See: <https://www.whitehouse.gov/blog/2015/10/07/incorporating-natural-infrastructure-and-ecosystem-services-federal-decision-making>. The Ontario Biodiversity Council has set goals and targets to implement ecosystem services approaches by 2020. See <http://sobr.ca/report/>, *Summary report - State of Biodiversity 2015* (Target 14).

<sup>16</sup> See DEFRA, *UK National Ecosystems Assessment*, at <http://uknea.unep-wcmc.org/>, accessed February 2017.

<sup>17</sup> See Wentworth Group of Concerned Scientists, *Accounting for Nature* (2008); and *Accounting for Nature – Quick Guide: Guidelines for Constructing Regional Scale Environmental Asset Condition Accounts* (2013) (with NRM Regions Australia) at [www.wentworthgroup.org](http://www.wentworthgroup.org). See also Dr. A. Hawke, *Report of the Independent Review of the EPBC Act 1999* (2009), Chapter 19 and recommendation 67. See further National Sustainability Council, *Sustainable Australia Report 2013*, 'Sustainability Indicators for Australia'.

<sup>18</sup> See Wentworth Group of Concerned Scientists, *Accounting for Nature - Quick Guide: Guidelines for Constructing Regional Scale Environmental Asset Condition Accounts* (2013) at [www.wentworthgroup.org/](http://www.wentworthgroup.org/).

## 1. KEY ISSUE: ENHANCING COMMUNITY PARTICIPATION<sup>19</sup>

The Bill includes some important gains for community participation in planning decisions.

### Community Participation Plans and principles

#### *Proposal*

A significant new requirement is that each 'planning authority'<sup>20</sup> (or decision-maker) will prepare and exhibit a Community Participation Plan. Each plan will set out how and when the planning authority will undertake community participation on a range of planning functions, including preparing environmental planning instruments like LEPs and SEPPs,<sup>21</sup> assessing development applications and conducting environmental impact assessment.<sup>22</sup>

In preparing the plan, the planning authority must *consider* the community participation principles in the Bill, developed from the community participation charter proposed in 2013.<sup>23</sup>

#### *Analysis & recommendations*

We strongly support the adoption of community participation plans and principles. However, there is no guarantee the principles will be reflected in the plans, as planning authorities are only required to consider the principles when formulating the plan, not implement them or show how their plan complies.

Further, the provisions of a community participation plan are only mandatory if a plan identifies them as mandatory. This is a potential weakness that could make the plan unenforceable and ineffective. Mandatory requirements will at least include minimum public exhibition and notification periods, and giving reasons for decisions, as well as other matters identified in individual plans.<sup>24</sup> Plan obligations should be mandatory by default, unless otherwise identified in the exhibited draft Plan.

Importantly, the community can challenge whether a Community Participation Plan is valid within 3 months of it being published on the NSW Planning Portal. While this would be rare, we strongly support this safeguard. Planning authorities are more likely to take the process seriously if the community has some oversight in this way.

### Minimum exhibition periods<sup>25</sup>

#### *Proposal*

Minimum timeframes for public exhibition are proposed for a range of planning matters:

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<sup>19</sup> Division 2.6, Bill pp 15-22.

<sup>20</sup> Planning authorities include: The Minister, the Planning Secretary, the Greater Sydney Commission, the Independent Planning Commission, Sydney district regional planning panel, a council, a local planning panel, a determining authority under Part 5, a public authority prescribed by the Regulations. See Draft Bill, pp. 15 and 16.

<sup>21</sup> Local Environmental Plans (LEPs) and State Environmental Planning Policies (SEPPs).

<sup>22</sup> Councils won't need to prepare these plans where an equivalent document is already in place, such as in a Community Strategic Plan prepared under s. 402 of the *Local Government Act 1993* (NSW).

<sup>23</sup> In brief the principles include (at clause 2.23): a right to be informed, partnerships and meaningful participation opportunities, accessible planning information, early engagement in strategic planning, inclusive and representative consultation, local consultation on major development, open and transparent decision-making and reasons for decisions, and proportionate participation methods based on a matter's significance and impacts.

<sup>24</sup> Schedule 2, clause 2.22, Bill p. 16.

<sup>25</sup> Schedule 1 to Part 2.

1. Draft community participation plans, regional and district plans, planning proposals for Local Environmental Plans (**LEPs**) and rezoning, and Development Control Plans,
2. Development applications and Environmental Impact Statements,
3. Mandatory notification of decisions on development applications and modifications, and reasons for the decision (including ordinary development and major projects).

Minimum timeframes range from 14 days for smaller-scale development applications, to 45 days for draft regional and district plans. However, minimum timeframes to exhibit State Significant Development (SSD) and Infrastructure (SSI) would reduce from 30 to 28 days.<sup>26</sup> The Planning Secretary will also be required to establish an online planning alert service.

#### *Analysis & recommendations*

This is a positive step as not all of these public participation provisions are currently required and some are discretionary. This will give the community some certainty about when they will be notified of applications and decisions, and how much time they will have to comment.

However, minimum timeframes should also apply to proposed SEPPs and amendments, instead of leaving their exhibition entirely to the Minister's discretion (under s. 38 of the Act).

Exhibition requirements for strategic plans should be supported by a clear requirement for decision-makers to give due consideration to public submissions before a plan is finalised.<sup>27</sup>

Major projects (SSD, SSI) should continue to be exhibited for a minimum of 30 days, not 28. Regional plans (which may be 20-year strategies) should be exhibited for 60 days, not 45.

Minimum notification or exhibition timeframes should also apply to local council activities and other 'Part 5' activities with environmental impacts, such as clearing trees. Members of the public often call our advice line concerned about Part 5 activities that public authorities may view as routine. Advance notice (and the chance to comment) can diffuse these situations.

We welcome the exclusion of the summer holiday period (20 December to 10 January) when calculating the minimum exhibition period. This should apply to SEPPs and other policies.

Planning alerts will be a useful update of notification options for those who wish to register.

Notifications for complying development are discussed under Local development below.

### **Statement of reasons for decisions<sup>28</sup>**

#### *Proposal*

Decision-makers will be required to publish reasons for decisions to give or refuse development consent (including for State Significant Development and Infrastructure, excluding smaller-scale, complying development). The statement of reasons is required to include how community views were taken into account in making the decision.

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<sup>26</sup> Note: Timeframes are minimum only. It is open to planning authorities to exhibit longer.

<sup>27</sup> See ICAC, *Anti-corruption safeguards in the NSW planning system*, 2012, recommendation 11. Currently the EP&A Act (s. 38) gives ministerial discretion to consider submissions as 'appropriate or necessary'.

<sup>28</sup> Division 4, Schedule 1 to Part 2, Bill p 21.

### *Analysis & recommendations*

We support steps that build transparency and accountability, help communities understand how decisions were arrived at, and how their input shaped the outcome. However, to fulfil these aims, care must be taken to ensure the process of giving reasons remains authentic and does not become a tick-a-box administrative procedure.

The requirement to explain reasons and public input should extend to decisions about final strategic plans and SEPPs.

All documents used to prepare the reasons should be designated 'open access information' under the GIPA Act, so the public can understand how the statement was prepared.

The Act or regulations need to clarify how people will be notified of decisions in practice.

It is unclear why reasons for decisions on infrastructure (approved under Part 5 of the Act) would only be required in rare cases where an Environmental Impact Statement is prepared. This limitation would also exclude most decisions on coal seam gas exploration (also Part 5). Reasons for Part 5 approvals are important as these do not require public consultation.

## **2. THE STRATEGIC PLANNING FRAMEWORK<sup>29</sup>**

### **Local strategic planning statements<sup>30</sup>**

#### *Proposal*

Councils will be required to develop and publish new Local Strategic Planning Statements on the NSW Planning Portal. These statements outline a vision, planning priorities and actions for the local area, taking account of regional and district plans and the local council's Community Strategic Plan. This is said to ensure a 'line of sight' between the various levels of strategic planning documents, from Regional Plans through to LEPs and Development Control Plan (**DCP**) guidance. This follows recent ministerial directions on plan-making.<sup>31</sup>

The statements will explain the rationale behind LEP provisions and zones, and explain how strategic priorities at the regional or district level are implemented locally. Councils will be required to consider the statements when preparing planning proposals for new or amended LEPs (including rezoning), and state whether the proposal will give effect to the statement.<sup>32</sup>

#### *Analysis & recommendations*

Although local strategic planning statements can draw on councils' Community Strategic Plans, the Planning Department (or the Greater Sydney Commission) must endorse each council's statement before it is published. This poses some risk of top-down determinism, where local preferences are seen to be shoe-horned into State priorities.

The community's role in preparing local statements should be clarified. There are no mandatory community participation requirements relating to the statements in the draft Bill.

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<sup>29</sup> Revised Part 3 of the Act, Bill p. 42.

<sup>30</sup> Schedule 3 item [20], Bill p. 45.

<sup>31</sup> Section 117 Directions issued Apr. 2016 (e.g. 5.1) require councils to amend LEPs to implement regional plans

<sup>32</sup> Schedule 3 item [6], Bill p. 42.

## Standard Development Control Plan format<sup>33</sup>

### *Proposal*

DCPs are currently made by local councils, and their structure and content varies. The Bill proposes to improve consistency by allowing future regulations (under the Act) to specify the form, structure and subject matter of DCPs. Ultimately, as with LEPs, a standardised DCP may be developed.

### *Analysis & recommendations*

A more consistent structure and shared expectations should assist people to better navigate DCPs. Again though, the Government and councils will need to manage the risk that local preferences and identity, expressed in DCPs, could be over-ridden by State priorities. Much will depend on what the regulations say, and the provisions of any standardised instrument.

The Government proposes further work and consultation with councils on the extent of standardising DCPs. This process should include community input and feedback.

## **Key issue: Integrating Planning Act with biodiversity conservation laws & aims**

### *Analysis & recommendations*

The Bill should include additional amendments that integrate biodiversity and ecological integrity as a fundamental consideration across all decision making processes. This is essential to implementing recommendation 15 of the Biodiversity Conservation Panel's 2014 report, to ensure biodiversity priorities are embedded in SEPPs and regional plans.<sup>34</sup>

In particular, amend Part 3 of the Planning Act to require plan-makers and the Minister to:

- make regional plans in accordance with clear environmental and social criteria, including taking into account the aims of the Biodiversity Conservation Act, Biodiversity Conservation Program, Investment Strategy and natural resource management planning;
- seek advice from OEH or the Biodiversity Conservation Advisory Panel on:
  - whether the planning proposal (i.e. a draft state, regional and local environmental plan or amendment) will exacerbate key threatening processes (KTPs) to biodiversity or cumulative impacts in the plan area, and
  - how to minimise these impacts;
- publish the above advice, and address how the draft plan avoids and minimises biodiversity impacts, including KTPs and cumulative impacts;
- address how the final plan achieves the aim of ESD, including with reference to the principles of ESD.

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<sup>33</sup> Schedule 3, item [17], amendment to s. 74E, Bill pp. 44-46. Div. 3.6 of the revised Act will deal with DCPs.

<sup>34</sup> See Byron et al., *Report of the Independent Review of NSW Biodiversity Laws*, (December 2014), which the Government stated it accepted in full. Recommendation 15 is as follows:

15. *Ensure that biodiversity objectives and priorities, including priorities identified in a state-wide framework or strategy for conservation or in plans prepared by Local Land Services —are:*

(a) *reflected in any new state planning policies prepared under the Environmental Planning and Assessment Act 1979*

(b) *incorporated in Regional Growth and Infrastructure Plans and Subregional Delivery Plans, instead of in separate Regional Conservation Plans.*

## **Key issue: Lack of climate change responses in strategic planning (mitigation/adaptation)**

### *Analysis & recommendations*

While the Bill proposes to ‘complete’ the strategic planning framework, there is still nothing in the Act’s framework that requires planning authorities to consider and respond to climate change at a strategic level. In 2012 the Government’s independent planning review panel recommended climate change be a mandatory consideration in strategic planning.<sup>35</sup> However this recommendation was not taken up in the 2013 Planning Bill or the current Bill.

The Bill should require planning authorities to consider climate change mitigation and adaptation in plan-making. This should include requiring that strategic plans (SEPPs, regional and district plans, and LEPs) contribute to reducing greenhouse gas emissions across sectors, in accordance with state and national targets, global goals and the best available science. Adaptation responses are also needed at the strategic planning stage to deal with increasing natural disaster risk, urban heat island effects and biodiversity corridors.

### **3. NEW PROCESSES FOR LOCAL DEVELOPMENT**

#### **Early consultation with neighbours**

##### *Proposal*

One of the Bill’s community participation principles states that developers should consult community members affected by major proposals before making an application for development consent.<sup>36</sup>

Regulations *may* require applicants for development consent or modification to consult first.<sup>37</sup> The Department also intends to do further research on options and incentives to encourage early conversations between neighbours, and this will inform future regulations.

##### *Analysis & recommendations*

We agree that there are many advantages to encouraging consultation in the early stages of a project. For example: local insights, better design, upfront resolutions and more durable acceptance of outcomes. However, the quality, independence and responsiveness of proponent-driven consultation varies. Communities may be sceptical of consultation with foregone conclusions. So it remains to be seen whether this provision and future regulations result in early and constructive consultation with neighbours.

To improve consultation outcomes, options for independent consultation, quality assurance and community satisfaction surveys should also be investigated.

Early consultation is not just relevant to major developments, but would also benefit complying development (now expanding significantly) and other forms of local development. We support the principle that methods should be proportionate to project scale and impact.

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<sup>35</sup> The Hon T. Moore and the Hon R. Dyer, *The way ahead for Planning in NSW*, Independent review panel report, Vol. 1 (2012) recommendation 8.

<sup>36</sup> Clause 2.23(2)(f), Bill p. 16

<sup>37</sup> Schedule 1, clause 23, Bill p. 22.

## Key issue: Efficient approvals and advice from NSW agencies<sup>38</sup> (concurrences)

### *Proposal*

The Bill proposes to empower the Planning Secretary to act in place of another agency to give advice, concurrence or general terms of approval (in-principle approval), where the agency has not met statutory timeframes or where two or more agencies are in conflict.<sup>39</sup>

The process for assessing 'integrated development' (where other agency approvals are required in addition to development consent) has been identified as problematic due to the potential for delays and conflict. However, inter-agency concurrences, approvals and advice can also ensure that informed decisions are made by appropriate experts, and that the priorities of various agencies are taken into account.

### *Analysis & recommendations*

We therefore do not support the proposal to empower the Planning Secretary to take the place of environmental agencies including the Office of Environment and Heritage (OEH) or the EPA. Such a move would concentrate too much decision-making power in the Planning Department where expert environmental advice or co-approval of decisions is warranted.

In the absence of up-to-date routine reporting, the Government needs to present clearer evidence on the extent and sources of the problem, and reasons for purported delay.<sup>40</sup> For example we understand relatively few proposals require concurrence from *environmental* agencies.<sup>41</sup> Major projects remain exempt from many concurrences altogether (discussed further below).

Effectively, the Bill would permit the Planning Secretary to determine which agency should prevail in the event of a conflict, without reference to decision-making criteria. For example, if the EPA requires higher environmental standards on a particular development than another agency that is not charged with environmental protection, then the Secretary of Planning can decide which standard is preferred. This may result in lower environmental standards. This problem is exacerbated by the lack of environmental goals and targets in NSW, or requirements to apply ESD principles when the Secretary makes a decision.

Timeframes already apply to agencies with concurrence roles. Those agencies are currently permitted to 'stop the clock' on assessment timeframes in order to seek additional information. A proposed regulation will allow the Planning Secretary to 'restart the clock' if the information request 'is inconsistent with policy requirements'.<sup>42</sup> It is unclear what the policy requirements are, but there is a concern that such provisions prioritise speed of approval over rigorous decision-making processes.

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<sup>38</sup> NSW Government, *Planning Legislation Updates - Summary of proposals* (January 2017), p. 17.

<sup>39</sup> Schedule 4, item 12, amendment to s. 91A (Development that is integrated development), Bill p. 50.

<sup>40</sup> The last public report on concurrences is from 2009: <https://www.planningportal.nsw.gov.au/planning-tools/reporting#con>, accessed February 2017. See also 'Transparent digital platform' discussed below.

<sup>41</sup> 2009 figures suggest around 10% of concurrences and referrals are to environmental agencies such as OEH (1%), Heritage Council or department (3%), Office of Water (5%), Sydney Catchment Authority and the Natural Resources Commission. NSW Department of Planning, *Concurrence and Referrals Monitoring Final Report on Agency Processing Performance 1st July 2009 – 31st December 2009*, '4.1 Agency summary' (linked above).

<sup>42</sup> NSW Government, *Planning Legislation Updates - Summary of proposals* (January 2017), p. 18.

## Ongoing review of concurrences and referrals

### *Proposal*

The Department plans to undertake a comprehensive review of referrals and concurrences to identify unnecessary requirements and alternative tools to assess less complex risks. This was also proposed in the 2013 reforms, but it is not clear how far this work was progressed.

### *Analysis & recommendations*

To ensure community confidence, any review of concurrences should be consultative, transparent, evidence-based and clearly reasoned. The review should also consider the effect of changes to concurrences arising from the *Biodiversity Conservation Act 2016*.<sup>43</sup> We anticipate particular public sensitivity if *environmental* concurrences are wound back.

## Transparent digital platform for concurrences

### *Proposal*

The Department is developing an electronic system to digitise the transactional elements of integrated development and promote collaborative work practices. This will assist information-sharing between all participants, data collection and notifications, and improve the accountability of all agencies. It will also allow proponents (and the public) to track the progress of a concurrence.

### *Analysis & recommendations*

This will be a welcome addition to the online planning tools already available and will make the referral process more efficient and transparent, where concurrences still apply.

The platform must provide public access to reasons for decisions and all evidence relied upon. As noted, a lack of up-to-date routine reporting on concurrences limits transparency.

## Key issue: Limiting misuse of modifications, and considering original reasons

### *Proposal*

The Bill proposes the introduction of provisions to prevent planning authorities, including the courts, from approving modifications for works already completed.<sup>44</sup>

### *Analysis & recommendations*

We strongly support these provisions. This will prevent the misuse of modification provisions to retrospectively validate unauthorised works.

There are, however, broader concerns about misuse of modifications that should be addressed. For example:

- There is no limit to the number of times a proponent can apply to modify a project;

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<sup>43</sup> For example, biodiversity concurrences may be deemed as satisfied if the BAM applies: see *BC Act 2016*, Part 7 Div. 3.

<sup>44</sup> Schedule 4, item [15], amending s. 96, Bill p. 51.

- There are concerns that scrutiny is less than for the original approval, so that contentious aspects of a project (such as extra floors on an apartment building) may be ‘held back’ from the initial application and later submitted as a modification; and
- Some SEPP requirements must be addressed in an initial development application but not in a modification (e.g. water quality in Sydney Drinking Water Catchments<sup>45</sup>).

We strongly support the proposal to require planning authorities to consider the statement of reasons for the original consent when determining a modification application.<sup>46</sup> Although this will not prevent modifications that lead to overdevelopment by stealth, it will ensure the consent authority is fully aware of the reasoning and intent of the original decision.

The separate proposal to consider modified Part 3A proposals as they are now, instead of as they were originally approved, seems to conflict with this approach (see further below).

A general power to update consent conditions is considered under section 4 below.

## **Ensuring complying developments meet the standards**

### *Analysis & recommendations*

We strongly support the amendment to clarify that, where a complying development certificate does not comply with the relevant standards in the State Policy (e.g. Housing Code), it can be declared invalid.<sup>47</sup> It is important to the integrity of code-based developments that compliance is viewed as a matter of fact, and not as a matter of the certifier’s opinion. A note could clarify that third parties (community members) can ask the Court for such orders, not just councils and state planning authorities.

## **Powers and resources for councils**

### *Analysis & recommendations*

We strongly support changes to empower councils to issue temporary stop work orders in order to investigate whether a development is being constructed in line with the complying development certificate, and to recover costs.<sup>48</sup> This will help to stop unscrupulous developers exceeding standards and benefitting from councils’ limited resources to take action.

The introduction of a compliance levy is also strongly supported. The proper functioning of the complying development pathway requires councils, as the enforcement body, to be appropriately resourced to undertake monitoring and enforcement activities. Council resourcing has not kept pace with government expansion of complying development.

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<sup>45</sup> State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011, clause 10, ‘Development consent cannot be granted unless neutral or beneficial effect on water quality’. This clause effectively prohibits an initial development consent unless the development has a ‘neutral or beneficial effect’ on water quality, but it does *not* operate as a prohibition on the approval of a modification application, due to s 96(4) EP&A Act.

<sup>46</sup> Schedule 4, items [14] and [16], Bill p. 51.

<sup>47</sup> (within 3 months) Schedule 4, item [9], Bill pp. 49-50.

<sup>48</sup> Schedule 4, item [17], Bill p. 51.

## Improved information for councils and neighbours

### *Analysis & recommendations*

We support the proposal to require certifiers to notify direct neighbours and council prior to issuing a complying development certificate in metropolitan areas. This requirement should extend to rural areas also (with exceptions where there are great distances between properties). We also support the proposal to require certifiers to provide direct neighbours with a copy of the certificate and any endorsed plans. This should be done as a matter of courtesy but it has the added benefit of allowing neighbours to monitor compliance, and an incentive for proponents to self-regulate their activities.

Code-based development (such as for housing, industrial and commercial buildings) will benefit from efforts to make the process more transparent. This is especially important to ensuring compliance with the relevant standards. However, we have expressed concerns about the continual expansion of code-based development over the past five years, despite poor governance and accountability in the private certification sector.

## Key issue: Ongoing concerns about code-based assessments

### *Analysis & recommendations*

Several issues with code-based assessment have not been addressed in these updates.<sup>49</sup> These issues include:

1. Assessing, avoiding and accounting for cumulative impacts of code-based approvals, especially on environmentally sensitive areas
2. Improving enforcement and governance of private certifiers<sup>50</sup>
3. Ensuring meaningful community engagement on design standards
4. Mandating leading practice sustainability standards (BASIX and beyond).

## 4. KEY ISSUE: NEW PROCESSES FOR STATE SIGNIFICANT DEVELOPMENT

### Transferrable conditions

#### *Proposal*

The amendments propose a new and significant change called 'transferrable conditions'. This would allow development consent conditions to lapse after a certain time if they are 'adequately addressed' in conditions later imposed under other approvals (such as a pollution licence or mining lease).<sup>51</sup> This proposal aims to reduce potential duplication and clarify agency responsibilities.

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<sup>49</sup> See EDO NSW submissions at [http://www.edonsw.org.au/planning\\_development\\_heritage\\_policy](http://www.edonsw.org.au/planning_development_heritage_policy). For example, submissions on the *Proposed Medium Density Housing Code – Statement of Intended Effect and Draft Medium Density Design Guide* (2016); *Review of Complying Development for Inland NSW* (2016); *Options for Low Rise Medium Density Housing as Complying Development* (2016); *10/50 Vegetation Clearing Code of Practice Review* (2014); *Proposed changes to NSW Exempt and Complying Development Codes* (2012).

<sup>50</sup> In September 2016 the Government released its response to an independent review of private certification (Oct. 2015). Among other things it proposes to rewrite the *Building Professionals Board Act 2005* during 2017. See further: <http://bpb.nsw.gov.au/news/strengthening-certification-nsw>.

<sup>51</sup> Schedule 4, item [6], Bill p. 49; *Planning Legislation Updates - Summary of proposals* (January 2017), p 27.

### *Analysis & recommendations*

The language in the Bill is weak and subjective, and does not require equivalent standards, despite the intent that transferred conditions will not permit greater impacts than the original consent.<sup>52</sup> It is unclear how this will work in practice – particularly if a project expands over time, or the transferred condition is itself amended by another agency or process (such as a mining lease renewal).

'Transferrable conditions' also present a number of risks unless clear and robust protections are built-in. Risks include:

- discretion and ambiguity as to whether a condition is 'adequately addressed' (or equivalent);
- still requiring the community (and others) to navigate multiple, changing approvals;
- lack of public scrutiny over changing conditions;
- loss of public rights to enforce a planning breach,
- lack of responsiveness by other regulators, and lower penalties under other laws.<sup>53</sup>

On balance we do not support the transferrable conditions approach. Instead we propose a general power to update development consent conditions (see below).

If it did proceed, safeguards for environmental protection, transparency and consultation would need to include:

- requiring transferred conditions to clearly *maintain or improve* on the existing level of environmental protection (this must be a positive standard, such as by requiring use of 'best available technology' or 'continuous improvement', *not* a negative standard such as 'no substantive reduction' etc);
- being a regulator-driven tool limited to resolving inconsistency between potentially contradictory conditions (not a right of the proponent to seek a 'condition transfer');
- limiting transfer of conditions to certain independent regulators (e.g. the EPA);
- equivalence must include the level of penalties and civil enforcement rights available;
- require a mandatory public consultation process that is equitable to the community and the proponent – including upfront public notification and consultation, mandatory exhibition of amendments, and a clear comparison explaining equivalent conditions;
- statements or place-markers referring people to the equivalent conditions; and
- prohibiting equivalent conditions being subsequently weakened under other laws.

### **No general power to update consent conditions**

#### *Analysis & recommendations*

Some heavy industry in NSW continues to operate under out-of-date consent conditions that do not meet modern standards of technology, efficiency or environmental compliance. It is unclear why the Government has not proposed a general power to update consent conditions, as available under NSW pollution laws, federal environmental laws, and

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<sup>52</sup> Sch 4 item [6]: 'if the consent authority is satisfied that the matters regulated... will be adequately addressed...'

<sup>53</sup> For example, there are no civil enforcement provisions in the *Petroleum (Onshore) Act 1991*, which regulates coal seam gas licences, or under forestry legislation, or under Crown Lands legislation. The Planning Act has high offence penalties and fines, while some mining, water and forestry laws often contain outdated fines.

overseas.<sup>54</sup> The Bill stops short of this, only including a power to vary or revoke conditions relating to monitoring and environmental audits.

A power to update consents would be a preferable alternative to the ‘transferrable conditions’ proposal. It would allow primary consent conditions to evolve with technology, updated monitoring data, other licences and community expectations. It would also be a counterweight to proponents’ repeated requests to modify and expand major projects. At the very least, when modification requests are made, the Department should require higher environmental standards in return.

Having such a power will lend greater credibility to the role of monitoring and environmental audits. Currently, consent authorities cannot revise and unilaterally amend conditions of consent to take into account the *results* of independent monitoring panels,<sup>55</sup> monitoring data or environmental audits.<sup>56</sup> We would support further amendments to Part 4 Division 7 of the Planning Act to give consent authorities the power to be responsive to new information.

## Merits review restrictions continue

### *Proposal*

The Bill perpetuates the current practice of removing appeal rights when a ‘public hearing’ is held by the Planning Assessment Commission (**PAC**) – to be renamed the Independent Planning Commission.<sup>57</sup>

### *Analysis & recommendations*

As noted by the Chief Justice of NSW:

*‘...gaining public confidence [in the rule of law and an inclusive justice system] requires ‘all manner of people’ to have confidence that they will be able to utilise the legal system.’<sup>58</sup>*

The ability of community members (third parties) to appeal significant planning decisions ‘on the merits’ is an essential part of the planning system and promoting community confidence in planning and development assessment procedures.

As public hearings are directed by the Planning Minister, this effectively places appeal rights at the Minister’s discretion. As this discretion is now almost always exercised, the community is deprived of an important avenue for review and participation in planning decisions, and

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<sup>54</sup> See for example, *Protection of the Environment Operations Act 1997* (NSW), s. 58; *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 143(1)(b)-(ba); and the *Clean Air Act* (USA).

<sup>55</sup> For example, the Springvale Extension Project (SSD 5594) was approved with conditions requiring an Independent Monitoring Panel (IMP) to be established, comprising qualified experts in the fields of mining subsidence, upland swamps and landforms of the western Blue Mountains (Schedule 3, Condition 11). The IMP was to provide advice and report to the Secretary and the applicant on a number of matters, including options for avoiding damage to endangered swamps. The IMP’s advice and recommendations, including a recommendation to increase the buffers to protect swamps, are unable to be acted upon by the Secretary or the Minister, as there is no general power to amend conditions of consent to account for new information on environmental impacts.

<sup>56</sup> The circumstances are presently limited to modifying a consent where a proposed EPI may conflict with the approved development: EP&A Act, s.96A.

<sup>57</sup> EP&A Act, ss. 23F, 97(7) and 98(5).

<sup>58</sup> The Hon T.F. Bathurst AC, Chief Justice of NSW, ‘Doing Right by “all manner of people”’: Building a more inclusive legal system’, Opening of Law Term Dinner, 1 February 2017. Available at: [http://www.supremecourt.justice.nsw.gov.au/Pages/sco2\\_publications/SCO2\\_judicialspeeches/sco2\\_speeches\\_chiefjustice.aspx](http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_publications/SCO2_judicialspeeches/sco2_speeches_chiefjustice.aspx), accessed February 2017.

the integrity of the system is undermined. ICAC has also observed that limitations on third party appeals mean ‘an important disincentive for corrupt conduct is absent.’<sup>59</sup>

Public hearings are no substitute for a merits appeal in the Land and Environment Court.<sup>60</sup> As almost all public hearings result in approval, removing merit appeals has a disproportionate effect on local communities’ rights. Even with the changes proposed, the Commission’s public hearing are by no means as rigorous or equitable as a Court hearing, where the evidence can be properly tested by both objectors and proponents.

### ***Disparity in access to justice***

Developers already enjoy much wider review and appeal rights than the community. The exception, on paper, is for ‘designated development’ – these are private projects with major social and environmental impacts, including State Significant Developments (**SSD**) like mines, chemical factories and ports. Community members who made a submission on the project are granted an equal right of appeal against designated development decisions. In practice however, community merit appeal rights are now routinely removed even here.

As ICAC has noted, the disparity of review and appeal rights increases the risk of biased and corrupt decision-making, and will continue to limit community confidence in the system.<sup>61</sup> The Bill increases this disparity, giving proponents new avenues for internal review of refusals or approval conditions for more complex projects, with no public input.

### ***Preserve and expand community appeal rights to improve fairness and public trust***

The Bill’s approach to the issue of third party merits review is contradictory to its stated purposes – to increase public participation, probity and accountability in decision-making, and improve planning outcomes.

In the last round of attempted reforms, ICAC proposed expanding third party merit appeals to a range of significant and controversial private sector projects. In particular if the project:<sup>62</sup>

- *is significant and controversial*
- *represents a significant departure from existing development standards*
- *is the subject of a voluntary planning agreement.*

In line with ICAC’s recommendations, community access to the Court as an impartial expert body should be facilitated, not curtailed. Further, the Bill should not expand internal reviews to major projects, to the exclusion of local participation.

## **Major projects exempt from concurrences & serious impact refusal**

### *Analysis & recommendations*

State Significant Developments (SSD) such as major mines, ports and factories are currently exempt from the requirement to obtain a range of environmental concurrences and approvals.<sup>63</sup> Other approvals, such as pollution licences from the EPA, must be granted

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<sup>59</sup> ICAC, *Submission regarding a new planning system in NSW (White Paper and Accompanying Bills)* (2013), p. 4; at [icac.nsw.gov.au](http://icac.nsw.gov.au).

<sup>60</sup> For in depth discussion of this issue, see EDO NSW Report: *Merits Review in Planning in NSW*, 2016.

Available at [http://www.edonsw.org.au/environmental\\_law\\_policy](http://www.edonsw.org.au/environmental_law_policy)

<sup>61</sup> ICAC, *Anti-corruption safeguards in the New South Wales planning system*, 2012, p. 6.

<sup>62</sup> *Ibid*, recommendation 16. See also ICAC (2013) above, p. 4.

<sup>63</sup> EP&A Act, ss. 89J-89K. See also equivalent provisions for State Significant Infrastructure, ss. 115ZG-115ZH.

consistently with any development consent. This exemption makes decision-making much less transparent.

It also creates perverse anomalies. For example, certain major projects, such as mining proposed in an environmentally sensitive area, are automatically classed as SSD because of the area's significance and sensitivity.<sup>64</sup> An Environmental Impact Statement is prepared, but the mine becomes *exempt* from permits and expert consideration of impacts – including for threatened species (terrestrial and aquatic), Aboriginal heritage impacts and other approvals.

The Bill should ensure the projects with the greatest impacts (often State Significant Development and Infrastructure) receive the greatest scrutiny. We recommend clarifying the role of expert environmental agencies in assessing major projects. The community needs to be assured that major projects – public or private – are not approved at excessive cost to other values, such as biodiversity protection, Aboriginal heritage or the wellbeing of a local village.

Exemptions from referrals and concurrence do not provide that assurance. Nor do recent reforms such as the biodiversity law reform package, which allows almost any environmental asset to be 'offset' elsewhere, or exchanged for money, if a major project will damage it.<sup>65</sup>

## **Discretion to reduce required offsets, and approve serious impacts**

### *Analysis & recommendations*

Current discretions for offsetting are too wide. Major projects (SSD and SSI) should not be exempt from mandatory conditions to avoid, mitigate and (as a last resort) directly offset their impacts on biodiversity, threatened species and ecosystems. By their very nature, and in some cases by definition,<sup>66</sup> major projects often have the most significant environmental impacts. Any major project approval should therefore impose non-discretionary conditions to fulfil any offset requirements identified by the BAM and biodiversity assessment report.<sup>67</sup>

Serious and irreversible impacts – a concept that will apply to the planning system once the Biodiversity Conservation Act commences – must act as a 'red flag' for unacceptable impacts. This test should consistently trigger mandatory refusal of:

- non-major projects (as per the Biodiversity Conservation Act); as well as
- major projects (State Significant Development and Infrastructure); and
- Part 5 projects (for example, utilities and local infrastructure);

with oversight, advice or concurrence from OEHL as to any future redesign or relocation.

Finally, to avoid perverse outcomes to sensitive areas, the Bill should revise SSD and SSI categories to determine which projects (if any) should continue to be considered 'State Significant'. For example, some projects are defined as state significant not because of their size, but because of the sensitivity of the environment where they are proposed. It makes no sense that such projects are then *exempt* from environmental agency concurrences or from mandatory avoidance, mitigation and offsetting requirements because they are deemed to be state significant.

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<sup>64</sup> SEPP (State and Regionally Significant Development) 2011, Schedule 1, item 5.

<sup>65</sup> The Biodiversity Conservation Act 2016 (NSW) anticipates 'serious and irreversible impacts' that may prevent a smaller-scale project from proceeding, but are only 'matters for further consideration' for major projects.

<sup>66</sup> Such as mining in environmentally sensitive areas: see SEPP (State and Regional Development) 2011, Sch. 1.

<sup>67</sup> Cf Biodiversity Conservation Act 2016 (NSW), s. 7.16(3)).

## Discontinuing Part 3A transitional arrangements

### *Proposal*

The Bill proposes to effectively switch off the Part 3A ‘transitional’ modification process, which otherwise allows the modification of hundreds of projects that were already in the system when the controversial major projects pathway was repealed in 2011. Part 3A projects will be moved into the updated system as either State Significant Development (SSD) or Infrastructure (SSI).

For the SSD stream, future modification applications (for developments that were first approved under Part 3A) will be assessed in the same way as other modification applications under s. 96 of the Act. For Part 3A projects that move into the SSI stream (such as major education or transport projects, or power generation), it should be noted that the SSI modification process is still highly discretionary, like Part 3A.<sup>68</sup>

The Bill also suggests that Part 3A may still be preserved in relation to ‘concept plans’ – high-level master planning approvals that were a controversial aspect of Part 3A discretion.<sup>69</sup>

### *Analysis & recommendations*

We strongly support discontinuing the Part 3A ‘transitional’ arrangements. These provisions add unnecessary complexity to planning decisions and extend the operation of controversial, discretionary provisions that were repealed six years ago. However, we note three qualifications.

First, although Part 3A modifications are to be largely ‘discontinued’, the Bill proposes to preserve the effect of outstanding (approved) Part 3A concept plans’ in regulations.<sup>70</sup> The explanatory documents do little to explain to the public what the ‘ongoing effect’ of concept plans means in practice. Our search found over 150 concept plans submitted via Part 3A, including some 116 major project determinations.<sup>71</sup> The intent and implications of this proposal should be clarified. In our view, wherever possible, such developments should also be transitioned to the SSD or SSI streams and be subject to proper public scrutiny – for consistency, clarity and confidence.

Second, there is no basis to support a further two months for proponents to lodge new modification applications under the *old* Part 3A modification process once this Bill is passed. The amendments should have effect immediately if Parliament passes them.

Third, for future applications to modify a Part 3A project, the Bill would assess whether the project is ‘substantially the same development’ based on *when the Bill is passed* in 2017 (allowing for any earlier modifications), instead of comparing the modification to the *original approval*. For example, if a major mine has been modified 17 times under Part 3A, a further modification application would be measured against the highly changed mine layout, rather than the original mine approved.

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<sup>68</sup> EP&A Act, s. 115ZI.

<sup>69</sup> Schedule 10, item 7, Bill p. 110.

<sup>70</sup> Schedule 10, item 7, Bill p 110: *Schedule 6A Transitional arrangements-repeal of Part 3A* (consultation note). See also NSW Government, *Planning legislation Updates - Summary of proposals* (Jan. 2017) p. 29: ‘the ongoing effect of approved Part 3A concept plans will be preserved.’

<sup>71</sup> NSW Planning and Environment, ‘Major Projects Assessments’ search tool, accessed February 2017: [http://majorprojects.planning.nsw.gov.au/index.pl?action=search&page\\_id=&search=&authority\\_id=&search\\_site\\_type\\_id=&reference\\_table=Part3A&status\\_id=&decider=&from\\_date=&to\\_date=&x=53&y=12](http://majorprojects.planning.nsw.gov.au/index.pl?action=search&page_id=&search=&authority_id=&search_site_type_id=&reference_table=Part3A&status_id=&decider=&from_date=&to_date=&x=53&y=12).

Future modifications should be assessed on whether the project is substantially the same as the development *originally approved* (as is the case for all other section 96 modifications). If not, a fresh development application should be prepared. There is no justification for making out a special case for old Part 3A projects. This increases complexity and fragmentation instead of clarity, consistency and fairness.

Section 96 is a more rigorous, transparent and consistent process for assessing applications to modify developments. In particular, it requires the modified project to be 'substantially the same development' as was originally approved; and requires additional notification and consultation if the regulations say so.

## **Environmental Impact Assessment improvement for major projects**

### *Analysis & recommendations*

The Department of Planning and Environment has a parallel policy underway to improve the quality and consistency of major project EIA, as well as public confidence, accountability and the speed of approvals. See our EIA Improvement Project submission for further detail.<sup>72</sup>

The Bill provides an opportunity to give legislative effect to EIA improvement measures, such as requiring professional development and accreditation of environmental consultants and agency staff, and a process of arms-length peer review for significant EIA reports.<sup>73</sup> To increase objectivity of the new Biodiversity Assessment Method, independent assessors should be allocated from a pool of accredited assessors to work on proposed projects. These changes are critical to public assurance, but the draft Bill does not enact them.

There is also no specific requirement to address the impacts of major projects on climate change (such as greenhouse gas emissions), or the risks that climate change poses to such projects (such as the likely effect of bushfire or flooding to mines, housing or infrastructure). As noted, climate impact assessment of major projects is of increasing importance and is not addressed in the proposed Bill.<sup>74</sup>

## **Modern approaches to managing impacts (financial assurance etc)**

### *Proposal*

The Bill proposes to clarify that conditions of consent can require financial assurance, such as to fund the decommissioning or rehabilitation of sites.

### *Analysis & recommendations*

We support this, however we have strong reservations about the expanded use of offsets as a means of managing the impacts of a development. There is significant scientific debate about whether offsets work in practice – that is, ensuring 'no net loss' of biodiversity.

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<sup>72</sup> EDO NSW *Submission on EIA improvement for major projects* (November 2016). Available at: [https://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/3395/attachments/original/1480370759/EIA\\_improvement\\_-\\_major\\_projects\\_-\\_EDONSW\\_submission\\_Nov\\_2016\\_.pdf?1480370759](https://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/3395/attachments/original/1480370759/EIA_improvement_-_major_projects_-_EDONSW_submission_Nov_2016_.pdf?1480370759).

<sup>73</sup> See for example: ICAC (2012), recommendation 5: 'That the NSW Government introduces a system of continuing professional development for government planning practitioners.' See also *A New Planning System For NSW - Green Paper*, p. 58: 'The NSW Government proposes that consultants that provide Environmental Impact Statements should be chosen from an accredited panel, and required to meet certain standards regarding the impartiality and quality of their work.' Peer review panels are now to be used under *Guidelines for the Economic Assessment of Mining and Coal Seam Gas proposals* (2015), and in our view should be widespread.

<sup>74</sup> See EDO NSW *Planning for Climate Change Discussion Paper* 2016.

Successful offsetting is only likely when used only as a last resort and under strict scientific conditions.

We have expressed concern about the erosion of offsets integrity in NSW over the past decade, including under the Biodiversity Offsets Policy for Major Projects, the Biodiversity Conservation Act 2016 and associated (draft) Biodiversity Assessment Method. For more on our concerns about using offsets to manage biodiversity impacts, see our submissions.<sup>75</sup>

## **5. FACILITATING INFRASTRUCTURE DELIVERY (Part 5 concurrences)<sup>76</sup>**

### *Analysis & recommendations*

We support the proposal to require concurrence or notification of public authorities of activities under Part 5 within future infrastructure corridors. This requirement should be adopted in all relevant SEPPs.

While Part 5 activities are generally limited to smaller public projects and infrastructure (such as water and electricity), there is a significant anomaly under Part 5 – mining exploration. There is no clear justification for retaining mining exploration in Part 5. It means exploration does not legally require public exhibition, development consent or an Environmental Impact Statement under Part 4 of the Act, as other private developments do.

The Chief Scientist's Review of CSG regulation was critical of the exploration and approval process, and the lack of compliance information available. Mining exploration should be removed from Part 5 assessment, by amending the Mining SEPP 2007 to require consent under Part 4.<sup>77</sup>

## **6. FAIR AND CONSISTENT PLANNING AGREEMENTS**

### *Proposal*

Voluntary planning agreements are legal agreements between developers and local councils (or other planning authorities) to deliver public benefits in addition to the developer's project. The Bill gives the Minister clearer powers to establish a standard methodology (principles and procedures) to direct how planning agreements are negotiated and made. The Government sought feedback on specific draft documents by 27 January 2016.

### *Analysis & recommendations*

We recommend the Government consider safeguards as proposed by ICAC (2012).<sup>78</sup>

*[ICAC] Recommendation 4 - That the NSW Government introduces changes to voluntary planning agreements that are consistent with those proposed in the yet-to-commence provisions set out in Schedule 3 of the Environmental Planning and Assessment Amendment Act 2008.*

*[ICAC] Recommendation 16 - That the NSW Government considers expanding the categories of development subject to third party merit appeals to include private sector development that... is the subject of a voluntary planning agreement.*

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<sup>75</sup> Submissions are available at: [http://www.edonsw.org.au/biodiversity\\_legislation\\_review](http://www.edonsw.org.au/biodiversity_legislation_review)

<sup>76</sup> Schedule 5, Bill p. 53 (Part 5 of the revised Act).

<sup>77</sup> *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*, clause 6.

<sup>78</sup> ICAC, *Anti-corruption safeguards in the NSW planning system* (2012), recommendations 4 and 16.

It appears that neither of these recommendations have been accepted in the draft Bill. Schedule 12 of the Bill proposes to repeal the *EP&A Amendment Act 2008* (p. 113).

## 7. CONFIDENCE IN DECISION-MAKING

### Local Planning Panels<sup>79</sup>

#### *Proposal*

The Bill proposes to standardise the make-up of bodies that local councils can appoint to make planning decisions, including development approvals. Many councils now have Independent Hearing and Assessment Panels (IHAPs) but their form and responsibility varies.

New 'Local Planning Panels' will have three members appointed by the local council, including two 'independent experts' in relevant listed fields, and one 'community representative' from a pool of council nominees. A model charter and operating procedures will be developed in consultation with ICAC.

Councils will make the rules on what matters go to the Panel (subject to any ministerial directions and regulations<sup>80</sup>). Panels are not mandatory, but new regulations will empower the Minister to direct a council to appoint one. Existing IHAPs will be retained and transitioned to the new system. Regional planning panels will continue to make decisions on 'regionally significant development', but the value thresholds for projects in this category may be raised (meaning more local decision-making).

The reforms propose that elected councils should set the strategy, policy and development standards, while independent experts (or council staff) make individual assessments and decisions. The Government expects council staff will still handle most development applications, while panels will determine more complex and contentious applications.

#### *Analysis & recommendations*

We support updating and standardising provisions to ensure consistency around the governance, membership and role of local planning panels. Standardised reporting on panels is also welcome, provided it goes beyond simplistic timeframes and numbers of approvals. Speed of approvals is not an indicator of sound assessment and decision-making.

Other points to clarify include:

- how community representatives will be identified and appointed (and whether they includes elected councillors);
- the use of ministerial directions (limiting this to ensuring good governance);
- how to ensure members' independence and credentials to act in the public interest;
- finally, listed expertise should also include community development or social science; and expertise in law or economics should in a relevant sub-field.

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<sup>79</sup> Division 2.5, Bill p. 14.

<sup>80</sup> Schedule 4, item [3], amendment to s. 76A, Bill p. 48.

## Key issue: Independent Planning Commission<sup>81</sup>

### *Proposal*

The Planning Assessment Commission (**PAC**) is to be renamed the Independent Planning Commission and its functions are to change.

Currently the PAC may *review* and report on a major project proposal midway through the assessment process; or it may *determine* whether to refuse or approve a project. Sometimes it does both.

The re-made Commission will no longer have a review role in the assessment of State Significant Developments (**SSD**). It will however continue to *determine* certain types of SSD.

Currently, the Planning Minister can delegate specific projects to the PAC. In future, the *State Environmental Planning Policy (State and Regional Development) 2011* will prescribe the types of proposals that the Commission will determine. In principle, this is a more transparent method, although it remains to be seen what types of projects these will be.

### **Public hearings**<sup>82</sup>

The Minister will continue to have the power to ask the Commission to hold *public hearings* prior to determining SSD proposals. Hearings would be held in 2 stages, and be more inquisitorial than current hearings.<sup>83</sup>

### *Analysis & recommendations*

As proposed, public hearings will continue to curtail rights to bring merit appeals in the Land and Environment Court – an important safety valve for accountability and anti-corruption. We strongly oppose the continued exclusion of merits appeals following a public hearing. As the vast majority of major projects are approved, this exclusion has a disproportionate effect on community rights and access to justice. We recommend repealing section 23F of the Act.

A public hearing is no substitute for merits appeal rights to the Court. For more information on the disadvantages of public hearings and the benefits of appeals to the Court, see our 2016 report, *Merits review in Planning in NSW*.<sup>84</sup>

A 2-stage public hearing process may allow the community and the IPC greater opportunity to influence the project so as to minimise adverse impacts. Yet this does not address some of the key community concerns with the PAC process and the role of public hearings.

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<sup>81</sup> Division 2.3, Bill p. 9.

<sup>82</sup> Schedule 2 of Part 2, Bill p 23.

<sup>83</sup> The *first hearing* will be held after exhibition of the development application and Environmental Impact Statement (**EIS**). The proponent will then have an opportunity to respond to issues raised in submissions and by community members at the public hearing. The issues raised can also inform the Commission's assessment of the project. The *second hearing* will take place after the assessment but before the Commission's determination. Commissioners will be able to examine the developer's preferred project design, the Planning Department's assessment report and any draft conditions. The community will also be able to raise any issues or concerns at this stage.

<sup>84</sup> Available at: [http://www.edonsw.org.au/merits\\_review\\_in\\_planning\\_in\\_nsw](http://www.edonsw.org.au/merits_review_in_planning_in_nsw)

### ***Auditor General's PAC performance audit***<sup>85</sup>

The proposal to rejig the PAC came just before the NSW Auditor-General released her report into PAC assessment of major development applications. At the time of writing it is unclear to what degree the Bill takes the Auditor-General's report into account. However, this is a logical opportunity to address issues identified in the report, and implement relevant recommendations (such as meeting procedures, notification processes and conflict of interest declarations).

We note that the Audit Office is limited to its performance audit functions, including assessing internal agency processes and compliance with existing laws. It does not review whether current laws are suitable, or the best legislative model for decision-making.

### **Model code of conduct for planning bodies**<sup>86</sup>

#### *Analysis & recommendations*

We strongly support the adoption of model codes of conduct for local and regional planning panels, as well as the Independent Planning Commission. Regulatory codes of conduct are important tools in holding decision-makers to account, especially regarding conflicts of interest. The codes will be included in the Regulation and their effectiveness will depend on the detail. We welcome the proposal to consult with ICAC on model codes. ICAC should also be consulted on the Code of Conduct for the Independent Planning Commission. Where relevant, a code of conduct for that Commission should also give effect to recommendations in the Auditor-General's report noted above.

### **Key issue: Expanded scope for internal review (for proponents only)**

#### *Proposal*

The Bill expands developers' rights to seek internal review of decisions – from smaller-scale council-approved developments to more complex and controversial projects – to include SSD, 'integrated development' (where other agencies' approval or concurrence is required) and modifications. Proponents whose applications are refused or who are unhappy with conditions of consent will be able to seek internal government review of the decision. Proponents may also amend their plans, without public input, before they seek an internal review.

#### *Analysis & recommendations*

We do not support the expansion of internal review rights. This gives proponents another bite at the approval 'cherry', behind closed doors, without the amended project being scrutinised in public. These more complex categories of development are much higher impact than a house or commercial building, and therefore generate higher public concern.

Unfortunately, the perception and the reality with this proposal is that community appeal rights continue to be curtailed, while proponents' review rights continue to be expanded. Internal reviews provide no community rights to participate, and the Bill does not propose any additional community involvement. By contrast, court appeals do trigger certain rights for community members to be heard.<sup>87</sup>

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<sup>85</sup> NSW Auditor-General's Report, *Performance Audit - Assessing major development applications - Planning Assessment Commission* (January 2017), available at [www.audit.nsw.gov.au](http://www.audit.nsw.gov.au).

<sup>86</sup> Schedule 2, Part 5 (*Provisions relating to procedure of planning bodies*), clause 28; Bill p. 31.

<sup>87</sup> See EP&A Act s. 97A; see also clause 8.12, Bill p. 79, 'Notice of appeals to be given and right to be heard'.

This lack of a community voice in internal reviews would further reduce transparency, fairness and public confidence in decision-making – when the reforms aim to do the opposite. If internal reviews are expanded to ‘integrated development’ and SSD categories, it is essential that local community members and objectors should have a right to be notified, and equitable opportunities to address the review body.

## **8. CLEARER BUILDING PROVISIONS**

While we do not comment in detail here on the 2015 review of the *Building Professionals Act 2005* or the Government’s 2016 response, we support measures to strengthen governance and oversight of private certifiers. Reform in this area is well overdue as the role of private certifiers continues to expand significantly.<sup>88</sup>

## **9. ELEVATING THE ROLE OF DESIGN**

### *Analysis & recommendations*

We support references to good design and heritage protection (including Aboriginal cultural heritage) in the revised objects of the Act. The objects should clarify that promoting ‘good design’ is intended to create healthy, inclusive, adaptable and sustainable communities, and to cope with major challenges such as population growth, ageing and climate change.

The object must be reinforced by high standards in state building codes and sustainability standards that drive continuous improvement (through BASIX, the Building Sustainability Index, and beyond – such as reducing building waste and greenhouse emissions). Good design also means recognising and prioritising the role of ‘green infrastructure’<sup>89</sup> – urban bushland, parks and gardens, waterways, cycleways, street trees and biodiversity corridors.

## **10. ENHANCING THE ENFORCEMENT TOOLKIT (Enforceable Undertakings)**

### *Analysis & recommendations*

We support the inclusion of enforceable undertakings as an additional tool for the Planning Department to use in tandem with the enforcement provisions of the current legislation. Such undertakings should not replace prosecutions where there are breaches in the law. Also, the Planning Act should require all information relating to enforceable undertakings to be made publicly available and accessible on the Department’s website.

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<sup>88</sup> EDO NSW submissions noting concerns regarding private certifiers in the context of code assessment are available at: [http://www.edonsw.org.au/planning\\_development\\_heritage\\_policy](http://www.edonsw.org.au/planning_development_heritage_policy).

<sup>89</sup> See for example Australian Institute of Landscape Architects, *Green Infrastructure: Adapting to Climate Change* (2012), available at: [www.aila.org.au/iMIS\\_Prod/AILAWeb/Advocate/National\\_Policy\\_Statements/AILAWeb/National\\_Policy\\_Statements.aspx](http://www.aila.org.au/iMIS_Prod/AILAWeb/Advocate/National_Policy_Statements/AILAWeb/National_Policy_Statements.aspx), accessed February 2017.