

PLANNING FOR A SUSTAINABLE FUTURE

SUBMISSION ON THE GREEN PAPER - A NEW PLANNING SYSTEM FOR NSW | SEPTEMBER 2012



The **Nature Conservation Council of NSW** (NCC) is the peak environment group for New South Wales. NCC represents more than 100 member societies from across the state. NCC's members have a strong interest in planning and development issues, and are strongly committed to securing positive environmental outcomes in their local area.

www.nccnsw.org.au



The **Total Environment Centre** (TEC) has been campaigning for environment protection in the city and country, changing government policy, advising the community and challenging business for over 30 years. TEC has been working to protect this country's natural and urban environment, flagging the issues, driving debate, supporting community activism and pushing for better environmental policy and practice.

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INTRODUCTION

Our organisations welcome the opportunity to respond to the Government's *Green Paper – A new planning system for NSW* and the report of the independent Planning System Review (**Independent Panel**), *The way ahead for planning in NSW*.

Throughout this review process our organisations have maintained the position that the review presents an opportunity to develop a modern planning system that is consistent with contemporary community expectations. We have continued to stress the important role our planning system has to play in helping us address many of our most pressing environmental challenges, including:

- loss and fragmentation of native vegetation and wildlife habitat,
- conversion and loss of strategic agricultural land,
- degradation of rivers, wetlands and water catchments,
- urban sprawl, traffic congestion and urban air pollution, and
- carbon pollution and impacts of climate change.¹

We have also stressed the legitimate expectation of the community to be involved in decisions that affect the environment in which they live, and the important role of community engagement in improving planning and development approval decisions.

The Green Paper provides us with the first indication of the Government's vision for planning in NSW. In our view, the Green Paper proposes a planning system heavily focused on facilitating development and economic growth, with limited safeguards for the environment and local communities. We are genuinely concerned that while the development sector has achieved improved specific rights in the Green Paper, the environment and community rights are left largely to generalities.²

Our organisations have two overarching concerns with the proposals set out in the Green Paper:

1. The Green Paper fails to clearly identify how the planning system will achieve social and environmental outcomes.
2. The Green Paper does not do enough to restore the community's confidence in the planning system.

We are also concerned that the Green Paper:

- fails to adequately respond to the findings and recommendations of the Independent Panel,
- does not provide sufficient information to allow stakeholders and the community to fully understand how the proposed planning system will operate,
- does not provide a balanced, long-term vision for planning across the whole of NSW,
- weakens important protections in an attempt to streamline development assessment processes.

¹ Similarly, the Independent Panel identifies challenges facing the State: "*New South Wales faces critical challenges – for example, population growth, infrastructure provision, climate change, competition for investment (both domestically and internationally) and biodiversity protection*", *The Way Ahead for Planning in NSW, Recommendations of the NSW Planning Review, Volume 1 – Major Issues*, May 2012, p 11.

² For example, the Green Paper proposes to introduce review rights for proponents with respect to decisions about rezoning proposals and applications for strategic compliance certificates. Interestingly, the development sector has been quick to acknowledge that the Green Paper delivers on all recommendations made to the planning review, see, for example, statements made by the Urban Taskforce: "*The Urban Taskforce listed 10 key ideas for a better planning system in our submission to the planning review, and the Government's Green Paper delivers on every one of these*", Media Release, 15 July 2012, available at: www.urbantaskforce.com.au/images/stories/Media_Releases/Proposed_Planning_System_Just_What_NSW_Needs.pdf

There are certain aspects of the Green Paper that, if implemented properly, have the potential to improve environmental outcomes and community engagement. For example, our organisations are encouraged by proposals to:

- implement a Public Participation Charter (p.22, *Green Paper*),
- require the assessment of cumulative impacts (p.34),
- improve integration between natural resource management and strategic planning (p.35),
- require the accreditation of environmental consultants (p.58).

This submission details how these proposals can be implemented in order to achieve the best outcomes for the environment and communities.

These positive changes are, however, overshadowed by proposals in the Green Paper that have the potential to weaken existing environmental protections and shut the community out of key decisions. For example:

- There is a shift in focus from environmental protection and consideration of environment impacts (which underpinned the introduction of the *Environmental Planning and Assessment Act 1979*³) to economic growth and development;
- The Government does not present a clear commitment to Ecologically Sustainable Development;
- The Green Paper makes no mention of climate change and no commitment to introducing mechanisms for climate change adaption and mitigation;
- The Green Paper proposes to remove important concurrence processes, effectively removing critical oversights and expertise from decision making;
- Proposals to expand code complying development will curtail the community's right to comment on development proposals for which public participation rights currently exist, which has the potential to exclude a greater number of developments from the scrutiny of community participation and third party appeal rights.

Further, the proposals do not resolve systemic issues that have led to the community losing confidence in the system. The negative consequences of increased discretion, reduced public consultation, centralised power and unaccountable decision-making have been outlined in a range of prior submissions and reports.⁴

Our organisations hold real concerns that the proposals for development assessment set out in the Green Paper will lead to poorer environmental outcomes and continued dissatisfaction of the community.

Part 1 of this submission addresses our key concerns with the Green Paper and makes recommendations for ensuring the White Paper achieves good environmental outcomes and restores the community's confidence in the planning system.

Part 2 provides additional comment on the 21 proposed changes outlined in the Green Paper.

Additionally, we refer to our joint report *Our Environment, Our Communities*, prepared together with EDO NSW.⁵ This report puts forward a legislative model for integrating environmental outcomes and community

³ For example, when it was introduced in 1979, the EP&A Act was celebrated as being one of the most progressive in the world. It was described as a "system of environmental planning under which decisions on land use and resource management are made within the physical capacity of the environment in order to promote the economic and social welfare of the people of NSW" NSW *Parliamentary Debates*, Legislative Assembly, 17 April 1979, Hansard p 4278, Hon Mr Haig, Minister for Corrective Services

⁴ See, for example, TEC and EDO NSW, *Reconnecting the Community with the Planning System* (August 2010); *The State of Planning in NSW* (December 2010); EDO NSW, *Submission to ICAC on corruption risks and the regulation of lobbying in NSW* (June 2010); see also NCC and EDO submissions to the Planning Review Stage 1 (November 2011); and *Planning for Ecological Sustainable Development - Opportunities for improved environmental outcomes and enhanced community involvement in the planning system* Prepared jointly by NCC, EDO and TEC. Available at: <http://planningreview.nsw.gov.au/LinkClick.aspx?fileticket=sUBZrIb4fU%3d&tabid=119&mid=569>.

engagement in the NSW planning system. The recommendations of that report also address issues of certainty and transparency. We strongly urge the NSW Government to adopt the recommendations set out in that report as it moves towards developing its White Paper and draft legislation.

Finally, we recognise that the transition to a new planning system will take some time. In the interim there is no reason why the existing legislation and/or environmental planning instruments should not remain in force. We reject calls for an interim set of policies to be put in place prior to the completion of this important reform process.⁶

The Government must show strong leadership and deliver on its commitment to protect the environment and restore the public's confidence in the planning system.

⁵ *Our Environment, Our Communities: Integrating environmental outcomes and community engagement in the NSW Planning System*, Nature Conservation Council of NSW, Total Environment Centre and EDO NSW (2012), available at http://nccnsw.org.au/sites/default/files/Our_Environment_Our_Communities_0.pdf

⁶ Media Release, *NSW needs a QLD style Planning Stimulus*, dated 24 August 2012, available at http://www.urbandtaskforce.com.au/index.php?option=com_content&view=article&id=1588:nsw-needs-a-qld-style-planning-stimulus&catid=71:media-releases&Itemid=17

Key Issues for the White Paper

The NSW Government must deliver on its commitments to protect the environment and restore the public's confidence in the planning system by:

1. Ensuring that **ecologically sustainable development** (ESD) is the overarching objective of the new planning system.
2. Guaranteeing that existing **environmental protections** will be retained in the new planning system. The Government must ensure that in transitioning to the new planning system, important environmental protections, including environmental protections in State Environment Planning Policies, are not weakened.
3. Only using code assessment for genuinely **low impact development**. The Government's proposal to substantially expand code complying development will limit public participation opportunities, reduce accountability and weaken environmental protection.
4. Prescribing requirements for the making of **planning instruments** including requirements for the carrying out of environmental studies, consideration of environmental criteria, and processes for effective community engagement.
5. Requiring planning instruments to be consistent with key natural resource management and **environmental policies** including, for example, Catchment Action Plans and Regional Conservation Plans.
6. Mandating **environmental impacts** that must be considered during the development assessment phase. Recommendations 71 to 73 from the Planning System Review must be considered.
7. Implementing the recommendations of the Planning System Review for improving **concurrence processes**. It is not enough to require agency input at the strategic planning phase. Proper assessment of a development by concurrence agencies is required once all the details of a proposed development are known.
8. Prescribing mechanisms for managing **climate change** impacts and mitigation.
9. Ensuring that **merit appeal rights** are available for all state significant development and infrastructure. State significant development is likely to have the most significant impact on the environment and communities and should require the greatest level of scrutiny.

PART 1: ADDRESSING KEY CONCERNS

1.1 OVERALL CONCERNS WITH THE GREEN PAPER

Both the Nature Conservation Council of NSW and the Total Environment Centre have been actively involved in the planning review process for the past twelve months. For example:

- Representatives of our organisations, and EDO NSW, met with the Independent Panel in August 2011 as part of its stakeholder consultation.
- In November 2011, as part of the listening and scoping phase, NCC made a written submission to the Independent Panel.
- In March 2012, our organisations, together with EDO NSW, made a detailed written submission in response to the Issues Paper.
- In May 2012, our organisations, together with EDO NSW, provided the Independent Panel, Minister for Planning and Infrastructure and Department of Planning and Infrastructure copies of our report *Our Environment, Our Communities – Integrating environmental outcomes and community engagement in the NSW planning system*.

During this process, we have repeatedly emphasised that the planning system should not be concerned solely with facilitating development and delivering economic outcomes. Just as important is the ability of the new planning system to achieve social and environmental outcomes.

Our organisations have two overarching concerns with the proposals set out in the Green Paper:

1. The Green Paper fails to clearly identify how the planning system will achieve social and environmental outcomes.
2. The Green Paper does not do enough to restore the community's confidence in the planning system.

These concerns are addressed in more detail at 1.2 and 1.3 below.

In addition to these overarching concerns we make the following observations about the Green Paper.

The Green Paper fails to adequately respond to findings and recommendations of the Independent Panel

In July 2011, the Government announced the establishment of an independent panel to undertake a review of the planning system in NSW “with the aim to create a new planning system in consultation with stakeholders and the community that meets today's needs and priorities”.⁷

The independent panel has spent months undertaking extensive community engagement, developing an Issues Paper, considering the 600+ submissions made on the Issues Paper and finally delivering 374 recommendations in its two volume report, *The Way Ahead for Planning in NSW – Recommendations of the NSW Planning System Review*.

It is our view that the NSW Government has failed to adequately respond to the issues raised during the consultation process as reflected in the findings and recommendations of the Independent Panel. For example:

- The Government does not provide a systematic response to each of the 374 recommendations of the Independent Panel.⁸

⁷ NSW Planning System Review, <http://www.planningreview.nsw.gov.au/Aboutthereview/tabid/87/Default.aspx>

- The Green Paper does not address key issues coming out of the consultation process.⁹
- The Government does not give reasons for not adopting certain recommendations of the Independent Panel.¹⁰

The Green Paper is silent on many issues that have been dealt with by the Independent Panel, and it is unclear whether the Government intends to adopt additional recommendations of the Independent Panel as it moves towards developing the White Paper and draft legislation.

The Green Paper does not provide sufficient information to allow stakeholders and the community to fully understand how the proposed planning system will operate.

Although the Government has indicated that further detail will be developed during the drafting of the White Paper, there are key components of the Green Paper that need further detail before stakeholders and the community will be in a position to provide valuable feedback.

Our organisations wrote to Minister Hazzard on 8 August 2012 seeking clarification on certain aspects of the Green Paper (**Annexure 1**). At this stage we have not received a response.

As outlined above, it is unclear if the recommendations of the Independent Panel will be adopted for those parts of the Green Paper where information is lacking.

The Green Paper does not provide a balanced, long-term vision for planning across the whole of NSW.

Despite repeated assurances from the Government that the environment and community are important matters for a new planning system, the Green Paper is heavily focused on facilitating development and restoring economic growth, while providing little detail about how real environmental and social outcomes will be achieved. Additionally, proposals seem to be directed more at urban areas rather than rural and coastal areas of the State.

The Government's review of the planning system was premised on "*returning local planning powers to local communities*" and providing "*greater certainty, transparency, timeliness and merit-based decision-making*".¹¹

However, the Blueprint for Change (Figure 1, *Green Paper*) outlined in the Green Paper appears to be much more about delivering economic outcomes, including streamlined development and housing. For example:

- The Blueprint for Change dedicates 9 out of the 21 proposed changes to streamlined approvals and provision of infrastructure.
- There is a strong emphasis throughout the Green Paper on increasing housing and housing affordability.
- The Green Paper provides increased rights for developers without increased rights for communities.¹²

⁸ In comparison, we note that in response to the independent review of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (known as the Hawke report), the Federal government's response systematically addressed each of the recommendations made in the Hawke report.

⁹ For example the Green Paper makes no reference to ecologically sustainable development, climate change or Aboriginal cultural heritage, despite these matters being raised by various stakeholders throughout the review process and identified in questions in the Independent Panel's Issues Paper.

¹⁰ For example the Green Paper provides no reasons for going against the Planning System Review's recommendations to introduce three new pieces of legislation (the Sustainable Development Act, the Planning Commission Act and Spatial Information Act).

¹¹ *Putting the Community Back Into Planning – The NSW Liberal and National Parties' plan to reform the State's planning system*, September 2009

¹² See above no 2.

By contrast, the Green Paper:

- Does not provide a clear commitment to ecologically sustainable development.
- Makes no reference to climate change. It does not provide any detail on how the planning system will seek to mitigate and adapt to the impacts of climate change.
- Does not identify how the planning system will achieve environmental outcomes. For example:
 - The Green Paper does not identify outcomes based objectives for either strategic planning or development assessment.
 - While the Government indicates that it supports NCC's recommendation to integrate environmental considerations and natural resource management much earlier in the planning system, it gives no further indication as to how this will be done.
 - There is no indication about how merit assessment will be carried out, and whether decision makers will be required to ensure that objective environmental criteria are met.
- Makes no reference to Aboriginal cultural heritage. It provides no detail on how the planning system will seek to identify and protect culturally significant heritage.

We are concerned that the vision in the Green Paper is aimed at delivering short-term, metropolitan-based outcomes, rather than delivering a system that will support economic, social and environmental outcomes across all of NSW into the future.

Proposals to streamline the development assessment process weaken important protections

While there is a general recognition that the planning system needs to be simplified, this should not be at the expense of proper assessment of impacts and scrutiny of decisions. Fast approvals that deliver poor quality, high risk, or unsustainable development are not in the public interest. As the Productivity Commission noted in its benchmarking report on Australian Planning Systems:

"...a combination of several benchmarks is often needed to reflect system performance. For example, while longer development approval times may seem to be less efficient, if they reflect more effective community engagement or integrated referrals, the end result may be greater community support and preferred overall outcome".¹³

Our organisations are concerned that attempts to improve efficiency and streamline development approval processes have resulted in the weakening of important and necessary checks and balances. For example:

- Proposals to expand code complying development will curtail the communities' right to comment on development proposals for which public participation rights currently exist, which has the potential to exclude a greater number of developments from the scrutiny of community participation and third party appeal rights.
- Proposals to 'switch off' concurrences at development assessment stage removes an important safety net that helps ensure that all important impacts of the development are properly considered with the assistance of those people who have the necessary expertise.

We do not support the streamlining of development assessment processes if it leads to poor outcomes. Proposals for reform should focus on areas where improvements can be made without jeopardising the quality of decision making. For example:

- Decision making processes can incorporate more objective decision making tools. Clear assessment methodologies can assist the consent authority to assess a development proposal. For example, the BASIX methodology requires proponents to meet certain energy and water targets in order to

¹³ Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (April 2011), Vol. 1, p xxviii.

obtain a BASIX certificate. The consent authority can then rely on the BASIX certificate for that aspect of the development.

- Consent authorities should be encouraged to reject inadequate development applications. Often, delays are caused because proponents have not provided all the necessary information or the information provided is inadequate. This often leads to a 'back and forth' between the proponent and consent authority before all the necessary information is obtained. The new planning system should contain a provision for the rejection of development applications, without appeal, on the basis that they fail to meet the requirements for lodging a development application and are therefore inadequate. This should be distinguished from a decision not to grant development consent, which would give rights of appeal to the Land and Environment Court.
- Consent authorities can be better resourced. If there is a genuine commitment to reducing assessment times, then resources should be directed to consent authorities to assist in achieving this.

1.2 ACHIEVING ENVIRONMENTAL OUTCOMES

One of the key concerns of our organisations is that the Green Paper fails to clearly identify how the planning system will achieve environmental outcomes.

Planning and the environment are intrinsically linked. Actions that may affect the environment and natural resources are regulated, either directly or indirectly, through the planning system. Further, land use planning has the potential to support the achievement of environmental outcomes including the protection and sustainable management of water resources, biodiversity, agricultural land and basic raw materials.¹⁴ Self-sustaining natural systems are essential for achieving sustainable economic and social development as they provide clean air and clear water, prevent land degradation caused by erosion, soil structure decline and land salinisation and have landscape, tourism and recreational values.¹⁵

The impact of planning and development on the environment is therefore a key consideration for decision makers in preparing planning instruments and determining development applications. It is therefore imperative that a new planning system for NSW has the ability to allow economic growth and development while regulating impacts on the environment and supporting the achievement of environmental outcomes.

While the Government supports our earlier recommendation to integrate environmental considerations and natural resource management much earlier in the planning system, there is still a substantial amount of work to be done in developing the White Paper and draft legislation to ensure that the new planning system is achieving the environmental outcomes that are needed in NSW for present and future generations.¹⁶

To this end, the following matters must be addressed by the Government in the White Paper:

¹⁴ *Directions Paper on the Integration of NRM into Land Use Planning*, *Directions Paper on the Integration of NRM into Land Use Planning*, Western Australia Planning Commission, p 12, available at:

http://www.planning.wa.gov.au/dop_pub_pdf/NRM_report.pdf

¹⁵ *Biodiversity Planning Guide for Local Government* (2001), Prepared by Land & Environment Planning and Environs Australia for the NSW National Parks and Wildlife Service, available at

<http://www.environment.gov.au/archive/biodiversity/toolbox/templates/pubs/nsw-bio-plan-guide.pdf>

¹⁶ See the case study on page 33 of the Green Paper which supports the recommendation of our organisations and EDO NSW to integrate environmental considerations and natural resource management earlier in the planning system.

1.2.1 REAL COMMITMENT TO ECOLOGICALLY SUSTAINABLE DEVELOPMENT IS NEEDED

The Green Paper presents mixed messages about the objectives of the new planning system.¹⁷ While the final sentence on page 17 states that “*the achievement of sustainable development will remain the main objective of the Act*”, the Green Paper goes no further to explain how this objective will be achieved.

It is a real concern that the Government has not presented a clear commitment to *ecologically sustainable development* (ESD) in the Green Paper, particularly as it is recognised by various industry stakeholders in NSW as being a necessary component of a new planning system in NSW.¹⁸

Both the Green Paper and Independent Panel talk about achieving triple bottom line outcomes.¹⁹ ESD is in itself the triple bottom line. ESD seeks to integrate environmental, economic and social considerations in decision making.

ESD is “not a factor to be balanced against other considerations; ESD is the balance between development and environmental imperatives”.²⁰ Properly applied, ESD recognises that ecological integrity and environmental sustainability are fundamental to social and economic wellbeing, particularly when considering the needs of both present and future generations.²¹ Despite the challenges presented by the

¹⁷ For example:

- Page 3 suggests that ‘*the objectives of the Act will emphasise in particular the role of planning in facilitating and managing growth and economic development*’.
- Page 17 of the Green Paper initially provides that:
The overarching purpose of the new planning system for New South Wales is to:
 - *promote economic development and competitiveness*
 - *connect people and places*
 - *protect the environment*
 - *improve people’s quality of life*
 - *resolve land use trade-offs based on social, economic and environmental factors*
 - *effectively manage growth and change.*
- The final sentence on page 17 states that “*the achievement of sustainable development will remain the main objective of the Act*”.

¹⁸ For example, the Urban Taskforce Australia submits that ‘the planning system should promote ecological sustainable development’ *Making it Work- Identifying the problems in and proposing solutions for the NSW planning system*, Submission to the Planning System Review by the Urban Taskforce, August 2011, p32; The NSW Minerals Council submits that “the principles of ESD should be included in those matters to be considered, where relevant, when evaluating an application for approval of State significant development under section 79C of the EP&A Act or its equivalent” Submission to the NSW Planning Review, NSW Minerals Council, November 2011, p6; The Local Government Association of NSW recommends the adoption of overarching principles including “to take account of the defined principles of ecologically sustainable development (ESD) in all undertakings” *Draft Submission Regarding Preliminary Comments on Review of NSW Planning System*, Local Government Association of NSW, November 2011.

¹⁹ See, for example: page 27 of the Green Paper which provides that the objects for strategic planning “*must promote ‘triple bottom line’ outcomes*”; page 35 of the Independent Panel’s report provides “*there is a wide range of other matters which require changes if all three aspects of a ‘triple bottom-line’ outcome are to be achieved – that is, development that is ecologically, economically and socially sustainable. Such an outcome is now considered to be a broadly desirable public policy outcome in any government policy process.*”

²⁰ Bates, G. *Environmental Law in Australia* (5th ed. LexisNexis. 2002), para [5.19]–[5.20], cited by Farrier D, et. al. (2007) *Biodiversity offsets and native vegetation clearance in New South Wales; The rural/urban divide in the pursuit of ecological sustainable development* 24 EPLJ 427

²¹ For example, ESD provides long term environmental, social and economic sustainability by:

- protecting biological diversity and ecological integrity,
- managing environmental risk (by encouraging caution when an activity has a suspected risk of causing harm to the public or to the environment, including where impacts are uncertain),
- encouraging sustainable outcomes that reduce pollution and consumption,
- putting the needs of people and our environment first, for present and future generations,
- engaging citizens in the decisions that shape our towns, cities and society,
- promoting healthy, liveable and long-lasting communities and development,
- assisting decision makers by properly assessing the true costs and benefits of particular development through full-cost accounting,
- driving innovation and encouraging use of new technologies, which can improve efficiency and reduce production costs,
- encouraging cleaner production and less pollution, which reduces ‘polluter pays’ costs,

concept of ESD, experts have recognised that ‘there is no other credible candidate for an integrative policy framework’.²²

ESD has its origins in international law and Australia recognises its international obligations through the *National Strategy for Ecologically Sustainable Development and Intergovernmental Agreement on the Environment*.²³ In New South Wales, the principles of ESD are set out in section 6 of the *Protection of the Environment Administration Act 1991* (see **Table 1**), and the implementation of ESD is supported by a body of case law.²⁴

TABLE 1 - Principles of Ecologically Sustainable Development

Ecologically sustainable development can be achieved through the implementation of the following principles and programs:

- (a) the precautionary principle-namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
In the application of the precautionary principle, public and private decisions should be guided by:
 - (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
 - (ii) an assessment of the risk-weighted consequences of various options,
- (b) inter-generational equity-namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,
- (c) conservation of biological diversity and ecological integrity-namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,
- (d) improved valuation, pricing and incentive mechanisms-namely, that environmental factors should be included in the valuation of assets and services, such as:
 - (i) polluter pays-that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,
 - (ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,
 - (iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.

- encouraging use of sustainable building design, which can lead to reduced consumer costs (for example, reduction in spending on electricity and water), and
- lowering the incidence of disputes, and the associated legal and court costs.

²² See Hawke, A. (2009), “*Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*”, October 2009. See also Dovers, S. (2008) ‘Policy and Institutional Reforms’, in D. Linenmayer, S. Dovers, M. Harriss Olson & S. Morton (Eds.), *Ten Commitments: Reshaping the Lucky Country’s Environment*, p 216.

²³ See *Rio Declaration on Environment and Development 1992*, available at <http://www.unep.org/Documents/Multilingual/Default.asp?documentid=78&articleid=1163>, See also the *National Strategy for Ecologically Sustainable Development (1992)*, <http://www.environment.gov.au/about/esd/index.html> and the *Intergovernmental Agreement on the Environment*, <http://www.environment.gov.au/about/esd/publications/igae/index.html>

²⁴ See, for example, *Carstens v Pittwater Council* (1999) 111 LGERA 1, *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237, *BT Goldsmith Planning Services Pty Limited v Blacktown City Council* [2005] NSWLEC 210.

While ESD has been a component of the planning system for a number of years, the planning system has failed to provide the necessary framework that would afford proper application of ESD and its guiding principles.²⁵ Until now ESD has been merely ‘encouraged’ as one of ten equally weighted objectives of the EP&A Act and it does not feature as a mandatory consideration in strategic planning or development assessment.²⁶ While the objectives of the EP&A Act are relevant considerations for decision makers, all that is required is a general consideration of ESD and, moreover, failure to consider the objectives of the EP&A Act does not necessarily render a decision void.²⁷

Simply making ESD an objective of the new planning system is not enough. All decisions, powers and functions exercised under the new planning system must be exercised to achieve ESD. In moving ahead to the White Paper and draft legislation it is important that the government confirms its commitment to ecologically sustainable development by:

- making the achievement of ecologically sustainable development the overarching objective of the new planning system, and
- ensuring the new planning system contains legislative mechanisms for achieving environmental outcomes.

1.2.2 PLANNING SYSTEM MUST CONTAIN OUTCOMES BASED OBJECTIVES

As outlined in 1.2.1, the achievement of ecologically sustainable development should be the overarching objective of the new planning system. In addition to this, the planning system should prescribe additional outcomes based objectives for key functions of the system. Outcomes based objectives are important in setting the framework in which decisions are made and providing key performance indicators for performance monitoring and evaluation.

Outcomes based objectives should follow the structural hierarchy of the system. For example, the overarching objective of the Act should be the high level, all-encompassing goal of achieving ESD. Any additional objectives would need to be consistent with this. Subsequently there should be more specific outcomes based objectives for strategic State and Regional plans, and likewise subsequent and consistent outcomes based objectives for subregional delivery plans and local land use plans.²⁸

Table 2 demonstrates how outcomes based objectives can be incorporated in the new planning system. It uses Recommendation 8 of the Independent Panel as a starting point, but builds on this by amending or adding objectives to create outcomes based objectives. Our recommended additions are marked in bold, underlined text.

²⁵ Ecologically sustainable development was added as an objective of the EP&A Act under section 5(c) by the *Environmental Planning and Assessment Amendment Act 1997*

²⁶ Ecological sustainable development is not listed, in its own right, as a head of consideration under section 79C of the EP&A Act. However the principles of ESD, including the precautionary principle, have been considered a relevant consideration in considering the ‘public interest’. See cases at above no.24.

²⁷ See for example the comments of Hodgins JA in *Minister for Planning v Walker* [2008] NSWCA 224: [52] “In my opinion, one difficulty with the view that failure to consider ESD principles renders void a Minister’s decision, ... is that the encouragement of ESD is just one of many objects set out in s 5 of the *EPA Act*, some of which seemingly would have no relevance to many decisions.” And [56] “but that a failure by the Minister to consider whether (say) “provision and maintenance of affordable housing” was relevant to a particular decision, or an incorrect decision that this object was not relevant, would not without more make a decision void. If that view is correct in relation to this object of the *EPA Act*, then in my opinion it must also be correct in relation to other objects, including the principles of ESD.

²⁸ See for example Recommendations 8 and 19 of the Independent Panel.

TABLE 2: Outcomes based objectives for strategic planning and local land use plans

Recommendation 8, Volume 1

8. The objects in the proposed Sustainable Planning Act for strategic planning are to be as follows:

- Identify anticipated human settlement locations, areas expected to increase in density of settlement patterns and the timeframes over which this might be expected to occur.
- **To ensure an appropriate mix of land uses that provide for housing choices and that enable easy access to employment, commercial, recreational, open space and community facilities.**
- Identify future State, regional and local infrastructure needs as well as the timelines, corridors and general locations required for its provision.
- Identify and take into account relevant matters from any current State plan.
- **To identify and protect** sensitive areas containing (or likely to contain) factors that will limit or prevent development taking place, such as:
 - biodiversity and other ecological constraints
 - significant landscapes or features, including Aboriginal cultural landscapes or sites
 - riparian corridors
 - items or localities of likely or known heritage significance
 - existing land uses that can be expected to place constraints on land use in their vicinity.
- **To improve or maintain biodiversity and ecosystem function.**
- **To improve or maintain catchment health and water quality.**
- **To ensure the agricultural use of prime crop and pasture land by minimising development which has an adverse and irreversible impact on the land's agricultural potential**
- Have regard to expected population changes, including seasonal or temporary population fluctuations whether for tourism or seasonal labour reasons.
- To **consider and plan for** scientifically anticipated impact of climate change within the footprint of the strategic planning study area and the broad measures required to mitigate its impact.
- **To consider and plan for the scientifically anticipated** impacts of natural risks such as flooding or bushfire **and coastal erosion.**
- Identify areas where competing and potentially conflicting land use expectations are likely to arise.
- Identify past and present human activity constraints with broader than localised impacts.
- **To consider and minimise the cumulative impacts of anticipated development in the strategic planning area.**

1.2.3 ENSURE EXISTING ENVIRONMENTAL PROTECTIONS ARE NOT WEAKENED

The Green Paper proposes replacing existing environmental planning instruments and policies with a new suite of documents.²⁹ There is a real concern that the environmental protections that have been introduced over the past 30 years are at risk of being weakened or lost during this transition process.

Examples of environmental protections in existing environmental planning instruments include:

Protections in State Environmental Planning Policies (SEPPs)

SEPPs contain environmental controls that play an important role in protecting some of our most vulnerable species and habitats.

²⁹ See p 26 of the Green Paper which proposes that the new planning system use NSW Planning Policies, Metropolitan/Regional Growth Plans, Subregional Delivery Plans, and Local Land Use Plans

These include, for example:

- SEPP No 14 – Coastal wetlands
- SEPP No 19 – Bushland in Urban Areas
- SEPP No 26 - Littoral rainforests
- SEPP No 44– Koala Habitat Protection
- SEPP No 71 – Coastal protection
- SEPP (Sydney Drinking Water Catchment) 2011

Other SEPPs have a role in regulating the impacts of certain types of development on the environment, for example:

- SEPP (Building Sustainability Index: BASIX) 2004
- SEPP No 62 - Sustainable Aquaculture
- SEPP No 55 - Remediation Of Land

The Green Paper provides no guarantee that these important environmental protections will be maintained in the new planning system. Further, SEPPs are statutory instruments that provide legally enforceable protection for these important matters. The Green Paper proposes to replace statutory SEPPs with non-binding NSW Planning Policies. This lower status in itself reduces the protections contained in the existing SEPPs.

The process for developing NSW Planning Policies must ensure that existing environment protections set out in State Environmental Planning Policies are retained, and where necessary improved, and remain legally enforceable, in the new planning system.

Regional planning strategies

Regional Strategies are in place for eight areas of regional NSW and have been prepared in partnership with state and local government, communities and business.³⁰ These strategies play an important role in identifying and protecting high conservation areas. Such protections must be carried over into the new planning system.

Protections in Local Environment Plans (LEPs)

Local Environment Plans play an important role in environmental protection and natural resource management. For example, the *Standard Instrument (Local Environmental Plans) Order 2006 (Standard Instrument)* contains a number of compulsory and model provisions intended for environmental protections, including:

- Environmental protection zones (Zone E1-E4 in the land use table of the Standard Instrument),
- Waterways zones (in particular Zone W1 in the land use table of the Standard Instrument,
- Restrictions on exempt and complying development in environmentally sensitive areas (clause 3.3 of the Standard Instrument),
- Protection afforded to heritage conservation (clause 5.10 of the Standard Instrument),
- Provisions relating to acid sulphate soils (Model Provision 7.1),
- Natural Resources Sensitivity and Natural Hazard mapping.

³⁰ These include Central Coast Regional Strategy, Lower Hunter Regional Strategy, Far North Coast Regional Strategy, Mid North Coast Regional Strategy, Illawarra Regional Strategy, South Coast Regional Strategy, Sydney-Canberra Corridor Regional Strategy, Murray Regional Strategy (draft)

There is significant potential to achieve environmental outcomes through local land use planning.³¹ It is important that existing protections are retained, and where necessary improved, in the new planning system.

Local Planning Directions (section 117 directions)

Section 117 of the EP&A Act allows the Minister to make directions that planning authorities must follow when making environmental planning instruments. Section 117 directions have been made in relation to environment protection zones, coastal protection and heritage conservation.

The Green Paper proposes that s 117 directions be replaced (along with SEPPs) by NSW Planning Policies. It is important that environmental protections contained in s 117 directions are retained, and where necessary improved, in the new planning system.

Our organisations recognise that there is a substantial amount of work to be done in translating existing environmental protections into the new planning system and identifying areas in which environmental protections can be improved. We would welcome the opportunity to be involved in this important process and work with Government to ensure that as we move forward in this reform process, the Government's commitment to protecting the environment and ecologically sustainable development are realised in robust legislative provisions.

1.2.4 MANDATED REQUIREMENTS FOR STRATEGIC PLANNING

The Government has made clear its intention to improve the strategic planning process in the new planning system. This policy change is welcomed by our organisations who have advocated for a legal framework for strategic planning to be included in the new planning system.³² There are however several points that we would reiterate in welcoming the shift in focus to strategic planning:

- Strategic planning must be carried out within a clear legislative framework that sets minimum requirements for the preparation of proposed planning instruments including, for example, requirements for the carrying out of environmental studies, consideration of prescribed environmental criteria, and processes for effective community engagement.
- While good strategic planning has the benefit of filtering out land use conflicts at an early stage, it does not remove the need for individual site assessment at the development assessment phase, once the exact details of individual proposals are known. Plans cannot sufficiently identify local environmental values, likely impacts and ensure their protection, without assessment at the development application stage.
- While it is important for the community to be engaged in the strategic assessment phase, communities are more likely to be engaged in the planning process when they have clear details about proposed development.

³¹ Our report *Our Environment, Our Communities* (above no. 5) identifies a number of initiatives and literature on facilitating improved integration between natural resource management and land use planning. See, for example:

- *Integrating Natural Resource Management into Local Government Operations - Volume 2: Land Use Planning*, prepared by UTS Centre for Local Government, Gibbs Consulting, Walsh Consulting, (principal author Planning Volume Walsh Consulting), available at: http://www.lgsa.org.au/resources/documents/NRM_Guidelines_Land_Use_Planning_020709.pdf
- *Integrating Natural Resource Management into Planning Schemes materials - A guideline for Queensland Local Governments*, Local Government Association of Queensland, 2007, available at: https://www.lgaq.asn.au/c/document_library/get_file?uuid=21fd58f8bad67e8435d933489732c3df&groupId=10136
- *Directions Paper on the Integration of NRM into Land Use Planning*, Western Australian Planning Commission, February 2011, available at: http://www.planning.wa.gov.au/dop_pub_pdf/NRM_report.pdf

³² See *Planning for Ecological Sustainable Development - Opportunities for improved environmental outcomes and enhanced community involvement in the planning system* Prepared jointly by NCC, EDO and TEC. Available at: <http://planningreview.nsw.gov.au/LinkClick.aspx?fileticket=sUBZriIb4fU%3d&tabid=119&mid=569>. See also *Our Environment, Our Communities*, above no 5

In this respect, our organisations have proposed legislative mechanisms that would support this shift in focus to strategic planning. These recommendations, summarised in **Table 3**, are set out in our report *Our Environment, Our Communities*.³³ Please refer to that report for further information.

TABLE 3 – Summary of proposed legislative framework for strategic planning

A legislative framework for strategic planning should require:

- the carrying out of robust baseline studies of environmental and NRM values,
- identification and protection of high conservation areas including coastal lakes, estuaries, aquifers, threatened species, vegetation communities and habitat corridors,
- the concurrence of prescribed agencies,
- clear provisions for community consultation,
- undertaking strategic environmental assessment, including assessment of prescribed environmental criteria,
- strategic plans and planning instruments to be consistent with existing strategic documents, including for example, Regional Conservation Plans, regional planning strategies and Catchment Action Plans (CAPs),
- planning instruments to identify competing and complementary land uses and values,
- planning instruments (including regional strategic plans) to achieve prescribed environmental thresholds (such as a rigorous ‘improve or maintain’ test),
- provisions that give appropriate weight to planning instruments,
- reporting on and review strategic plans and environmental planning instruments at regular intervals.

1.2.5 INTEGRATION WITH EXISTING ENVIRONMENT AND NATURAL RESOURCE MANAGEMENT POLICIES

In order to effectively integrate environmental protection and natural resource management (NRM), strategic plans and planning instruments should be required to consider existing environmental policies developed by agencies such as the Office of Environmental and Heritage and Office of Water, and also Catchment Management Authorities. Apart from improving integration between planning and NRM, this also has the benefit of drawing on the extensive work done by those agencies, in carrying out environmental studies and developing an NRM and environmental protection framework for each region.

Catchment Action Plans

Catchment Action Plans (CAPs) are important natural resource management tools as they bring together government priorities, best available science and the values of catchment communities into a strategic plan for making improvements to natural resource management in NSW. CAPs are required to comply with State-wide natural resource management standards and promote the achievement of State-wide natural resource management targets.³⁴ Further, CAPs are subject to Cabinet approval and are therefore key Government documents aimed at managing NSW’s natural resources.

A 2008 report by the NSW Natural Resources Commission found that the NRM policy environment is not sufficiently integrated into the planning system for CMAs to implement Catchment Action Plans effectively.³⁵ Environmental planning instruments and development approval decisions can often

³³ Above no. 5

³⁴ Section 23 of the *Catchment Management Authorities Act 2003*

³⁵ Natural Resources Commission, *Progress Report on Effective Implementation of Catchment Action Plans*, November 2008.

Available at:

<http://www.nrc.nsw.gov.au/content/documents/Progress%20report%20on%20effective%20implementation%20of%20CAPs.pdf>

undermine initiatives in CAPs, as there is no legal requirement to consider CAPs when making LEPs or when assessing development applications.

Our organisations are pleased to see that the Government has recognised the important role that Catchment Management Authorities can have in planning processes.³⁶ This is particularly important given the Government's commitment to improve integration between planning and natural resource management.

Regional Conservation Plans

Regional Growth Plans should be developed in conjunction with Regional Conservation Plans.³⁷ These should be produced in collaboration with the key state environmental agency and CMAs. Baseline environmental studies undertaken to inform conservation strategies can also be used to inform strategic land use plans. This would help integrate land use planning and natural resource management over the long term. Further, it provides the opportunity to utilise single data sources, providing a more efficient and streamlined system of strategic planning.

Regional strategies

As outlined at 1.2.3, Regional Strategies are in place for eight areas of regional NSW and have been prepared in partnership with state and local government, communities and business. These strategies play an important role in identifying and protecting high conservation value areas as well as areas for sustainable growth. The new planning system should require that strategic planning be consistent with and build existing regional strategies.

1.2.6 MECHANISMS FOR MITIGATING AND ADAPTING TO THE IMPACTS OF CLIMATE CHANGE

The 2011 Federal State of the Environment Report states:

"If we consider the major environmental challenges we now face, the most confronting is the prospect of a changing climate. This is, in part, because climate is such a direct and pervasive driver of environmental response, in part because global warming is something beyond our near-term or local control, and in part because of the uncertainties of scientific prediction and global policy.

*Climate change is now widely understood as a prime risk to both our environment and our society, and is clearly a major item on our national agenda. The Climate Commission's (2011) report, Climate science, risks and responses, makes the reality, certainty and implications of our changing climate clear and immediate. These implications extend to regional security and threats to our export markets".*³⁸

A review of the State's greenhouse gas emissions shows that about a quarter of NSW emissions come from building and construction activities.³⁹ Energy use is also increasing, leading to discussions about the need to increase base load power and build more coal or gas fired power stations, which will, in turn, increase

³⁶ For example, it is proposed that Catchment Management Authorities will sit on Regional Planning Boards, Green Paper p. 8

³⁷ Regional conservation plans are prepared by the Office of Environment and Heritage (formerly Department of Environment, Climate Change and Water) to complement regional strategic plans prepared by the Department of Planning, by setting out regional conservation priorities for the same period.

³⁸ Australian Government, State of the Environment (2011), 'Future reporting', summary p 8, available at <http://www.environment.gov.au/soe/2011/report/future-reporting.html>

³⁹ Centre for International Economics, "Capitalising on the building sector's potential to lessen the costs of a broad based greenhouse gas emission cut" (Sept 2007), Australian Sustainable Built Environment Council, available at www.asbec.com.au/research. But see also Australian Government Department of Infrastructure, *State of Australian Cities 2011*, at www.infrastructure.gov.au, which reports that since 2006, Australians have been consuming less energy and water while also cutting their household waste. From 2010 to 2011, energy consumption (mainly electricity) fell 1.2 %.

emissions.⁴⁰ Transport is also a major contributor to NSW emissions and is one of the strongest sources of emissions growth in Australia.⁴¹

These activities are regulated, in one way or another, by the State's planning system. To this end, climate change was raised as an issue by the Independent Panel in the March Issues Paper, and was the subject of a number of recommendations made by the Independent Panel, including:

- *Recommendation 8 – objects for strategic planning*
Consider the scientifically anticipated impact of climate change within the footprint of the strategic planning study area and the broad measures required to mitigate its impact.
- *Recommendation 19 – objects for local land use plans*
Provide controls for any anticipated specific impacts of climate change within the local government area.
- *Recommendation 72 – matters for merit assessment*
The factors to be specifically taken into account during an assessment process are:
 - ...
 - climate change projections
 - ...
- *Recommendation 109 – time limited development consents*
Time limited development consents of up to 90 years are to be permitted for areas subject to projected sea level rise as a consequence of climate change?

Despite the real threats presented by climate change, and the commitment by the NSW Government in the State Plan to minimise impacts of climate change in local communities,⁴² the Green Paper fails to mention climate change in its vision for a new planning system and does not prescribe measures to mitigate emissions or adapt to climate change impacts.

A 2011 paper entitled "*Are New South Wales' planning laws climate-change ready?*" examines the current ability of NSW planning laws to effectively manage climate change issues and identified how the planning system can be improved to better manage climate change and achieve the goals set out in the former New South Wales State Plan.⁴³ A copy of this paper was annexed to our March submission to the Issues Paper.

In summary, this paper concludes that there is an urgent need for legislative amendment to the EP&A Act to ensure there is a robust and meaningful response to climate change. Amendments required include:

- incorporation of climate change into strategic planning
- establishment of a robust coastal adaption regime
- introduction of a comprehensive assessment framework of the climate change implications of all development
- strong energy efficient and water standards for building and construction.⁴⁴

⁴⁰ Greenhouse gas emissions from NSW's electricity sector increased by 31% between 1990 and 2006. By 2009 the increase was 37.5%. See Australian Government, *Australia's National Greenhouse Accounts – State and Territory Greenhouse Gas Inventories 2004* (2006), pp 16-17; and 2009 accounts (2011), p 18.

⁴¹ In 2009, transport contributed 83.6 Mt CO₂-e or 15.3% of Australia's national greenhouse inventory emissions. See <http://www.climatechange.gov.au/publications/greenhouse-acctg/state-territory-inventory-2009.aspx>. For 2006-07, 62.7% of all energy used by NSW road transport was for passenger vehicles (Department of Environment, Climate Change and Water, *NSW State of the Environment 2009*, section 3.3).

⁴² See Goal 23 of State Plan 2021, p 46, available at: http://2021.nsw.gov.au/sites/default/files/NSW2021_WEB%20VERSION.pdf

⁴³ Ghanem, R and Ruddock K, "Are New South Wales' planning laws climate-change ready?" (2011) 28, *Environmental and Planning Law Journal* 17

⁴⁴ *Ibid*, p 35

The failure to address climate change in the Green Paper is a significant oversight by Government and must be remedied by proper consideration of this issue as it moves towards preparing its White Paper and draft legislation.

1.2.7 ASSESSMENT OF CUMULATIVE IMPACTS

The Government's proposal to require the assessment of cumulative impacts at the strategic planning phase is a step in the right direction. In particular, the new planning system will need to provide a clear process for the assessment of cumulative impacts on biodiversity, air and water quality, native vegetation and catchment health as well as the cumulative impacts of greenhouse gas emissions.⁴⁵

This is important to anticipate and avoid impacts and land use conflicts that are likely to arise without proper strategic planning. This process is currently being attempted through the Strategic Regional Land Use Policy process, but needs to be based on the best available science, legislative safeguards, and full cost accounting for environmental values and ecological services.

We therefore support the Government's decision to adopt Recommendations 12 and 13 of the Independent Panel to require the assessment of cumulative impacts at the strategic assessment phase.

We also recommend that the Government adopt Recommendation 73 of the Independent Panel to require the assessment of cumulative impacts at the development assessment stage. The assessment of cumulative impacts should not be limited to the strategic planning phase. It is important that the cumulative impacts of development are considered at the individual assessment stage, once all the impacts of the development and other developments in the region become known. This could be framed as requiring the decision maker to ensure that the impacts from the project, when added to the impacts from all existing or anticipated projects in the catchment, do not compromise environmental resilience or the system's ability to sustain natural processes.

We would welcome the opportunity to work with Government on developing mechanisms to effectively measure and manage cumulative impacts.

1.2.8. OBJECTIVE DECISION MAKING FRAMEWORK FOR DEVELOPMENT ASSESSMENT

Throughout this planning review process our organisations have continued to emphasise the need for a clear and objective decision making framework for development assessment.⁴⁶ There are several benefits of establishing an objective decision making framework in the new planning system:

- Discretionary decision making processes have historically led to environmental considerations losing out to development and economic interests.⁴⁷

⁴⁵ There are a number of useful case studies that can inform the process of developing an assessment methodology for the new planning system. See for example:

- Eco Logical Australia (2011) *Proposed Framework for Assessing the Cumulative Risk of Mining on Natural Resource Assets in the Namoi Catchment*. Project 11COFNRM-0006 prepared for Namoi CMA, September 2011, available at http://www.namoi.cma.nsw.gov.au/namoi__risk_assessment_final_v5_14sept11.pdf.
- European Communities (May 1999) *Guidelines for the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions*, available at <http://ec.europa.eu/environment/eia/eia-studies-and-reports/guide1.pdf>
- Hegmann, G., C. Cocklin, R. Creasey, S. Dupuis, A. Kennedy, L. Kingsley, W. Ross, H. Spaling and D. Stalker. 1999. *Cumulative Effects Assessment Practitioners Guide*. Prepared by AXYS Environmental Consulting Ltd. and the CEA Working Group for the Canadian Environmental Assessment Agency, Hull, Quebec.

⁴⁶ Above no. 5, see also NCC and EDO submissions to the Planning Review Stage 1 (November 2011), available on the NSW Planning Review website, <http://planningreview.nsw.gov.au/>

⁴⁷ For example, section 79C of the EP&A Act prescribes matters for consideration by the decision maker in determining a development application. Section 79C does not prescribe how the matter is to be considered by the decision maker or what weight is to be given to each matter.

- Discretionary processes have contributed to the community losing confidence in the planning system. A good example of this is the introduction of the former Part 3A, which increased the Minister's discretionary decision making powers and which was the cause of much community concern. On this point, we note Recommendation 1 of the Independent Commission Against Corruption that the NSW Government ensures that discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective.⁴⁸
- Methodologies to support objective decision making can be streamlined through using of information technology and ePlanning processes.⁴⁹ The National ePlanning Strategy proposes that "decision rules (are) integrated into application lodgement to automate low risk applications and identify critical issues relating to higher risk applications".⁵⁰

In our report *Our Environment, Our Communities*, our organisations demonstrate how an objective decision making framework can support environmental outcomes. For example, it would require decision makers to ensure that proposed development:

- improves or maintains biodiversity and ecosystem function,
- improves or maintains catchment health and water quality,
- complies with energy and water efficiency standards (for example, a BASIX type model),
- will not have cumulative impacts that exceed prescribed environmental thresholds,
- complies with prescribed standards for climate change adaption and mitigation,
- complies with prescribed pollution laws and standards.

The decision maker would rely on appropriate methodologies to support the decision making process. There are existing examples of methodologies and standards that could be adapted for use in the new planning system. These examples include:

- The *Native Vegetation Act 2003* (NV Act), which establishes an 'improve or maintain environmental outcomes' test with respect to broad scale clearing of native vegetation on rural land. The NV Act adopts an *Environmental Outcomes Assessment Methodology* that underpins any approvals and property vegetation planning under the NV Act.⁵¹ The tool requires an objective assessment to determine if prescribed environmental indicators are improved or maintained.⁵² The application of the assessment tool is mandatory and is based on objective scientific criteria. It has helped overcome problems associated with subjectivity and inconsistent decision making under the previous regime.
- The *State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011*⁵³, which provides that a consent authority must not grant consent to the carrying out of development under Part 4 of the Act on land in the Sydney drinking water catchment unless it is satisfied that the carrying out of the proposed development would have a neutral or beneficial effect on water

⁴⁸ Independent Commission Against Corruption, *Anti-corruption safeguards and the NSW planning system* (2012), p 6.

⁴⁹ We note that both BASIX and the NorBE Tool under the State Environmental Planning Policy (Sydney Drinking water Catchment) 2011 utilise online tools.

⁵⁰ See page 12 of the National ePlanning Strategy. Available at <http://www.eplanningau.com/wp-content/uploadsold/2011/07/National-ePlanning-Strategy-2011.pdf>

⁵¹ See the *Native Vegetation Regulation 2005* and the *Environment Outcome Assessment Methodology* available at <http://www.environment.nsw.gov.au/resources/vegetation/110157eoam.pdf>.

⁵² The *Environmental Outcome Assessment Methodology* applies the improve or maintain test with respect to water quality, salinity, biodiversity and land degradation (soil).

⁵³ *State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011* satisfies section 34B(2) of the EP&A Act which requires provision to be made in a State Environmental Planning Policy requiring a consent authority to refuse to grant consent to a development application relating to any part of the Sydney drinking water catchment unless the consent authority is satisfied that the carrying out of the proposed development would have a neutral or beneficial effect on the quality of water.

quality.⁵⁴ The SEPP is underpinned by the methodology prescribed in the *Neutral or Beneficial Effect on Water Quality Assessment Guideline* prepared by the Sydney Catchment Authority.⁵⁵

- The Building Sustainability Index (BASIX) methodology, which requires proponents to meet certain energy and water targets in order to obtain a BASIX certificate. The consent authority can then rely on the BASIX certificate for that aspect of the development.⁵⁶
- Existing pollution standard, including standards set by the Environmental Protection Authority, ANZECC and AMRCANZ water quality guidelines, National Pollution Protection Council standards for ambient air quality, the National Framework for Chemicals Environment Management and the National Industrial Chemicals Notification and Assessment Scheme (NICNAS).⁵⁷

It is noted that Victoria applies a 'net gain test' in its framework for the management of native vegetation. The main goal is 'to achieve a reversal, across the entire landscape of the long-term decline in the extent and quality of native vegetation, leading to a net gain'.⁵⁸ It is also noted that in Western Australia, the Environmental Protection Authority has proposed a 'net environmental benefit' standard in its discussion of biodiversity offsets, stating that 'this policy position recognises that the environment has been significantly compromised in the past and that halting and reversing the decline of the environment is now a priority'.⁵⁹

Our proposed model would build on Recommendations 71, 72 and 73 of the Independent Panel by requiring decision makers to consider a number of factors in undertaking merits assessment including Aboriginal heritage, air quality, biodiversity, climate change projections, human health and liveability, soil, water and the water cycle, and the public interest.

Structuring this within an objective decision making framework has the benefit of not only ensuring the environmental outcomes are achieved but also reducing uncertainty, ensuring that decisions are transparent and that decision makers are accountable. In turn, this will help to restore the community's confidence in the planning system.

1.2.9 CONCURRENCE AND INTEGRATED DEVELOPMENT

As outlined at the start of this section, the planning system has an important role in managing and mitigating the impact of development on the environment and communities. It also has an important role in helping to secure important environmental outcomes, such as ensuring there is no further loss of endangered species or endangered ecological communities.

⁵⁴ See clause 10 of *State Environmental Planning Policy (Sydney Drinking Water Catchment)* 2011.

⁵⁵ Available at: http://www.sca.nsw.gov.au/__data/assets/pdf_file/0007/4300/NorBE-Assessment-Guideline.pdf

⁵⁶ While we generally support the BASIX system as a method for achieving energy and water reduction targets for house and units, we recognise the following shortcomings:

- It only requires a 50% reduction for energy and water use in new houses and small blocks of units, and a weaker 20% for multi-unit housing.
- It does not allow LEPs or DCPs to impose improved standards for energy or water consumption.
- Auditing and monitoring can be improved, to ensure that commitments made in a BASIX certificate continue to met.

⁵⁷ See further, EDO NSW, *Clearing the Air: Opportunities for improved regulation of pollution in New South Wales* (2012), prepared at request of NCC, at <http://www.nccnsw.org.au> or http://www.edo.org.au/edonsw/site/policy_discussion.php

⁵⁸ Refer to *Native Vegetation Management: A Framework for action*, available at http://www.dse.vic.gov.au/__data/assets/pdf_file/0016/102319/Native_Vegetation_Management_-_A_Framework_for_Action.pdf

⁵⁹ See Environmental Protection Authority Western Australia (January 2006) *Environmental Offsets, Position Statement No 9*, available at http://www.epa.wa.gov.au/docs/1863_PS9.pdf

Historically, the EP&A Act has recognised the important concurrence role of Government agencies, and has also facilitated the process of obtaining permits and approvals required under environmental protection legislation, through provisions for integrated development.⁶⁰ For example:

- In order to ensure that impacts are properly assessed and managed, the EP&A Act requires that in certain circumstances the concurrence of a person other than the consent authority is required before development consent can be given.⁶¹
- The EP&A Act has also facilitated the process of obtaining permits and approvals required under environmental protection legislation, through provisions for integrated development.⁶² Such approvals and permits play an important role in managing impacts of development on significant matters such as marine environments, air pollution, heritage, and Aboriginal heritage.

The integrated development provisions of the EP&A Act require the development consent authority to obtain general terms of approval from other approval bodies during the assessment of development applications. This process has the benefit of having all impacts of development considered at the same time. It also provides some certainty to the proponent that it will be able to obtain the additional approval or permit in the event development consent is granted.

When Part 3A was introduced it removed important licensing and approval requirements from other agencies for Part 3A projects. This has continued with the repeal of Part 3A and the reintroduction of state significant development under Part 4. This essentially removed a critical component of the assessment and management of environmental impacts including pollution, and impacts on heritage, water and Aboriginal cultural heritage. This goes against the fundamental idea that proposals likely to have the most impact should be subject to the most scrutiny.

The Green Paper proposes to maintain the current level of integration in the state significant assessment process and look for additional opportunities to integrate other relevant State approvals.⁶³

It proposes that Government will bring together assessment expertise from different government agencies to work as a team in undertaking the assessment of major infrastructure and private sectors projects.⁶⁴

In doing so, it is unclear whether the Government intends to adopt the recommendations of the Independent Panel to establish a unit within the Department of Planning and Infrastructure to act as a central coordinating body for obtaining concurrences from other government departments and instrumentalities.⁶⁵

Our concern with the proposal in the Green Paper is that the assessment of those integrated aspects of the proposal will occur outside the framework set up by the environmental protection legislation. That is,

⁶⁰ See, for example, section 90- 93B of the EP&A Act. Examples of other legislation requiring permits include *Fisheries Management Act 1994*, *Heritage Act 1977*, *Protection of the Environment Operations Act 1997*, and *Water Management Act 2000*, *National Parks and Wildlife Act 1974*, *Roads Act 1993*

⁶¹ See for example ss 79B(3) and section 112C of the EP&A Act which require that the concurrence of the Director General of the Department of Environment, Climate Change and Water (or current equivalent) is obtained. This requirement is imposed to ensure that there is proper assessment of potential impacts on threatened species and endangered ecological communities and allows the primary decision maker to draw on the expertise of the Department of Environment, Climate Change and Water (or current equivalent). See also State Environmental Planning Policy No 14 (Coastal Wetlands) and State Environmental Planning Policy No 26 (Littoral Rainforest) which requires the concurrence of the Director of the Department of Planning (or current equivalent). We also note that some local environment plans preceding the *Standard Instrument (Local Environmental Plans) Order 2006* (Standard Instrument) may also contain provisions requiring the concurrence of the head of a different agency. The Standard Instrument contains a compulsory clause that requires the concurrence of Director General of the Department of Planning for variations to development standards.

⁶² Section, for example, section 90- 93B of the EP&A Act. Examples of other legislation requiring permits include *Fisheries Management Act 1994*, *Heritage Act 1977*, *Protection of the Environment Operations Act 1997*, and *Water Management Act 2000*, *National Parks and Wildlife Act 1974*, *Roads Act 1993*

⁶³ Green Paper, p 57

⁶⁴ Green Paper, p 57

⁶⁵ See Recommendations 76-91 of the Independent Panel

unless the assessment requirements under the new planning system are the same as those set out in the environmental protection legislation there is a real risk that the impacts will not be properly assessed and that the development will not be subject to the same level of scrutiny as intended by those permits and approvals.⁶⁶ If the Government really does intend to bring together the expertise of other agencies it should ensure that the level of assessment required matches that in the relevant environmental protection legislation.

1.3 RESTORING THE PUBLIC'S CONFIDENCE IN THE PLANNING SYSTEM

The central tenet of the Government's election promise to rewrite the planning system was to address the risks and perceptions of corruption and restore focus on community engagement, accountability and the public interest.⁶⁷

As outlined in the introduction to this submission, it is our view that the Green Paper fails to restore the community's confidence in the planning system.

The first significant step the Government can take in improving the public's confidence in the planning system would be to adopt more of the recommendations of the Independent Panel. As outlined at section 1.1, the two volume report of the Independent Panel was prepared after extensive consultation with the community and addresses many community concerns with the planning system. Failure to give proper consideration to those recommendations only reinforces community concerns that public participation in the planning system is not genuine and meaningful.

In addition, this section looks at four integral components that underpin successfully restoring the public's confidence in the planning system:

- genuine and meaningful public participation
- creating certainty
- improving transparency
- improved compliance and enforcement

1.3.1 GENUINE AND MEANINGFUL PUBLIC PARTICIPATION

The Green Paper places a strong emphasis on improving public participation. Despite this, our organisations are concerned that the Green Paper does not guarantee that genuine and meaningful community engagement will be achieved and will, in certain respects, substantially reduce public participation opportunities. In particular, we are concerned that:

- The Green Paper lacks detail on the legislative framework that will support public participation.
- Public participation, on the scale proposed in the Green Paper, requires significant funding and resources.
- The stated commitment to public participation is undermined by proposals in the Green Paper. Such proposals are aimed at facilitating development and have the intention that growth and development are to be paramount objectives of the planning system, over-riding social and environmental objectives.

⁶⁶ See for example section 45 of the Protection of the Environment Operations Act which sets out the matters to be taken into consideration for environmental protection licenses; see also clause 26 of the Water Management Regulation 2011 outlining matters affecting consideration for water approvals under the Water Management Act 2000

⁶⁷ Above no.11. See also NSW Government state plan, *NSW 2021* (2011), at <http://www.2021.nsw.gov.au/restore-accountability-government>, in particular State Goals 29-32.

Further, it is important to remember that no matter how much public consultation there is, unless the public's views are actually listened to, properly considered and acted upon where appropriate, the public will remain cynical about planning processes.

Green Paper lacks detail on the legislative framework that will support public participation

The Green Paper does not provide clear information about the proposed legislative framework for public participation. It is unclear whether existing legislative requirements relating to notification and exhibition will be retained, or improved, in the new system. It is also unclear what legal framework will support the public participation charter and how the charter will be enforced.

In this respect, our organisations have proposed legislative mechanisms that would support improved community engagement in the new planning system. These recommendations, summarised in **Table 4**, are set out in our report *Our Environment, Our Communities*.⁶⁸ Please refer to that report for further information.

TABLE 4 – Summary of legislative framework for public participation

Genuine and meaningful public participation needs to be supported by a legislative framework that includes, for example:

- an obligation on planning authority/decision maker to consult
- legislative requirement to give notification
- legislative requirement to make information available
- legislative right for community to participate in consultation process, and right to be heard (for example, if a public meeting is to be held)
- legislative requirement for planning authority/decision maker to consider submissions made
- legislative requirement that planning authority/decision maker respond to submissions
- legislative requirement that planning authority/decision maker give reasons for decisions, including reasons as to why input from the community was adopted, or not adopted, in the final decision
- third party merits appeal rights for the community, on a more equitable footing with developers.

Genuine and meaningful public participation, on the scale proposed in the Green Paper, requires significant funding and resources

The proposed improvements to public participation, particularly the emphasis on early public participation at the strategic planning phase will require strong support from Government in terms of funding and resources. It is unrealistic to assume that improvements to legislation alone will improve public participation.

For example, the Green Paper refers to international case studies of successful public participation processes from Vancouver, Seattle and Portland.⁶⁹ These case studies are drawn from the Grattan Institute's *Cities – Who Decides?* report. This report highlights the high level of funding and resources needed for successful community engagement. In Seattle, for example, "around three quarters" of the Seattle planning budget was allocated to public engagement by the neighbourhood planning office.⁷⁰

The Green Paper has not given any real commitment to investing this level of funding and resources in the new planning system. If the Government is serious about putting community and public interest at

⁶⁸ Above no. 5

⁶⁹ Green Paper, p 22,

⁷⁰ See also JF Kelly, *Cities: Who Decides?* (2010) Grattan Institute, Melbourne, p 5

the centre of the new planning system it requires a proper investment in expertise and resources to support improved public participation practices.

Any real commitment to public participation is undermined by proposals in the Green Paper aimed at facilitating development

While there are strong efforts being made to improve public participation in some parts of the planning system, proposals aimed at facilitating development have the potential to lock the community out of important decision making processes. For example:

- Proposals to expand code complying development will curtail the communities' right to comment on development proposals for which public participation rights currently exist, which has the potential to exclude a greater number of developments from the scrutiny of community participation and third party appeal rights.
- The Green Paper provides increased rights for developers without increased rights for communities. For example, the Green Paper proposes to introduce review rights for proponents with respect to decisions about rezoning proposals and applications for strategic compliance certificates.

These matters will need to be addressed by the Government as it moves towards developing the White Paper and draft legislation.

1.3.2 CREATING CERTAINTY

One of the common themes raised during this review is the need to remove uncertainty in the planning system. The uncertainty in the system has been attributed to a number of factors, including:

"a combination of sweeping ad hoc changes and a constant flow of amendments, circulars, alterations to regulations and other minor changes,... resulting in a range of unintended consequences"....⁷¹

"the existing approach to the preparation of environmental planning instruments has been reactionary rather than visionary and has ultimately resulted in a myriad of controls, great complexity and significant uncertainty".⁷²

The Green Paper argues that long-term strategic planning will create certainty by setting the clear vision for planning upfront. It is also argued that having the community involved in strategic planning will create community buy-in and allow the community to know well in advance what types of development are likely in an area.

While there is merit in this argument, it is our view that a number of proposals in the Green Paper promote uncertainty and will undermine strategic planning outcomes and public confidence in the system. These include:

- Proposals that allow developer initiated rezoning proposals and increased rights of review of decisions concerning rezoning proposals,

⁷¹ Western Sydney Regional Organisation of Councils, quoted on page 14 of the Green Paper.

⁷² Green Paper, page 28

- Proposals to introduce strategic compliance certificates that, in essence, will allow development to proceed before strategic planning has been completed and environmental assessment has been carried out,
- A proposal to introduce an enterprise zone, which will be characterised by minimal controls,
- The ability for developers to submit applications that do not comply with prescribed codes.

Far from increasing certainty, these proposals have the potential to be misused by developers and undermine any certainty and community buy-in that would have come out of effective strategic planning. Our organisations hold real concerns that such proposals will lead to continued disenchantment within the community.

We are also concerned with proposals to move away from strict development controls, toward a more flexible system of guidelines. This is another example of proposals in the Green Paper undermining certainty in the system. Strict legislative controls provide a level of certainty as they are easier to enforce and must be amended through proper procedures. There is also the benefit that both the community and proponents know exactly what development standards will apply to proposed development, increasing confidence in the system.

Our organisations recognise that the planning system must be somewhat flexible, for example, in order to accommodate for the differences between coastal, urban, rural and regional areas. We suggest that those differences can be addressed at the strategic planning phase, thereby providing a framework for the subsequent imposition of strict, local controls that accurately reflect outcomes of the strategic planning process.

Finally, applications that depart from controls have the potential to undermine strategic planning, and to give rise to disputes. Any test for a proposed variation to a control should be based on community or environmental grounds, for example, to avoid social and environmental damage or to lead to better sustainability and design outcomes. Proposed variations must also remain consistent with long term strategic objectives. Any decision allowing variation to development controls should be subject to objector merits appeal. However, where development that exceeds local development standards is *refused*, developers should not have an automatic right to merits appeal.

1.3.3 IMPROVING TRANSPARENCY

The potential for corruption, real or perceived, in the planning system stems from a lack of transparency in decision making processes.

The Green Paper states that *“the new planning system will be based on transparency in process and decision making”*. The Green Paper outlines a number of mechanisms for improving transparency, including, for example:

- improving access to information,
- increased public tracking of decision making processes,
- evidence based strategic planning,

While these proposals provide a starting point for improving transparency, we argue more can be done to improve efficiency in the planning system. For example:

- Limiting discretion and prescribing objective decision making tools (see section 1.2.8 of this submission),
- Requiring decision makers required to respond to submissions and give reasons for decisions (see section 1.3.1 of this submission),

- Ensuring accountability through appeal rights,
- Requiring effective enforcement, monitoring and reporting (see section 1.3.4 of this submission).

In addition to these recommendations, we note the recent ICAC report on *Anti-corruption safeguards and the NSW planning system*.⁷³ This report lists six key corruption prevention safeguards, many of which reinforce the points above: providing certainty; balancing competing public interests; ensuring transparency; reducing complexity; meaningful community participation and consultation; and expanding the scope of third party merit appeals.⁷⁴

Among the ICAC report's 16 recommendations, we particularly note and paraphrase the following:

- Recommendation 1- Ensure that discretionary planning decisions are made subject to mandated, robust and objective criteria
- Recommendation 3 - Adequate oversight safeguards for assessing and determining development applications for prohibited uses
- Recommendation 4 - Increased oversight and safeguards for voluntary planning agreements⁷⁵
- Recommendation 5 - Clear articulation of objectives, and guidance on prioritising them
- Recommendation 8 - Adopting a protocol to document decisions, and publish reasons for decisions, where the Planning Minister disagrees with departmental recommendations on a planning matter
- Recommendation 9 - Produce and maintain a community guide to development processes
- Recommendations 11-13 - Require community consultation and due consideration of public submissions on major strategic planning documents, draft voluntary planning agreements and state significant planning instruments.⁷⁶
- Recommendation 14 - Give statutory backing to community consultation requirements for draft LEPs
- Recommendation 16 - Expand third party merits appeals to a range of additional categories of private sector development.

We strongly support the intent of the ICAC's 2012 recommendations, along with the other accountability and probity mechanisms outlined in our earlier submissions to the Planning System Review. If the Government is truly committed to improving transparency and accountability and restoring the public's confidence in the NSW planning system then it should fully implement the recommendations of the ICAC report.

1.3.4 COMPLIANCE AND ENFORCEMENT

Matters of compliance and enforcement are integral to the proper functioning of the new planning system. Key areas in which a lack of effective compliance and enforcement can cause problems include:

- non-compliance with consent conditions, including for large projects like mines and landfill sites,
- no follow-up or leniency where development is carried out without consent,
- confusion as to the agency responsible for enforcement.

Historically, the Department of Planning and Infrastructure has not played a large role in enforcing breaches of the EP&A Act, or development approvals granted by the Minister for Planning, and local

⁷³ Independent Commission Against Corruption, *Anti-corruption safeguards and the NSW planning system* (2012), available via www.icac.nsw.gov.au.

⁷⁴ Ibid, p 6.

⁷⁵ Consistent with uncommenced provisions set out in Schedule 3 of the *Environmental Planning and Assessment Amendment Act 2008*. Safeguards included establishing 'reasonableness' as a consideration in making VPAs; and ensuring council VPAs do not involve public infrastructure without ministerial agreement in certain circumstances. See ICAC report, 2012, p 11 and recommendation 4; see further Planning Review Issues Paper (December 2011), p 112.

⁷⁶ See specific recommendations for detail. For example, ICAC recommends community consultation on state significant instruments except in exceptional and publicly justified circumstances where there is an adverse public interest.

councils have struggled to carry out their enforcement roles. There is no doubt a combination of reasons for these problems, including, for example, limited resources (funding, staff, and skills), a weak enforcement ‘culture’ and limited or ineffective penalties.

In order to improve compliance and enforcement in the new planning system, these underlying reasons need to be addressed. There needs to be adequate funding and resources available to enforcement authorities and cultural change, supported by requirements for enforcement agencies to:

- adopt and publish enforcement policies,
- publish data on complaints received and investigated, and
- report on the exercise of their enforcement powers (with appropriate support and resourcing).

Table 5 summarises a number of the key recommendations for improving compliance and enforcement, made by our organisations and EDO NSW in response the Issues Paper.⁷⁷

TABLE 5 – Summary of key recommendations for improving compliance and enforcement in the NSW planning system

- Penalties:
 - increase maximum penalties available for certain breaches of the planning regime, with more specific penalty ranges for different offences,
 - adopt a tiered penalty system in the Act, setting a range of penalty categories relative to seriousness, to inform the community and guide sentencing,
 - ensure greater equity between penalties (and powers) for local council enforcement and departmental enforcement, and
 - strengthen penalties for inaccurate information beyond ‘knowingly false or misleading’ to negligent or reckless material inaccuracies.
- Orders and offences:
 - a new, flexible range of orders should be made available to enforcement authorities and courts, with corresponding remedies for non-compliance, and
 - further research on the use and adequacy of different existing offences would assist the design the enforcement system under the new planning Act.
- Other matters:
 - Councils should have rights to seek costs and other remedies against private certifiers in certain circumstances.
 - Post-approval monitoring and reporting conditions should not be able to be weakened through review processes, although improving the utility and effectiveness of such conditions should be supported.
 - Proponents and consent authorities should also be required to publish monitoring and reporting data online and accessibly to make public scrutiny easier.
 - Consent authorities should be given wider powers to suspend or revoke development consents, including for significant breaches of consent conditions. Council compliance officers should be given appropriate rights of entry and inspection, and, more pressingly, the resources and support to monitor, enforce and report on compliance.

⁷⁷ Above no. 32.

PART 2 - RESPONSE TO CHANGES PROPOSED BY THE GREEN PAPER

COMMUNITY PARTICIPATION

CHANGE 1 – PUBLIC PARTICIPATION CHARTER

We welcome the Government's support of our recommendation to adopt a public participation charter in the new planning system.⁷⁸

The public participation charter was proposed by our organisations, together with EDO NSW, as a mechanism for ensuring that community engagement in the new planning system is underpinned by core principles, and achieves prescribed outcomes. Full details of our proposed recommendations for a public participation charter can be found in our report *Our Environment, Our Communities*.⁷⁹

Table 6 below provides an example of how core principles would translate into practical solutions for improving community engagement:

TABLE 6 - Implementing core principles of community engagement	
Underlying principle	Possible ways to implement
Inform: the information provided should be transparent, accurate and easy to understand	<ul style="list-style-type: none">▪ Make information available through a range of means – hard copy (in different locations), hard disc, on website▪ Develop plain language, easy to read fact sheets and address multicultural language needs▪ Provide information in different ways, for example, make use of visual plan information for those people who are illiterate or who process visual information better than written information▪ Allow information to be made available to the public prior to consultation sessions (so that there is a distinction between information giving and consultation processes)
Engage: the process is not simply the passive supply of information but seeks to encourage views and engage informed opinion	Use a variety of methods, in which people feel comfortable, to obtain opinions. For example: <ul style="list-style-type: none">▪ Use workshops in lieu of written submissions▪ Use an independent facilitator for public consultation sessions▪ Provide opportunities for consultation through social media
Interrogate: information can be complex but resources should be provided to allow interrogation and translation.	<ul style="list-style-type: none">▪ Facilitate community groups to engage independent consultants to provide advice on information▪ Facilitate an experts panel to which the public can ask questions

⁷⁸ Green Paper, 21

⁷⁹ Above no. 5.

Facilitate dialogue: there should be attempts to bring various stakeholders together to devise solutions on a level playing field	Use methods that bring people together to discuss issues, for example: <ul style="list-style-type: none"> ▪ Roundtables ▪ Workshops ▪ Opportunities for people to offer alternatives to a proposal and to which council or developer needs to respond
Evaluate – the success or otherwise of the effort is reviewed and lessons learnt.	<ul style="list-style-type: none"> ▪ Include performance indicators in legislation ▪ Require reporting on engagement practices

Our report *Our Environment, Our Communities* provides further recommendations for a legislative framework for integrating community considerations in the NSW planning system. Please refer to that report for more information.

In summary, we recommend that:

- The new planning legislation contain a legislative framework for public participation in all key processes, including:
 - law reform processes
 - preparation of planning instruments and strategies,
 - development assessment, and
 - review, compliance and appeals.
- Traditional public participation processes including notification, exhibition and consultation on planning instruments and development proposals are maintained in the new planning system to ensure there this minimum standard of community consultation continues. These processes should, however, be updated to reflect modern and current practices, such as providing information online, and holding public hearings.
- The public participation charter form part of the new planning act (not a separate policy document or guideline).
- The new planning legislation includes a statutory obligation to ensure that all community consultation undertaken under the new planning act is carried in accordance with the principles of the public participation charter.

We also recommend that the content of the public participation charter be finalised in consultation with communities and key stakeholders.

CHANGE 2 – STRATEGIC COMMUNITY PARTICIPATION

Our organisations support proposals to increase statutory requirements for community engagement in strategic planning and in the preparation of planning instruments. To this end, we recommend a legislative framework similar to that set out in Table 4 (at 1.3.1) be included in the new planning system.

We recognise that early community engagement has the benefit of improving decision making by assisting decision makers in identifying public interest concerns, utilising local knowledge and ensuring community ‘buy-in’ of decisions which can reduce potential disputes.

However, we do not support the notion that community engagement at the strategic planning stage is a substitute for community engagement at the development assessment stage. Communities are more likely to be engaged in the planning process once clear details about proposed development. The community can also add an additional level of scrutiny at this step of the process, ensuring that important matters that failed to emerge at the strategic planning phase are addressed.⁸⁰

The Green Paper confirms that community participation will occur for State Significant Development, Merit Assessed Development, Priority Infrastructure Projects and merit-related issues and design matters for Code Assessment. However, there is concern that, in practice, community engagement at the development assessment stage will be curtailed by proposals in the Green Paper to:

- expand code complying development, which has the potential to exclude a greater number of developments from the scrutiny of community participation and third party appeal rights
- increase rights for proponents without reciprocal rights for the community (for example proposals relating to rezoning applications, strategic compliance certificates).

Further, the Government has given no commitment to remove the restrictions to merits appeal rights for state significant development.⁸¹ State significant development is likely to have the most significant impact on the environment and communities and should require the greatest level of scrutiny, including genuine and meaningful public participation that includes merit appeal rights.

CHANGE 3 – TRANSPARENCY IN DECISION MAKING

One of the key concerns of our organisations is that the Green Paper does not go far enough to restore the community's confidence in the planning system including improving transparency. In fact, by expanding the scope of code assessment, the proposed reforms will reduce transparency in relation to development proposals, and exclude the community from meaningful participation in these decisions. ***Please refer to section 1.3.3 for our comments on this issue.***

CHANGE 4 – USE OF INFORMATION TECHNOLOGY AND ELECTRONIC PLANNING

The Green Paper proposes to make use of information technology to support an online planning system. This would include an online planning portal and current reliable and accurate electronic planning data available online 24 hours a day.⁸²

In our view, there are substantial benefits in having an online planning system.⁸³ For example:

- ***ePlanning could support the better coordination of general administrative processes:***
 - The development assessment process could generally be managed through a development assessment tracking system, similar to the system currently used by the Department of Planning and Infrastructure. This model could be extended to all types of development in NSW.

⁸⁰ Gleeson notes that the 2008 reforms to the EP&A Act excluded the involvement of a substantial proportion of the community from the decision-making and decision review processes, and this led to a greater incentive for members of the excluded public to seek judicial review of planning decisions Grant Gleeson *Whose Neighbourhood is it anyway?* FIG Congress 2010, Facing the Challenges - Building the Capacity, Sydney 11-16 April 2010, available at http://www.fig.net/pub/fig2010/papers/ts03e%5Cts03e_gleeson_4368.pdf

⁸¹ Despite the repeal of Part 3A in 2011, merits appeal rights for state significant development remain limited. Objector merits appeal rights are not available in the case of critical infrastructure proposals, proposals that have been to public hearing as part of a PAC review and proposals that would not have otherwise been designated development

⁸² Green Paper, p 24

⁸³ See further *Our Environment, Our Communities*, above no. 5

- Such a system would allow for the standardisation of administrative processes, such as applications forms, which may reduce complexity and improve efficiency.
 - The system could also support improved interaction between government agencies, and support important concurrence processes.
- ***An ePlanning system could allow for the improved sharing of information:***
 - Firstly, an ePlanning system could ensure that all information relevant to planning processes is available in one space. This could range from environmental studies carried out during strategic planning, environmental planning instruments, draft policies that are open for public comment, fact sheets, development applications, environmental assessment reports supporting development applications, decisions and reasons for decisions,
 - ePlanning technology could also be used to consolidate all information about a particular parcel of land,
 - Such a system could potentially be extended to support an improved 'whole-of-Government' approach to planning. For example, relevant information from other agencies and other agency processes could also be managed through a similar system.
 - ***ePlanning technology could be used to support objective decision making methodologies:***
 - In section 1.2.8 of Part 1 of this submission we highlight the potential for ePlanning to support objective decision making methodologies.
 - The proposed ePlanning framework set out in the *National ePlanning Strategy* proposes that "decision rules (are) integrated into application lodgement to automate low risk applications and identify critical issues relating to higher risk applications".⁸⁴
 - For example, BASIX uses an online methodology that requires proponents to meet certain energy and water targets in order to obtain a BASIX certificate.⁸⁵ The proponent enters data about the proposed development into an online program that calculates whether the proposed development satisfies the energy and water criteria. The consent authority can then rely on the BASIX certificate for that aspect of the development.
 - A web based software application has been developed to support the Neutral or Beneficial Effect on Water Quality Assessment required under the *State Environmental Planning Policy (Sydney Drinking Water Catchment)* 2011.⁸⁶ The NorBE Tool helps councils decide whether the proposed development will have a neutral or beneficial effect on water quality, or whether the concurrence of the Chief Executive is required. It records the decision process for each development application. Where an assessment needs to be referred to the Sydney Catchment Authority, the assessment summary must be attached to the development application.

The Green Paper also proposes the use of social media to improve community engagement practices. While social media can be a useful tool in engaging the community, we recognise that there are some limitations on the use of social media:

- Online community engagement should not be viewed as a replacement for traditional methods of engagement – used in isolation it can exclude sectors of the community and may not provide a

⁸⁴ See page 12 of the National ePlanning Strategy, above no. 50

⁸⁵ The Building Sustainability Index (BASIX) is a methodology that ensures homes are designed to use less potable water and be responsible for fewer greenhouse gas emissions by setting energy and water reduction targets for house and units. The methodology relies on an online program that is accessible to anyone. The user (usually the building designer) enters data relating to the house or unit design - such as location, size, building materials etc - into the BASIX tool. BASIX analyses this data and determines how it scores against the Energy and Water targets. The design must pass specific targets (which vary according to location and building type) before the user can be issued with a BASIX Certificate (which is required for particular classes of development).

⁸⁶ See p16 of the Neutral or Beneficial Effect on Water Quality Assessment Guideline 2011, available at http://www.sca.nsw.gov.au/__data/assets/pdf_file/0007/4300/NorBE-Assessment-Guideline.pdf.

definitive representation of the community. Online engagement should be balanced with other community engagement methods.⁸⁷

- Managing social media as a form of community engagement requires “a lot of time and commitment from organisers and the right incentives to keep people engaged”.⁸⁸
- It is not simply enough to set up an online community engagement forum. The forum needs to be regularly monitored. It is important that agencies provide timely and appropriate feedback. Given the ‘immediacy’ of internet communication, expectations of a timely response may be increased.

STRATEGIC PLANNING

The Green Paper heralds a substantial and significant shift in the planning system towards a strategic planning framework. Our organisations have advocated for improved strategic planning throughout this review process. As recognised in the Green Paper “there are wide benefits in prescribing a clear legislative framework for strategic planning that includes environmental assessment and public participation”.⁸⁹

However, strategic planning should not be seen as a substitute for robust and proper assessment of individual development proposals. While good strategic planning has the benefit of filtering out land use conflicts at an early stage, it does not remove the need for individual site assessment at the development assessment phase, once the details of a proposal are known. Additionally, while it is important for the community to be engaged in the strategic assessment phase, communities are more likely to be engaged in the planning process when they have clear details about proposed development. ***Please see further our comments in response to Change 11 – Strategic Compliance***

Finally, the Green Paper does not provide a clear outline of the legislative process for the making of planning instruments and policies, including who is responsible for preparing and making each of the environmental planning instruments, and what appeal rights will be available to the community.⁹⁰ Without this information it is difficult to provide informed input on the proposals for the new types of planning policies and instruments.

CHANGE 5 – NSW PLANNING POLICIES

The Green Paper proposes that existing State Environmental Planning Policies and section 117 Directions will be replaced with 10 – 12 NSW Planning Policies.

As outlined in section 1.2.3 of this submission, there is a real concern that the environmental protections that have been developed over the past 30 years are at risk of being weakened or lost during this transition process. Further, the fact that NSW Planning Policies will not be statutory instruments is a step backwards in the level of protection provided by the existing instruments.

The process for developing NSW Planning Policies must ensure that existing environment protections set out in State Environmental Planning Policies are retained, and where necessary improved, in the new

⁸⁷ *Online Community Engagement Guideline* (December 2010), Queensland Department of Public Works. Available at: <http://www.qld.gov.au/web/community-engagement/policy-guidelines/guidelines/documents/online-community-engagement-guideline.pdf>

⁸⁸ Brittle et. al *Promising Practices in Online Engagement* (2009), cited in Herriman, J. 2011. *Local Government and Community Engagement in Australia. Working Paper No 5*. Australian Centre for Excellence for Local Government, University of Technology, Sydney

⁸⁹ Green Paper p 33, citing NCC, TEC and EDO NSW, *Planning for Ecological Sustainable Development - Opportunities for improved environmental outcomes and enhanced community involvement in the planning system*, above no 32.

⁹⁰ While there are some lines tucked away in the text, for example, NSW State Policies will be approved by Cabinet (p 30) , and local councils will be responsible for preparing Local Land Use Plans (p8) the Green Paper fails to provide an overall framework with outlining clear processes for the making of these instruments.

planning system. For example, there is an opportunity to introduce new protections in relation to energy and water efficiency (BASIX), climate change mitigation and adaptation, and other building standards and measures for clean industry. The new planning system must also ensure that protections in NSW Planning Policies are legally enforceable. **Please also refer to 1.2.3.**

CHANGE 6 – REGIONAL GROWTH PLANS

The Green Paper proposes new Regional Growth Plans that will provide the principal direction on how the Government expects a region to grow over a 20 year period.

Our initial comments with respect to the proposals set out in the Green Paper are as follows:

- Regional strategic planning should support triple bottom line outcomes, and regional plans should balance economic, social and environmental considerations. They should not be called regional growth plans.
- The Green Paper indicates that Regional Growth Plans will be linked with the *NSW Long-Term Transport Master Plan* and the *State Infrastructure Strategy*. In order to ensure a whole of Government approach to planning (as intended⁹¹) regional planning instruments should also be linked to Regional Conservation Plans and Catchment Action Plans. See further section 1.2.5.
- Regional plans should build on existing Regional Strategies and Strategic Regional Land Use Plans.
- The role of regional planning boards is unclear (see Change 21) and it is unclear exactly who will have the responsibility of making regional plans.
- The Green Paper outlines matters that will be included in the framework for regional planning under the new Act (p 33). In addition to those matters listed, we recommend the Act include provisions that require:
 - regional plans to be prepared having regard to outcomes based objectives (see 1.2.5 above)
 - the early carrying out of robust baseline studies of environmental and NRM values to inform the planning process,
 - strategic environmental assessment of draft plans,⁹²
 - mandatory concurrence of prescribed agencies,
 - mandatory community consultation (see Table 4 in section 1.3.1)
 - regional plans linked with regional conservation plans and Catchment Action Plans (CAPs) (see section 1.2.5).

CHANGE 7 – SUBREGIONAL DELIVERY PLANS

CHANGE 8 – SIMPLIFYING LOCAL LAND USE PLANS

The proposal to introduce both subregional delivery plans and maintain a simplified local land use plan appears, from our initial reading of the Green Paper, to be adding further complexity the system.

While we continue to consider these proposals in further detail, and as more information becomes available, we reiterate some of our key concerns with respect to plan making:

- The new planning system should include a clear legislative framework for the making of plans. See Table 3 in section 1.2.4. See also our joint report *Our Environment, Our Communities*.⁹³

⁹¹ Green Paper, p 33

⁹² See, for example, Hawke (2009) *The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999*, see in particular 3.43 – 3.50

- Plans should be prepared having regard to outcomes based objectives (see 1.2.5 above)
- It is appropriate to have strict controls in local land use plans (see 1.3.2 above)

CHANGE 9 – NEW ZONES AND GREATER FLEXIBILITY WITH ZONES

- The proposed Future Urban Release Area Zone has the potential to reduce future land use conflicts by early identification of growth areas. However, given the potential environmental and social impacts of urban release, it is particularly important that these areas are subject to effective community consultation, environmental studies and objective environmental outcome standards.
- Our organisations are concerned with the proposal to introduce a new Enterprise Zone. In particular we are concerned that these zones will be characterised by very little, if any, development controls.
- If Enterprise Zones are to be included in the new system, it is important that any development proposed in these zones is subject to a robust merit assessment, including assessment of environmental impacts and mandatory community consultation.

DEVELOPMENT ASSESSMENT AND COMPLIANCE

CHANGE 10 – DEPOLITICISED DECISION MAKING

The issue of who should make decisions with respect to development applications was a key matter for the Planning System Review. The Independent Panel sought the views of stakeholders and the community on this issue during the consultation process and through the March Issues Paper.

At that time, our organisations acknowledged that the matter of who should determine development applications, for regionally significant development and local development, as well as State significant development, is multifaceted. On one hand there is a desire to remove the politics from decision making and reduce potential corruption risks through independent decision making. On the other hand there is the desire to ensure elected representatives, at both State and local government levels, are accountable.

In our submission to the Issues Paper we highlighted the range of feedback from our members and clients on this issue.⁹⁴ Opinions varied based on individual experiences in the variety of locations throughout the State.

The common concern amongst the environmental community is that the decision making process must be transparent and objective, and decision makers must be accountable.

The Liberal and National's policy *Putting the Community back into Planning* provides:

"... the NSW Liberal & National Parties are committed to returning local planning powers to local communities (through their councils)...We believe that local residents – through councils – are best placed to make local planning decisions affecting their suburbs. After all, it is local residents – not Macquarie Street planners – who have to live with the results of these planning decisions".⁹⁵

⁹³ Above no. 5

⁹⁴ Above no 32.p, 49 - 50

⁹⁵ Above no. 11

There seems to have been a change in Government thinking. The Green Paper provides that “(t)o restore public confidence in the planning system and merit based decision making, the Government considers a shift towards independent expert decision making as highly desirable”.⁹⁶

Unfortunately, the proposals outlined in the Green Paper are unclear. Although there is a table setting out the hierarchy of decision makers, it is not clear if decision making powers are delegated from the Minister or elected councillors, or vested directly in the independent bodies.⁹⁷

We also have concerns about the real independence of panel members. There can be a strong political element when panel members are appointed by the Minister. In order to give the public trust in the independent panels, there needs to be provisions in legislation to ensure that there is no conflict of interest (for example, panel members not having acted for a proponent of a development). Additionally, the relevant expertise and qualifications of panel members should be made public and expertise should be relevant to the proposal under consideration.

In terms of the process relating to panels, the public must be able to make submissions directly to panels, (not through the Department), panels must be required to publically give reasons for decisions, and decisions should be appealable by third parties and

There is also no indication in the Green Paper of the legislative framework that would apply to decision makers. In section 1.2.8 we highlight the importance of an objective decision making framework in achieving environmental outcomes and improving transparency in decision making. This is also discussed at section 1.3.3.

While the Green Paper proposes depoliticised decision making as a way of restoring the communities’ confidence in the planning system we say that more important to restoring the communities’ confidence in the planning system is a clear and objective decision making framework. To this end, the new planning system must seek to:

- limit discretion in decision making,
- incorporate objective decision making tools,
- require information to be made publicly available, prior to decisions being made,
- mandate genuine public participation,
- require decision makers to provide reasons for decisions, and
- ensure merit appeal rights in relation to planning and development decisions.

These fundamental elements are essential in ensuring that the decision making processes is transparent and decision makers are accountable.

CHANGE 11 – STRATEGIC COMPLIANCE

Strategic Planning and Development Assessment

As outlined above, we are concerned that the Green Paper places too much emphasis on strategic planning at the expense of proper assessment frameworks at the development assessment stage.

Strategic planning is not an adequate substitute for robust and proper assessment of individual development proposals. While good strategic planning has the benefit of filtering out land use conflicts at an early stage, it does not remove the need for individual site assessment at the development assessment phase, once the details of a proposal are known. Additionally, while it is important for the community to be

⁹⁶ Green Paper p 49

⁹⁷ Green Paper, p 50

engaged in the strategic assessment phase, communities are more likely to be engaged in the planning process when they have clear details about proposed development.

The Green Paper's reliance on improved strategic planning to justify the expansion of code complying development and the move towards flexible development controls is concerning. This is even more so, given other proposals in the Green Paper, including proposals that allow developer initiated rezoning proposals and increased rights of review of decisions concerning rezoning proposals and proposals to introduce strategic compliance certificates, have the ability to undermine strategic planning. It is alarming that the Government is proposing to improve developers' rights while at the same time proposing to weaken development assessment processes.

Strategic compliance before Subregional Delivery Plans are complete

Our organisations are strongly opposed to the proposal to override existing environmental planning instruments using Strategic Compatibility Certificates. This proposal will have the effect of allowing development to proceed before key strategic planning processes (in particular, the preparation of a subregional plans and local land use plans) have been completed. This creates a risk that development will proceed before potential impacts have been considered and proper controls have been put in place.

NSW Planning Policies and Regional Plans are non-statutory instruments and it is intended that they will be given effect through statutory controls set out in subregional delivery plans and local land use plans. Additionally, the Green Paper highlights the important role that communities, councils and agencies will have in preparing subregional delivery plans.

It is inappropriate for development that would otherwise be prohibited or restricted by an existing environmental planning instrument to proceed before these important processes have occurred. It essentially gives developers that opportunity 'jump the queue'. Further, the proposal to allow only councils or proponents to appeal decisions for the issuing of strategic compliance certificate is not supported as it expands developer rights without providing equal rights for the community.

There is no reason why existing legislation and/or policies should not remain in force until subregional delivery plans and local land use plans are put in place.

Streamlining development assessment where Subregional Delivery Plans are in place

Our organisations do not support the Government's proposal to increase the use of code complying development. The proposal has the potential to exclude a greater number of developments from the scrutiny of proper assessment, community participation and third party appeal rights. ***Please see further our comments in response to Change 14 – Increasing the Use of Code Complying Development.***

Removing concurrences through strategic planning

We oppose the proposal in the Green Paper to remove concurrences from development assessment stage. We recommend that the Government considers implementing the recommendations of the Independent Panel for improving concurrence processes in the new system. ***Please see further our comments in section 1.2.9.***

CHANGE 12 – REFORMING STATE SIGNIFICANT DEVELOPMENT

Considering state planning principles

The Green Paper proposes that decision makers will be required to take into account state planning principles and this will provide a better strategic framework in which to assess state significant proposals

We have a number of concerns with this proposal:

- The Green Paper provides little detail on the types of matters that will form state planning principles. There is no indication whether the Government will adopt Recommendations 71, 72 and 73 of the independent panel as to matters for consideration.
- Throughout this planning review process our organisations have continued to emphasise the need for a clear and objective decision making framework for development assessment.⁹⁸ There are several benefits of establishing an objective decision making framework in the new planning system:
 - Discretionary decision making processes have historically led to environmental considerations losing out to development and economic interests.⁹⁹
 - Discretionary processes have contributed to the community losing confidence in the planning system. A good example of this is the introduction of the former Part 3A, which increased the Minister's discretionary decision making powers and which was the cause of much community concern. On this point, we note Recommendation 1 of the Independent Commission Against Corruption that the NSW Government ensures that discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective.¹⁰⁰
 - Methodologies to support objective decision making can be streamlined through using of information technology and ePlanning processes.¹⁰¹ The National ePlanning Strategy proposes that "decision rules (are) integrated into application lodgement to automate low risk applications and identify critical issues relating to higher risk applications".¹⁰²

The new planning system should build on the Recommendations 71, 72 and 73 of the Independent Panel to requiring decision makers to consider a number of factors in undertaking merits assessment including Aboriginal heritage, air quality, biodiversity, climate change projections, human health and liveability, soil, water and the water cycle, and the public interest.

Structuring this within an objective decision making framework has the benefit of not only ensuring that environmental outcomes are achieved but also reducing uncertainty, ensuring that decisions are transparent and that decision makers are accountable. In turn, this will help to restore the community's confidence in the planning system. ***Please refer to section 1.2.8 for more detailed comments on this issue matter.***

⁹⁸ See above no. 5 and no. 32

⁹⁹ For example, section 79C of the EP&A Act prescribes matters for consideration by the decision maker in determining a development application. Section 79C does not prescribe how the matter is to be considered by the decision maker or what weight is to be given to each matter.

¹⁰⁰ Independent Commission Against Corruption, *Anti-corruption safeguards and the NSW planning system* (2012), p 6.

¹⁰¹ We note that both BASIX and the NorBE Tool under the State Environmental Planning Policy (Sydney Drinking water Catchment) 2011 utilise online tools.

¹⁰² See page 12 of the National ePlanning Strategy. Available at <http://www.eplanningau.com/wp-content/uploadsold/2011/07/National-ePlanning-Strategy-2011.pdf>

Improving environmental impact statement procedures

We welcome the Government's acknowledgment of the many submissions raising concerns with the integrity of environment impact statement, in particular concerns with the impartiality of consultants.

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. In response to this proposal we submit that:

- Accreditation should apply to all persons preparing environmental assessments or studies under the planning system (for example, environmental studies that underpin strategic planning processes) and not just consultants preparing environmental impact assessments.
- The Government should provide further information on the standards it intends to impose on consultants regarding the impartiality and quality of their work.

Further, while the Government's proposal is an important starting point, we believe the most effective way of ensuring the integrity of environmental impact assessments is to break the financial nexus between the developer and the environmental consultant. So long as developers continue to directly pay the consultants there is the risk of bias, undue influence and unethical practices. We believe that the same can be said about the private certification system.

We therefore submit that the new planning system must provide an improved system for engaging environmental consultants. Such a system could be implemented by the following steps:

- a central register of consultants is created (potentially managed by the Department of Planning, Office of Environment and Heritage or an independent body),
- proponents pay a fee (based on a percentage of the estimated construction investment value) into a designated fund,
- a consultant(s) is allocated to the proponent's project from the register of consultants,
- the consultant prepares a public environmental study of values and potential impacts, and
- the developer then finalises its proposal and preferred course of action.

We recognise that there may be potential issues with respect to liability and competition but we believe these issues could be appropriately managed; for example, registered consultants could be allocated through an open tender process, which would allow consultants to set their own fees.¹⁰³ We also recognise that any such framework would need to be developed in consultation with industry and community.

We also submit that there are further mechanisms and principles which could be implemented alongside any proposal for the independent appointment of consultants that would contribute to improving the integrity of environmental consultants. For example:

- ***Rejection of inadequate documents***

The new planning system should allow for the rejection of environmental impact assessments in circumstances where they are inadequate. We note that clause 51 of the EP&A Act Regulation allows a consent authority to reject a development application within 14 days if the application does not contain any information, or is not accompanied by any document, specified in Part 1 of Schedule 1 of the Regulation, or is not accompanied by an environmental impact statement (if required). This

¹⁰³ We also note that public interest exemptions can be sought from the ACCC regarding competition issues, if necessary. See, for example, *Competition and Consumer Act 2010* (Cth), Part VII (Authorisations, Notifications, and clearances in respect of restrictive trade practices).

clause is unclear however, as to whether a consent authority can reject an application that, despite including the necessary documentation, contains inadequate or inaccurate information.¹⁰⁴

We propose that consent authorities should be able to reject development applications that are accompanied by inadequate supporting documentation including inadequate environmental impact assessments (see also comments in response to Change 13).

▪ ***External auditing through peer review panel***

The new planning system could introduce strategic auditing and quality assurance processes through a peer review panel or a new government authority with the role of assessing the accuracy of environmental impact statements, species impact statements and assessments, as well as ensuring ongoing management conditions are complied with.

▪ ***Annual reporting***

The new planning system could introduce a requirement for the Minister for Planning and Infrastructure to table an annual report in parliament providing statistics and updates on environmental assessments and accuracy of EIA predictions over time.

▪ ***Strengthened penalties for proponents providing false and misleading information***

We also recommend that the new planning legislation strengthens penalties for proponents providing false and misleading information in seeking an approval or permit under the EP&A Act or integrated legislation.

The current Act makes it an offence for a person to:

- knowingly include false or misleading information in a report of monitoring data or an audit report produced to the Minister in connection with an environmental audit¹⁰⁵, and
- make any statement, knowing it to be false or misleading in an important respect, in or in connection with any document lodged with the Director-General or a consent authority or certifying authority for the purposes of EP&A Act or Regulation.¹⁰⁶

We submit that limiting the offence to 'knowingly false or misleading' statements is a barrier to effective enforcement, due to the difficulties involved in proving the offence. To the best of our knowledge there have been no prosecutions under these sections. We would support strengthening penalties for inaccurate information beyond 'knowingly false or misleading'. Offences should apply to negligent or reckless material inaccuracies.

There is precedent for this in the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.¹⁰⁷ Under section 489, a person is guilty of an offence if:

- (a) the person provides information in response to a requirement or request under Part 7, 8, 9, 13 or 13A;¹⁰⁸ and
- (b) the person is reckless as to whether the information is false or misleading in a material particular.

¹⁰⁴ We note that the *Local Development Performance Monitoring Report for 2010/2011* released by the Department of Planning and Infrastructure reports that only 0.9% of applications were rejected, while 37% of applications were referred back to applicants for further information, available at

<http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=29mGD0zKm9c%3d&tabid=74&language=en-AU>

¹⁰⁵ Section 122E of the *Environmental Planning and Assessment Act*

¹⁰⁶ See clause 283 of the *Environmental Planning and Assessment Regulation 2000*

¹⁰⁷ See sections 489, 490 and 491 of the EPBC Act

¹⁰⁸ Part 7 of the EPBC Act relates to deciding whether approval of actions is needed; Part 8 of the EPBC Act relates to assessing impacts of controlled actions; Part 9 of the EPBC Act relates to approval of actions; Part 13 of the EPBC Act relates to listing threatened species and communities; Part 13a relates to the international movement of wildlife specimens

Independent environmental assessment and offences for misleading and deceptive information will address the concerns of the community and stakeholders.

Seeking greater opportunities for integration in assessment

The Green Paper proposes to maintain the current level of integration in the state significant assessment process and look for additional opportunities to integrate other relevant State approvals.¹⁰⁹ It proposes that Government will bring together assessment expertise from different government agencies to work as a team in undertaking the assessment of major infrastructure and private sectors projects.¹¹⁰

In doing so, it is unclear whether the Government intends to adopt the recommendations of the Independent Panel to establish a system within the Department of Planning and Infrastructure to act as a central coordinating body for obtaining concurrences from other government departments and instrumentalities.¹¹¹

Our concern with the proposal in the Green Paper is that the assessment of those integrated aspects of the proposal will occur outside the framework set up by the environmental protection legislation. That is, unless the assessment requirements under the new planning system are the same as those set out in the environmental protection legislation there is a real risk that the impacts will not be properly assessed and that the development will not be subject to the same level of scrutiny as intended by those permits and approvals.¹¹²

If the Government really does intend to bring together the expertise of other agencies it should ensure that the level of assessment required matches that in the relevant environmental protection legislation. ***Please see further our comments in 1.2.9.***

CHANGE 13 – SMARTER AND TIMELY DEVELOPMENT ASSESSMENT

The Green Paper states that “(t)he NSW Government is proposing to speed up and improve development assessment by setting assessment timeframes, involving decision making Panels early, and providing applicants the opportunity to redesign their proposal prior to refusal”.¹¹³

As outlined in Part 1 of our submission, while there is a general recognition that development assessment processes need to be improved, this should not be at the expense of proper assessment of impacts and scrutiny of decisions.

The Green Paper quotes the Productivity Commission as saying:

*“Complaints regarding delays in obtaining planning approval ... have been a recurring theme among developer interests in [the Productivity Commission study]. Planning approval delays can lead to significant costs for business including increases in land holding costs, lost revenue, interest costs, higher input costs (on materials and labour) and contractual penalties for exceeding agreed delivery times ... In some cases, the likelihood of delays may even prevent certain projects from proceeding in some locations”.*¹¹⁴

¹⁰⁹ Green Paper, p 57

¹¹⁰ Green Paper, p 57

¹¹¹ See Recommendations 76-91 of the Independent Panel

¹¹² See for example section 45 of the Protection of the Environment Operations Act which sets out the matters to be taken into consideration for environmental protection licenses; see also clause 26 of the Water Management Regulation 2011 outlining matters affecting consideration for water approvals under the Water Management Act 2000

¹¹³ Green Paper, p 58

¹¹⁴ Green Paper p 58

We also note the Productivity Commission's comments that:

"...a combination of several benchmarks is often needed to reflect system performance. For example, while longer development approval times may seem to be less efficient, if they reflect more effective community engagement or integrated referrals, the end result may be greater community support and preferred overall outcome".¹¹⁵

In essence, fast approvals that deliver poor quality, high risk or unsustainable development are not in the public interest.

Our organisations agree that the new planning system should seek to improve the development assessment process in order to reduce unnecessary delay and inefficiency.

This does not mean, however, that fundamental aspects of development assessment should be removed. Genuine public participation, robust environmental assessment and concurrence from integrated approval agencies are all essential components of the development assessment process that must remain.

Improvements can however be made in other respects, for example:

- Consent authorities should be encouraged to reject inadequate development applications. Often, delays are caused because proponents have not provided all the necessary information or information provided is inadequate. This often leads to a 'back and forth' between the proponent and consent authority before all the necessary information is obtained. The new planning mechanism should contain a provision for the rejection of development applications, without appeal, on the basis that they fail to meet the requirements for lodging a development application and are therefore inadequate. This should be distinguished from a decision not to grant development consent, which would give rights of appeal to the Land and Environment Court.
- Consent authorities can be better resourced. If there is a genuine commitment to reducing assessment times, then resources should be directed to consent authorities to assist in achieving this.
- Decision making processes can incorporate more objective decision making criteria that can be supported by efficient online tools. ***See further our comments in section 1.2.8 above.***

CHANGE 14 – INCREASING THE USE OF CODE COMPLYING ASSESSMENT

Our organisations do not support the Government's proposal to increase the use of code complying development. The proposal has the potential to exclude a greater number of developments from the scrutiny of proper assessment, community participation and third party appeal rights.

According to the Green Paper, the expansion of code complying development will extend to new industrial buildings on industrial land, additions to existing commercial buildings, townhouses, terrace housing and villas.¹¹⁶

The Government's proposal to increase the use of complying development is concerning because:

- It is inappropriate to remove community consultation processes and appeal rights for potentially a large percentage of development applications. This is inconsistent with commitments in the *NSW 2021 State Plan* to increase opportunities for people to look after their own neighbourhoods and environments (Goal 23) and restore confidence and integrity in the planning system (Goal 29).

¹¹⁵ Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (April 2011), Vol. 1, p xxviii.

¹¹⁶ Green Paper p 61

- The use of a uniform code for complying development across the State can be problematic, as local government areas in NSW vary greatly in terms of their locality, diversity, social pressures and environmental sensitivity. It is therefore not always appropriate to define exempt and complying development in a uniform manner across NSW. Some developments which may be considered 'minor' in a highly developed urban area may have significant impacts in areas of environmental sensitivity such as waterways, lakes, coastal, forest, heath, woodlands and wetlands.
- The types of development to which the expanded codes would apply, including industrial development on industrial land, cannot be said to be low risk, low impact. For example, the Green Paper proposes that, in certain circumstances, an industrial building may be approved in ten days, with no formal environmental assessment and no public participation.
- Code bases assessment does not provide a mechanism for assessing the cumulative impacts of a myriad of 'minor' developments, which, when considered in isolation, have minimal environmental impacts, but when considered on the whole, lead to "death by a thousand cuts".

Given the potential impacts of development on the environment and on communities, only very minor development should be identified as code complying development under the new planning system.

With respect to proposals for partially complying development set out under Change 14, we submit that there needs to be mechanisms for transparency and community involvement, including legislated rights for public participation and third party merits appeal rights for third party objectors. To this end we refer to Recommendation 16 of the Independent Commission Against Corruption report *Anti-corruption safeguards and the NSW planning system*.¹¹⁷

CHANGE 15 – RIGHT OF REVIEW FOR REZONINGS AND MERIT APPEALS

As outlined in Part 1 of our submission, our organisations are concerned with proposals that facilitate development that is contrary to strategic planning and which provide increased rights of appeal to developers without providing equivalent rights to the community.

In general, the proposals relating to developer initiated rezoning proposals set out in Change 15 of the Green Paper are not supported by our organisations.

As outlined in our May submission to the draft policy statement *'More local, more accountable plan making'*, there is significant community concern over proponent initiated spot rezoning proposals and whether there is any public benefit associated with them. Spot rezoning has the potential to undermine strategic planning processes. If strategic planning is done properly then there should be little need for rezoning to take place between periodic reviews of local land use plans.

Our organisations do not support the proposal to introduce review rights for proponents in circumstances where council determines not to proceed with a rezoning proposal (pre-gateway review rights). This proposal not only continues to support proponent initiated rezoning proposals but adds another layer to an already complicated process. We do not support 'gate-way review rights' for the same reason. The public benefit of introducing such review rights is unclear.

The proposed policy changes do little to restore confidence and integrity in the planning system. We would recommend that any proposed amendment to a planning instrument be required to go through an assessment, consultation and approval process that is at least as rigorous as the process for developing the principle instrument, to dissuade proponents from 'unpicking' the outcomes of a strategic planning process.

¹¹⁷ Above no.48

INFRASTRUCTURE PLANNING AND COORDINATION

CHANGE 16 – CONTESTABLE INFRASTRUCTURE PROVISIONS

CHANGE 17 – GROWTH INFRASTRUCTURE PLANS

CHANGE 18 – INFRASTRUCTURE CONTRIBUTIONS

CHANGE 19 - PUBLIC PRIORITY INFRASTRUCTURE

In general, we support efforts to better integrate the delivery of infrastructure in the planning system. We see this as an important component of the overall efforts towards a whole of Government approach to planning.

While this chapter of the Green Paper has not been a focus for our organisations we emphasise our general concerns outlined in Part 1 of this submission with the need to improve certainty and transparency within the system and set outcomes based objectives for decision making processes. These concerns apply to provisions relating to infrastructure, in particular provisions relating to State Significant Infrastructure.

Additionally, we submit that:

- The new planning system should recognise the value of ‘green infrastructure’. Green infrastructure includes the parks, gardens, waterways, trees, cycleways and biodiversity corridors that make our communities more liveable, valuable, healthy, connected and climate change-ready.¹¹⁸
- The Green Paper signals an expedited approvals process for projects that are deemed to be ‘public priority infrastructure’. While we recognise that NSW faces significant infrastructure challenges now and into the coming decades the new planning system must recognise these types of projects can have significant environmental and social impacts, just as private projects do. It is therefore important that the new planning system provides a framework for assessing public priority infrastructure projects that provides for community engagement and the proper assessment of environmental impacts. Such a framework would need to include mechanisms for managing any conflicts of interest in the approval process for public priority infrastructure.

DELIVERING A NEW PLANNING SYSTEM

CHANGE 20 – CHIEF EXECUTIVE OFFICERS GROUP

The Green Paper states:

“The CEOs Group would need to ensure a whole of government integrated approach in planning making at the strategic level, and in particular, in coordinating the delivery of plans and associated infrastructure. In addition, in order to avoid duplication processes, the CEOs Group would need to ensure all agencies interest and requirements are addressed at the relevant strategic level so as to prevent concurrence and referral at the development application stage and increase certainty”.

¹¹⁸ For example, the Landscape Principles of the Australian Institute of Landscape Architects (AILA) provide a practical focus on the social, economic and environmental values of green infrastructure in increasing liveability of our cities and towns. AILA’s principles call for:

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

The Green Paper indicates that the CEOs Group will include the CEO/Director General of Department of Planning and Infrastructure, Department of Premier and Cabinet, Treasury, Transport for NSW, Department of Trade and Investment, Regional Infrastructure and Services and Infrastructure Australia.

Although our groups have advocated for a whole of Government approach to planning, we are hesitant about the Government's proposal to establish a CEOs Group.

In particular, we are concerned that:

- The CEO of the Office of Environment and Heritage is not listed. It is not enough that the Director General of Premier and Cabinet sits on the CEO Group. Given the important link between the environment and planning, and the Government's commitment to integrating environmental considerations and natural resource management much earlier in the planning system, it follows that the CEO of the Office of Environment and Heritage be included as a member of the CEO group.
- The CEOs group should not be seen as an appropriate replacement to the important concurrence role of Government agencies.
- No indication has been provided of how the group will operate, what decision making powers it will have, how it will be held accountable and transparent.

CHANGE 21 – REGIONAL PLANNING BOARDS

While improved collaboration between stakeholders is beneficial, the Green Paper does not provide sufficient detail on how Regional Planning Boards will operate.

Our organisations ask that the Government provides further information on:

- The process for appointing persons to regional boards,
- The functions to be exercised by regional boards,
- Processes for decision making and dispute resolution.

Of particular concern is the composition of regional planning boards. If these boards are to be truly independent, they should not include stakeholders with vested interests, including those that have a monetary interest in the outcomes of the process. Rather, these boards should be made up of people with relevant expertise, local government representatives, members of the public, members of environmental groups and other groups without direct interests.

CHANGE 22 – MANDATORY PERFORMANCE MONITORING

Our organisations support efforts to introduce mandatory performance monitoring. We strongly suggest that key performance indicators be entrenched in the new planning legislation, not simply in a performance monitoring guideline. Key performance indicators should include environmental and natural resource management outcomes. The new planning system should include outcomes based objectives that underpin the strategic planning framework. This is discussed further in section 1.2.2 above.

CHANGE 23 – PLANNING CULTURE

Cultural change within the planning system requires substantial commitment and resources from Government. In section 1.3.1, we have already highlighted the substantial amount of resources required to implement proposals to improve community engagement in the planning system. The same can be said for

proposals to deliver cultural change among planners. Proper implementation requires substantial commitment and resources from Government.

Next generation planners should be required to understand more than just *“integration of infrastructure and land use, and... economics and growth management”*. In light of the environmental and social challenges facing communities in NSW, planners must have a strong understanding of the principles of ESD and mechanisms for managing the environmental impacts of development including, for example, mechanisms for managing and adapting to the impacts of climate change, mechanisms for assessing cumulative impacts, green infrastructure and planning for liveable cities.

ANNEXURE 1



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The Hon. Brad Hazzard MP
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8 August 2012

Dear Minister Hazzard,

Re: Clarification on certain aspects of the *Green Paper – A new planning system for NSW*

We refer to the *Green Paper – A new planning system for NSW* released on 14 July 2012.

Additionally, our organisations would like to recognise the extensive work of the Independent Planning System Review (**Independent Panel**) in delivering its final two volume report *The Way Ahead for Planning in NSW*. This report is the culmination of widespread community and stakeholder engagement and has led to 374 recommendations for a new planning system in NSW.

We are generally concerned that while the development sector has achieved improved specific rights in the Green Paper, the environment and community rights are left largely to generalities.

It is our understanding that the *Green Paper* is intended to outline the Government's broad vision for a new planning system in NSW, and that further detail has been deferred until the White Paper. It is hoped that the Government will provide a further, structured response to the recommendations of the Independent Panel as it moves towards developing the White Paper and draft legislation; rather than ignoring key proposals.

At this stage however, our organisations would like to seek further clarification on certain aspects of the Green Paper, as outlined below.

Commitment to ecologically sustainable development and protection of the environment

1. Page 17 of the Green Paper indicates that the achievement of sustainable development will remain the main object of the Act.
 - a. Is it intended to adopt Recommendation 6 (Volume 1) of the Independent Panel?
 - b. Will the definition of ecologically sustainable development, as set out in the section 6(2) of the *Protection of the Environment Administration Act 1991* be retained in the new planning system? We would be very concerned if its omission heralds the broader removal of ESD from legislation.

2. Strategic Planning:
 - a. How will the Government ensure that environmental considerations are properly considered during the strategic planning process?
 - b. Does Government intend to give effect to Recommendation 8 (Volume 1) of the Independent Panel, with respect to the proposed objects for strategic planning?
 - c. Will Regional Conservation Plans and Catchment Action Plans be required to be considered as part of the strategic planning process?
3. Merit Assessment:
 - a. What environmental factors will be required to be considered as part of the merit assessment of development applications?
 - b. Does the Government intend to adopt Recommendations 71, 72 and 73 (Volume 1) of the Independent Panel in relation to matters for consideration as part of merit assessment?
 - c. Will the public interest remain as a matter for consideration in merit assessments, as recommended by the Independent Panel?

Public Participation Charter

4. Does the Government intend to adopt the proposed *Public Participation Charter* recommended in the joint report *Our Environment, Our Communities* authored by the Nature Conservation Council of NSW, Total Environment Centre and EDO NSW?
5. If not, what is the process for finalising the content, and mechanisms for enforcing, the Public Participation Charter proposed by Government?
6. How does Government intend to resource the proposed changes to public participation processes in the new planning system?

Proposed planning instruments – NSW Planning Policies, Regional Growth Plans, Subregional Delivery Plans and Local Land Use Plans

7. What will be the process for developing NSW Planning Policies and how will the Government ensure that existing environment protections set out in State Environmental Planning Policies, and policies such as the *NSW Coastal Policy* are retained in the new planning system?
8. Why are Regional Plans seemingly restricted to “growth”? Is it intended that Regional Growth Plans will address other matters, including, for example:
 - protection and maintenance of coastal and rural environments and landscapes,
 - the social and cultural character of communities,
 - industries including agriculture and tourism, and
 - natural hazards such as floods and bushfire?
9. If planning instruments proposed under the new planning system are not to be given statutory weight, how is the Government going to ensure that the outcomes of those policies are achieved?

State Significant Proposals

10. Page 63 of the Green Paper proposes the introduction of State Planning Principles, to be considered in the assessment of state significant proposals.
 - a. Are these State Planning Principles separate to the suite of planning instruments proposed?
 - b. What will be the process for developing State Planning Principles, and what will be the mechanism for enforcing compliance with State Planning Principles?
11. How are State Significant Proposals to be defined given that the current definitions are related to either cost or particular sites (generally metropolitan), rather than environmental/cultural values and sensitivity and impacts?

Designated development

12. How will development currently identified in Schedule 3 of the *Environment Planning and Assessment Regulation 2000* (designated development) be dealt with under the new planning system?

Merits Appeal Rights

Despite the repeal of Part 3A in 2011, merits appeal rights for state significant development remain limited. Objector merits appeal rights are not available in the case of critical infrastructure proposals, proposals that have been to public hearing as part of a PAC review and proposals that would not have otherwise been designated development.

13. The Government indicates that appeal rights to the Land and Environment Court will be maintained. Is it the Government's intention to remove the restrictions to merits appeal rights for state significant development (essentially reinstating appeal rights as they existed prior to Part 3A)?

Representatives of environmental groups on Regional Planning Boards

14. What will be the process for appointing representatives of environmental groups to Regional Planning Boards?
15. Will representatives of environmental groups be permanent members of Regional Planning Boards?
16. What, if any, decision making powers will be given to Regional Planning Boards?

CEO's Group

17. Given the integral relationship between strategic planning and development assessment and environment conservation and natural resource management, why is the CEO of the Office of Environment and Heritage not included as a member of the CEO's group?

Transitional arrangements

18. Apart from strategic compliance certificates, what transitional arrangements will be put in place during the transition to a new planning system?

We look forward to your response in relation to these matters.

We would also like to take this opportunity to confirm our interest in being involved in the development of the White Paper and draft legislation.

Of particular importance is the process by which environmental protections are developed in the White Paper and draft legislation. We hope to work closely with Government to ensure that as we move forward in this reform process, the Government's commitment to protecting the environment and ecologically sustainable development are realised in robust legislative provisions.

Yours sincerely,

Pepe Clarke
Chief Executive Officer
Nature Conservation Council

Jeff Angel
Director
Total Environment Centre

CC:
Mr Sam Haddad
Director General
Department of Planning and Infrastructure