

The State of Planning in NSW

With reference to social and environmental impacts and public participation



RECOMMENDATIONS FOR REFORM



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With reference to social and environmental impacts and public participation

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This Report was commissioned by the NSW Nature Conservation Council (NCC)
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This report prepared by the Environmental Defender's Office NSW (EDO).



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Executive Summary

The planning system in New South Wales is at a crossroads.

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

Since 1979, these principles have been buried under layers of incremental amendment resulting in substantial change.

In 2010, while efforts have been made to make the planning system in NSW more consistent (for example, standard Local Environment Plan) and more strategic (for example, Regional Strategies), it is once more become complex and highly politicised, disconnected from local communities, and resulting in poor environmental outcomes.

It is time for an overhaul of our planning laws.

This Report draws on the recently released *Reconnecting the Community with the Planning System Report*, which was based on feedback from over 120 community members across NSW, representing 40 different organisations. The feedback received, reflecting a general community sentiment, almost unanimously called for better, more transparent planning laws that base decisions on the principles of ecologically sustainable development (ESD). Two crucial elements of this are broad-ranging community consultation and comprehensive environmental assessment of all proposed developments, projects and activities. This consultation project revealed a serious disconnect between how local communities want planning laws to work and how the NSW Government sees the role of planning law.

Recent reports on the current 'state of planning' produced by the NSW Government only tell part of the story. Reports on planning reforms – such as the Major Development Monitor - have tended to focus on the numbers (such as the economic bottom-line of large developments, jobs created, the number of days taken to assess a development, or the percent of development types that can be streamlined) rather than a qualitative 'triple bottom line' assessment of the environmental and social impacts of decisions made and outcomes achieved. To prioritise the economic over the social and environmental impacts is clearly out of balance.

This Report attempts to tell the other half of the story – not just the numerical outcomes, but an assessment of the social and environmental impacts of the current system, and the adequacy of public participation. **Part One** involves an assessment of current planning tools (relating to both strategic planning and development assessment) in terms of whether the tools provide for the correct balance of considerations needed to achieve ESD, specifically

the provision for comprehensive community participation and environmental assessment, including climate change readiness.

Our analysis reveals a failure of the current system to balance social and environmental considerations against the Government's desired economic and statistical outcomes. This begs the question that we then explore in **Part Two** – can we fix the current Act? Based on the feedback from our workshops and surveys, our research into planning best practice, EDO experience in the Land & Environment Court and our legal advice line, we identified over 70 preliminary amendments that would be required to begin to restore the ESD balance and genuine public participation into current planning laws.

Is it worth trying to resuscitate the current legislation or would it be better to create a new best-practice planning Act? **Part Three** explores this issue and identifies the 10 key elements that must be addressed in new planning legislation to restore the balance and achieve ESD.

The 10 key elements of a new Act are:

1. A focus on strategic planning
2. Implementing ecologically sustainable development
3. Improving the objectivity, credibility and cumulative impact review of the environmental impact assessment process
4. Genuine, appropriate and timely public participation
5. Transparency and accountability for major public projects
6. Recognising the pre-eminent role of the Land & Environment Court
7. Applying a meaningful 'maintain or improve' test to key developments
8. Making planning law climate-ready
9. Ensuring integration with other environmental legislation
10. Regular review of the new Act

Part One: The state of planning in NSW

The Environmental Defender's Office of NSW (EDO) has worked on planning and development law in NSW for the last 25 years. The office was specifically created to perform this function after the passage of the *Environmental Planning & Assessment Act 1979* (EP&A Act) and *Land & Environment Court Act 1979* (LEC Act). The Total Environment Centre (TEC) and the Nature Conservation Council of NSW (NCC) have, since their inception several decades ago, been concerned with protecting public participation, environmental impact assessment and the implementation of ecologically sustainable development. Given the lack of public confidence in the planning system that has built up over the last ten years as governments frequently amended the law and displayed a bias to changes advocated by developers and implemented fast tracking, TEC and NCC commissioned the EDO to review the state of planning and recommend legislation more suited to 21st century challenges.

Planning law prior to 1979 was noted for "its failure to give members of the public any meaningful opportunity to participate in planning decision making."¹ As summarized by Lipman and Stokes:

*Before the commencement of the EPA Act 1979, environmental land-use planning in New South Wales was characterised by strong technocratic influences, with strategic land-use planning dominated by central government, assisted by technical experts. Ordinary citizens had few opportunities to be involved in the planning system or to have a role in the assessment of development proposals. The introduction of the EPA Act in 1979 heralded a new direction in environmental land-use planning which emphasised environmental protection, power sharing between State and local government and public participation.*²

Indeed, it was recognised by the then NSW Planning Department during planning reviews in the 1970s that the planning system must not only provide information to the public, but that the system should allow the community's needs and aspirations to be reflected in planning proposals, and that public involvement should not only be about informing people but also allowing their views to shape plans.³

Post-1979 it was envisaged that the groundbreaking new planning legislation and the establishment of a specialist court would cement the role of the public in planning. However, since 1979 the EP& A Act has been constantly amended, with the most significant changes occurring in the last 5 years. Recent reforms have focused on streamlining assessment processes for major projects, standardizing local planning, decreasing assessment requirements and timelines by expanding categories of exempt and complying development, establishing new decision-making bodies, and concentrating planning power and discretion

¹ 1979, NSW Legislative Assembly, Second Reading Speech of *Environmental Planning and Assessment Bill*, Haigh, Minister for Corrective Services. NSW Parliament.

² Zada Lipman & Robert Stokes (2008), "The technocrat is back: Environmental land-use planning reform in New South Wales" 25 EPLJ 305.

³ Minister for Planning and Environment, 1974, *Towards a New Planning System for New South Wales: First Report* Nov at 22.

in the Minister for Planning and Director General regarding major projects. While these reforms sound practical in terms of efficiency and planning system through-put, they have had significant negative ramifications for local communities and the environment, and represent a significant departure from the goals of the original 1979 EP&A Act.

Case study: EDO community inquiry statistics in 2010

For the last 25 years the EDO has been involved in advising on, and where necessary, running legal challenges on behalf of community groups concerned about local development, and analyzing the need for planning law reform. Responding to community concerns about the planning system constitutes the lion's share of EDO work.

In 2010, the EDO community legal advice line has received:

- 812 total phone inquiries to date;
- 559 of these related to planning issues (including local government, merits advice, judicial review, civil enforcement), 35 to mining and 46 to public land management (both mining and public land management are essentially planning inquiries);
- Planning constitutes 69% of all inquiries. If mining is included this goes up to 73%. If public land management is included the figure is 79%;
- In comparison, the EDO received 45 biodiversity inquiries in same period (5%), 22 water inquiries (3%), 15 forestry (2%); and
- Major recurring issues include Part 3A, Infrastructure SEPP, exempt and complying development and Councils/Department of Planning ignoring community issues such as social impacts and impacts on biodiversity/environment.

Based on the EDO's experiences, Part One of this Report assesses the current tools in the EP&A Act in terms of whether they are facilitating balanced decision-making in accordance with the principles of ESD, in particular, in relation to public participation and environmental assessment. We also assess whether the current Act needs updating by testing whether the current planning tools are climate ready. Along with public participation, this is a key indicator of whether the current law implements ESD.

Why is ESD our key criteria for assessment?

At an international level, Australia is signatory to several international conventions that are particularly relevant to implementing the principles of ecologically sustainable development.⁴ The concept of ESD was developed in response to a global realisation that rates of exploitation of natural resources are not environmentally sustainable. The overarching aim of ESD is to achieve a level of development that meets the needs of the present without compromising the ability of future generations to meet their own needs.⁵ In particular, the

⁴ In 1992, Australia endorsed the *Rio Declaration on Environment and Development*. The Declaration was essentially a worldwide commitment to sustainable development, which is a concept marrying economic development, social development and environmental protection - <http://www.worldsummit2002.org/> The Rio Declaration consisted of 27 principles intended to guide future sustainable development around the world <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>.

⁵ World Commission on Environment and Development, (1987) *Our Common Future* at 43.

concept of ESD attempts to make it clear that environmental impacts are no longer seen as separate from economic and social considerations.⁶ 178 nations, including Australia, also adopted *Agenda 21*- the international plan of action for sustainable development. One of *Agenda 21*'s key tenets is that broad public participation in policy development, combined with greater accountability, is essential to achieving sustainable development. This means that individuals, groups and organisations need to participate in environment and development decisions, particularly those which can affect their communities.⁷ In order to implement its commitments, the Australian Government negotiated with the states to develop the *National Strategy on Ecologically Sustainable Development*.⁸ The key emphasis of the strategy was to ensure that environmental, economic and social considerations are integrated into government decision-making. The Strategy made it clear that protecting biological diversity and maintaining ecological processes is a key element to achieving ESD and to satisfying Australia's international obligations. As a result of the national strategy, the NSW Government adopted ESD, which has now been incorporated into over 60 pieces of NSW legislation.⁹ As stated by Dovers¹⁰ and noted by Hawke¹¹ in the 10 year review of the Environmental Protection and Biodiversity Conservation (EPBC) Act, despite the challenges presented by the concept of ESD, there is "no other credible candidate for an integrative policy framework".

Our assessment focuses on the following areas:

1. Objects

2. Strategic Planning

State Plan

State Environmental Planning Policies

Regional Strategies

Local Environmental Plans

3. Development Assessment

Part 3A

Part 4

Part 5

4. Interaction with related environmental legislation

This Part analyses the current tools and identifies strengths and weaknesses. Recommendations for reform based on the analysis of each tool is summarized in **Part 3**.

⁶ For example, see: The 2002 *World Summit for Sustainable Development* and the *National Strategy for Ecologically Sustainable Development*, available at <http://www.environment.gov.au/esd/national/nsesd/index.html>.

⁷ http://www.un.org/esa/dsd/agenda21/res_agenda21_01.shtml

⁸ <http://www.environment.gov.au/about/esd/index.html>

⁹ Justice Paul Stein, (2000) 'Are decision-makers too cautious with the precautionary principle?' 17 *Environmental and Planning Law Journal* 3 at 22.

¹⁰ Dovers, S. (2008) 'Policy and Institutional Reforms', in D. Linenmayer, S. Dovers, M. Harriss Olson and S. Morton (Eds.), *Ten Commitments: Reshaping the Lucky Country's Environment*, at p. 216.

¹¹ Hawke, A. (2009) *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, Final Report*, October 2009.

1. Objects

Legislative objects have a critical role in defining the whole purpose of the Act and guiding implementation. The current objects of the EP&A Act are:¹²

- (a) to encourage:
 - (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,
 - (ii) the promotion and co-ordination of the orderly and economic use and development of land,
 - (iii) the protection, provision and co-ordination of communication and utility services,
 - (iv) the provision of land for public purposes,
 - (v) the provision and co-ordination of community services and facilities, and
 - (vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and
 - (vii) ecologically sustainable development, and
 - (viii) the provision and maintenance of affordable housing, and
- (b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and
- (c) to provide increased opportunity for public involvement and participation in environmental planning and assessment.

The objects of the Act, which have been added to over time, include some appropriate goals of a planning system, and were initially recognized as cutting edge in 1979. There are 2 main problems with the current objects. First, ESD is listed as one of the list of objects (section 5(a)(vii)) rather than as the overarching guiding principle. The current drafting means ESD is weighed up against other considerations and not prioritized. Second, the objects are not effectively implemented in practice and are therefore rendered meaningless.

Case study: *Minister for Planning v Walker*

HODGSON J in *Minister for Planning v Walker*¹³ held:

It would in my opinion be difficult to discern a legislative intention that decisions by the Minister be void if the Minister had failed to take into account an object of the EPA Act which was not materially relevant to the decision in question... I think that the better view is that good decision-making would involve the Minister considering whether any of the objects of the EPA Act was relevant to the decision, and taking into account those that were considered relevant; 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.

¹² Section 5 *EP&A Act 1979*.

¹³ [2008] NSWCA 224 (24 September 2008) at 53 and 55.

OBJECTS SUMMARY: The strengths of the current objects include the specific references to ESD, protection of the environment and providing increased opportunity for public participation. However, the weakness of the current objects is that ESD is not the overarching objective, only one of a number of considerations; and that the objects are not currently operationalised in a meaningful way.

2. Strategic Planning

Strategic planning refers to tools designed to formulate overarching plans for regions. These plans are important because they set out the planning controls applicable to particular parts of the state, identify which areas are to be preserved and protected and which areas are open for future development. The main advantage of strategic planning is that it allows regions to be considered holistically, rather than in an ad hoc manner through individual development applications and spot rezonings. Strategic planning in NSW is primarily undertaken through environmental planning instruments (Local Environmental Plans and State Environmental Planning Policies) and regional strategies. This Part assesses:

- The NSW State Plan,
- State Environment Planning Policies,
- Regional Strategies, and
- Local Environmental Plans.

NSW State Plan

The NSW State Plan was first released in 2006 and revised in 2010. The State Plan is an overarching policy document setting out the goals that the NSW Government will work towards, and identifies priorities for government action. The plan focuses on 6 key areas of action: transport, supporting business and jobs, education, healthy communities, environment, stronger communities, keeping people safe and better government.¹⁴ The State Plan sets identifiable and measurable targets in all these areas.

The State Plan is not a legislative instrument. As such, there was no formalised **community consultation** process set down in legislation. However, community consultation on the plan was quite broad. In 2006, the State Plan was finalised after consultation with more than 3,500 groups and individuals who provided their views to the NSW Government. As part of the 2010 review process, extensive community consultation occurred, including:

- Community meetings held around NSW, hosted by the Premier and Ministers, and attended by 1,600 people representative of their community (including young families, Aboriginal community members and school students) and community leaders (including Local Government, business, and interest groups);
- A State Plan website visited by more than 2,000 people who were able to participate in independently moderated forums;

¹⁴ The NSW State Plan (Nov 2010 version) is available to download at:
<http://www.nsw.gov.au/sites/default/files/pdfs/chapters/State-plan-2010-web.pdf>.

- A Stakeholder Forum, hosted by the Premier and the 13 Directors-General, and attended by more than 100 of the State's peak groups; and
- Consultation with young people and women's groups.¹⁵

This provided an opportunity for a broad cross-section of the public to make submissions on the State Plan and allowed individuals to publicly voice their opinions on what the priorities in the plan should be. The NSW Government has committed to reviewing the State Plan every three years "to make sure the priorities remain relevant".¹⁶ This will presumably involve consultation with the public as has happened in 2006 and 2010.

As the State Plan involves identifying broad priorities and targets for NSW, it does not trigger specific **environmental assessment** processes, as this typically applies only when there is a specific proposed plan or development to be considered. Instead, the targets and actions in the State Plan are operationalised through specific legislation or programs outside the State Plan, and therefore successful implementation is dependent on related legislation - for example, threatened species legislation, *Coastal Protection Act 1979* and *Water Management Act 2000*. However, as discussed below currently the EP&A Act seems at odds with implementing the goals of certain related environmental legislation.

Case study: Native vegetation and the Seniors Living SEPP

In Chapter 5 of the State Plan, the NSW Government states "we put an end to broadscale land clearing, one of the greatest threats to our natural environment."¹⁷ This was done by introduction of the *Native Vegetation Act* (NV Act) in 2003. However, we note that not only is urban land clearing excluded from the Act, but other environmental planning instruments under the EP&A Act, specifically the Seniors Living SEPP.¹⁸ These exceptions oust the NV Act and allow clearing to continue.¹⁹ While planning legislation fails to address urban clearing and allows exemptions to the rural ban on broadscale clearing, it is unclear how state targets for maintaining certain vegetation and biodiversity (for example coastal ecosystems), will be achieved.

The State Plan sets as its overarching **climate change** target to reduce NSW's greenhouse gas emissions by 60 per cent by 2050, presumably in comparison to the year 2000 levels (recently omitting the previous 2020 target). To achieve this reduction as well as to allow NSW to adapt to unavoidable impacts, the State Plan contains 5 key actions to combat climate change:

¹⁵ Available at:

http://www.nsw.gov.au/sites/default/files/pdfs/chapters/State%20Plan_Foreword%20&%20Intro_WEB_0.pdf

¹⁶ *Ibid* at p7.

¹⁷ NSW State Plan, p41.

¹⁸ *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*.

¹⁹ See *Native Vegetation Act 2003* – Schedule 1 - 16 Land on which development for the purposes of seniors housing, and no other development, is carried out under *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* and for which a site compatibility certificate has been issued under that Policy.

- developing and implementing a detailed *NSW Climate Change Action Plan* which sets out our Climate Change priorities and programs over the next five years;
- making households, schools and businesses more sustainable through the \$700 million Climate Change Fund;²⁰
- helping communities and regions prepare for those predicted climate changes that cannot be prevented— including sea level rise, reduced rainfall, and increased temperature and storm frequency and intensity— through new research, information on regional climate change projections and new policies and programs;
- expanding sustainable transport options, including more public transport, cleaner vehicles and fuels and a new Bike Plan for NSW to make cycling a safer and easier option; and
- making Government agencies carbon neutral by 2020.

In addition, the State Plan proposed a new Clean Energy Strategy for NSW to develop renewable energy sources, energy efficiency measures (including the new Energy Savings Scheme), smart power transition grids and lower carbon transition fuels.²¹ This includes aiming to achieve 20% renewable energy consumption by 2020, implementing 4,000 GWh of annual electricity consumption savings through NSW energy efficiency programs by 2014 and increase participation in green skills training (TAFE and other publicly funded training) to 5% by 2013.²²

Whilst the State Plan contains desirable targets and outlines some robust measures that are critically needed to combat climate change, the success of the State Plan's climate change measures will depend on political will and the implementation of legislation and programs to implement the State Plan objectives. However, these measures are an indication of the NSW Government's intentions in this area, which is a welcome step forward.

STATE PLAN SUMMARY: The development of the State Plan provides one example of how broad community consultation can be conducted regarding strategic documents. The State Plan also has laudable targets (such as a 60% cut in greenhouse gas emissions by 2050, increased water recycling, increased renewable energy use) and it is important to have statewide strategic documents addressing economic social and environmental goals together. However, the likely success in achieving the targets and implementing a balanced ESD vision for the State will depend on political will and the efficacy of related legislation.

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

²¹ See State Plan at:

http://www.nsw.gov.au/sites/default/files/pdfs/chapters/5.%20Green%20State_WEB.pdf

²² See State Plan at:

http://www.nsw.gov.au/sites/default/files/pdfs/chapters/NSW%20State%20Plan_Targets%20&%20Measures.pdf

State Environmental Planning Policies

There are currently about 40 State Environmental Planning Policies (SEPPs)²³ in NSW designed to address environmental planning issues of state significance. SEPPs vary considerably in their scope and function, but are an important part of the planning system, as they usually override LEPs.

There is no formalised **public participation** process for the making of SEPPs. However, the Minister may publicise an explanation of the intended effect of a proposed SEPP and may seek and consider submissions from the public.²⁴

No specific **environmental assessment** is required for the making of SEPPs. This is because SEPPs are not generally project specific, but impose standards that will apply across the state or to certain types of development and/or in certain locations. There are however special consultation procedures concerning threatened species. If threatened species, populations, ecological communities or their habitats will or may be adversely affected by the SEPP, then the Director-General of the Department of Planning must consult with the Director-General of the Department of Environment, Climate Change and Water (DECCW).²⁵ We note that consultation does not mean concurrence.

However, SEPPs of course have significant implications for levels of environmental assessment undertaken regarding relevant projects. For example, the Major Projects SEPP refer projects for assessment under Part 3A. Problems with environmental assessment under Part 3A are discussed below.

In making a SEPP, the Minister for Planning does not have to consider the effects that the SEPP will have on **climate change** issues. For example, the *State Environmental Planning Policy No 70 – Affordable Housing* does not require affordable housing to minimise emissions. In contrast, it allows for higher densities for low cost housing which are likely to increase emissions. Likewise, policies such as the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* do not encourage sustainable and low emissions seniors living as such SEPPs relax many of the standards for other development.

There is also confusion about when certain SEPPs apply in different situations. It is also not clear whether certain SEPPs actually add value to the planning system – some examples are outlined below.

²³ A State Environmental Planning Policy (SEPP) is an environmental planning instrument which addresses environmental planning issues of state significance. A SEPP may address any matter that, in the opinion of the Planning Minister, is of State or regional environmental planning significance. SEPPs vary considerably in their scope and function. Some SEPPs prohibit certain types of development in LGAs, some make the Minister for Planning consent authority for certain types of high-impact development or development in sensitive areas, others relate to specific issues such as Coastal Wetlands, Development Standards and Seniors Living.

²⁴ Section 38, *EPA Act*.

²⁵ Section 34A, *EPA Act*.

State Environmental Planning Policy (Infrastructure) 2007 (Infrastructure SEPP)

The EDO has received numerous calls from members of the public concerned about the Infrastructure SEPP. In the EDO's experience there is widespread confusion among the community, practitioners and public authorities regarding the scope and applicability of the Infrastructure SEPP. Two significant problems with the application of the SEPP are first, public authorities relying on the SEPP where it in fact does not apply, and second, public authorities failing to conduct a Part 5 assessment under the EP&A Act or obtain approvals under other legislation where development consent is not required under the SEPP.

In our view, part of the confusion surrounding the SEPP stems from the fact that it adds significant complexity to an already multi-layered and complex planning system in NSW that operates on many levels. For example, development conducted by public authorities for the purposes of infrastructure can be authorised or occur under the following regimes:

- Infrastructure SEPP
- Part 3A, EP&A Act
- Part 4, EP&A Act
- Part 5, EP&A Act
- *National Building and Jobs Plan (State Infrastructure Delivery) Act 2009* (NSW)
- Approvals under other environmental legislation

These regimes have differing environmental assessment and community consultation requirements. Some, such as the *National Building and Jobs Plan (State Infrastructure Delivery) Act 2009*, provide no guarantee of any environmental assessment or community consultation. It is therefore very difficult for the public and practitioners to determine whether the Infrastructure SEPP applies, whether consent is in fact required under the SEPP, what notification requirements exist, what other provisions of the EP&A Act apply and what the scope of any environmental assessment will be. This has led to disillusionment among the community and a perception that there is no transparency or accountability in relation to development by public authorities.

Case study 1 - Department of Education and Training

The EDO is aware of a development that occurred within a school purportedly under the Infrastructure SEPP. The school built a common room for students within a conservation area, which was in breach of an existing condition of consent that required rejuvenation of the conservation area. The Department of Education and Training argued that the Infrastructure SEPP allowed them to override this condition of consent. However, there were two clear problems with this argument. Firstly, the common room was not actually permitted without consent under the Infrastructure SEPP. The Department of Education and Training argued that the common room fell within the definition of 'classroom' even though no teaching would be occurring in the common room. Second, even if the development was development permitted without consent, no Part 5 assessment or any other environmental assessment was done as required. The building of the common room impacted negatively on an area set aside to allow for rejuvenation of an endangered ecological community. The council would not take action to enforce the breach of the condition of consent requiring rejuvenation as it stated that the development was a state

government matter because it occurred pursuant to the SEPP. The EDO informed the council that the SEPP did not actually apply. However, the council still refused to take action. The Department of Education and Training has now acknowledged that it breached the requirements of the EP&A Act (including a failure to notify neighbours for 21 days). They have advised the EDO that they are preparing a retrospective Review of Environmental Factors (REF). However, the REF will be effectively meaningless in light of the fact that the development has already occurred and environmental damage has already occurred.

Case study 2 - Newcastle City Council

Newcastle City Council recently proposed a significant expansion of a skate ramp in Empire Park, a public reserve in Newcastle. The council claimed that the expansion fell under exempt development in the Infrastructure SEPP and as such, no assessment would be conducted under Part 4 or Part 5 of the EP&A Act. Under the Infrastructure SEPP, exempt development in public reserves includes the construction of “sporting facilities, including goal posts, sight screens and fences, if the visual impact of the development on surrounding land uses is minimal” and “play equipment where adequate safety provisions (including soft landing surfaces) are provided, but only if any structure is at least 1.2m away from any fence”. In the EDO’s view, the expansion of a skate ramp does not fall within either of these categories. “Sporting facilities” under the SEPP is intended to refer to minor development associated with sporting ovals. Play equipment is limited to play equipment for children with strict specifications. A more accurate interpretation is that the development may fall under development permitted without consent in Clause 65. That clause stipulates that local councils do not require consent for development on a public reserve for the construction of “outdoor recreational activities”. The skate ramp might be construed as such. If not, then consent under Part 4 is required. The effect of the incorrect characterisation of the skate park as “exempt development” is that neither consent under Part 4 nor assessment under Part 5 (for development permitted without consent) will be required by council.

In addition to needing clarification on *what* projects SEPPs apply to, the value of SEPPs may also be questioned due to confusion about *when* they apply. In a recent case,²⁶ Preston CJ of the Land and Environment Court found that SEPPs do not apply to the beginning and end of a project, that is, they only apply to the carrying out of a project but not the approval of a project. SEPPs should be explicit about when they apply to avoid confusion and inconsistent application.

SEPPs SUMMARY: SEPPs can be useful tools to set statewide standards and have been used effectively to introduce interim emergency environmental protection (for example, SEPP 46 introduced native vegetation clearing controls prior to the *Native Vegetation Conservation Act* being passed in 1997). However, recent reforms, such as the subsuming of previous SEPP provisions into the Major Projects SEPP (for example SEPP 71 safeguards), means a new breed of SEPP is overriding previous protections and channeling more development to Part 3A. In addition, confusion about the application of SEPPs is of increasing concern. The more recent SEPPs, for example, those designed to fast track infrastructure projects, arguably do not

²⁶ *Rivers SOS Inc v Minister for Planning* [2009] NSWLEC 213.

implement a balanced approach to ESD, instead prioritise economic values over social and environmental considerations.

Regional strategies

Regional Strategies are strategic policy documents that set out a 25-year plan for future land use of a region and provide for environmental, housing and infrastructure needs. They are overarching strategic documents that implement relevant SEPPs and inform planning decisions, such as the creation of LEPs, land releases and development assessments. It has been noted that ESD discourse has generally been prominent in all meaningful place-based strategic documents in NSW for a number of years.²⁷ However, we note a concerning retreat from ESD discourse in recent strategies.²⁸

Case study: Sydney Metropolitan Strategy Discussion Paper *Sydney Towards 2036*

The recent Sydney Metropolitan Strategy Discussion Paper *Sydney Towards 2036* fails to focus on, or even refer to, the principles of ESD. As the EDO has previously stated in relation to the planning system as a whole, our view is that the Strategy should be centred on the principles of ESD to ensure that the equal integration of environmental, economic and social considerations is at the core of the Strategy. This is critical given that this document is intended to be the long term strategic vision for Sydney's future. While the Discussion Paper touches on the issues of climate change and the need to balance land use on the city fringe to protect agricultural land, we are concerned that the Strategy does not even refer to the need to ensure that Sydney manages its growth in line with the principles of ESD. Instead, it focuses heavily on increasing jobs and housing, without integrating principles of ESD throughout discussion of these issues.

Seven regional strategies have been finalised for the following regions: Lower Hunter, Far North Coast, Illawarra, South Coast, Central Coast, Sydney-Canberra Corridor, and Mid North Coast. It is unclear whether new regional strategies will be made in future.

Regional Strategies are not legally enforceable. However, councils are required to ensure that draft LEPs are consistent with the relevant Regional Strategy that applies to their local government area.²⁹ All planning proposals are required to be consistent with the applicable Regional Strategy, unless the Director-General is satisfied that the inconsistency is of minor significance and the overall intent of the Regional Strategy is still achieved.³⁰ However, the Minister can make a LEP that is inconsistent with a Regional Strategy and there is no right to

²⁷ Searle (2004) noted that ESD was a prominent discourse in both the 1994 Cities for the 21st Century metropolitan strategy and the 1999 Shaping our Cities metropolitan strategy. The 2004 City of Cities metropolitan strategy continues the ESD discourse with the Environment and Resources Strategy using sustainability references: Searle, G. (2004) 'Planning Discourses and Sydney's Recent Metropolitan Strategies', *Urban Policy and Research*, 22(4), pp: 367-391.

²⁸ *Submission on the Discussion Paper for the Metropolitan Strategy Review – Sydney Towards 2036* 30 April 2010 http://www.edo.org.au/edonsw/site/pdf/subs10/100430metro_strategy.pdf.

²⁹ This is as a result of a Ministerial direction under s117 of the EP&A Act issued 1 July 2009, at clause 5.1.

³⁰ *Ibid.*

appeal.³¹

Regional Strategies are therefore environmental planning documents setting out general NSW Government policy positions, rather than formal instruments. Unfortunately, the process for making Regional Strategies and **community consultation** is not set down in legislation. There are no standard departmental guidelines setting out the procedure for publicising and consulting the public on the Regional Strategies.

Draft Regional Strategies to date have been predominantly prepared by the staff from regional offices of the Department of Planning. It was thought that these staff members would know how to best consult with the local community and so each region devised its own strategy for consultation. While each region was left to devise its own exhibition and consultation methods, a number of standard principles guided the process. For example, each Draft Regional Strategy was:

- Exhibited for 6-8 weeks;
- Available on the Department of Planning's website;
- Available at local council offices; and
- Available at the regional offices of the Department of Planning.

However, although some of the initial consultation processes were quite comprehensive, there were significant concerns relating to the lack of consultation on the final agreed strategies.

Case study: Regional Strategy consultation processes

The final *Far North Coast Regional Strategy* was very different from the draft strategy and the community was not given an opportunity to comment on the amendments even though the final strategy included new greenfield sites open to development that were not foreshadowed in the initial draft. This was also an issue with the *Lower Hunter Regional Strategy* which was perceived by the community to have included sites inappropriate for development as a result of intense lobbying by Hardie Holdings and Rosecorp.

The most recent consultation on the Sydney Metropolitan Strategy Discussion paper (noted above³²) did benefit from independent expert facilitators running the consultation sessions, for example on sustainability and transport. While this was an improvement on previous Sydney-based strategic planning consultations which were invitation only and cost \$250,³³ unfortunately the feedback was edited in some sessions by Department of Planning staff. For example, in the session on public transport priorities, the discussion identified a range of priority actions. At the last minute, a senior departmental representative rearranged the top 3 issues to include a second airport even though no-one in the room had raised this.³⁴ This

³¹ Section 117 (2), EP&A Act.

³² For example, one session was held at Redfern Technology Park – 9th April 2010.

³³ The Department of Planning 'New ideas for Planning' forum on 14 August 2007.

³⁴ The recommendation for a second airport appears in the summary report (*Review of Sydney's Metropolitan Strategy and Metropolitan Transport Plan. Submissions Summary Report* 25 June 2010), even though it had not been mentioned by participants, but we note it may have been raised in other forums or submissions.

gave the impression that priority issues had already been predetermined by the Department, regardless of consultation feedback.

Since regional strategies are not statutory instruments, there are no standard **environmental assessment** processes in place. However, various environmental assessment documents and conservation plans have been released in conjunction with the regional strategies, although this has occurred in an ad hoc and disparate manner across the state.

There have been some clear problems with the timing of environmental assessments related to strategies. For example, the *Far North Coast Regional Strategy* was released several years before the *Far North Coast Conservation Strategy* which set out conservation priorities and goals for the area. Therefore, the final regional strategy was not based on a comprehensive assessment of the environment even though its goals affect the scope and extent of environmental protection.

While recognising the need to address **climate change**, the regional strategies made to date are largely silent on how to facilitate mitigation and adaptation action. The key focus of the strategies is on accommodating population and economic growth. This lack of guidance in regional strategies means that new development can occur without consideration of climate change issues.

Case study: Lower Hunter Regional Strategy

The *Lower Hunter Regional Strategy* allows new development in areas that were inappropriate in that the sites chosen for development will lead to significantly more greenhouse gas emissions than other sites. For example, the new Huntlee development near Branxton proposes to build a new Town Centre in an area that had poor to non-existent public transport, which would ensure car use would predominate, significantly increasing the future greenhouse gas emissions of its residents. The idea was to build a new centre where people could also find employment, which is an unproven strategy, particularly when there are existing regional centres nearby and no existing facilities. This was one of the reasons that the Huntlee site was rated the least appropriate for new development by the Department of Planning, but despite this it still appeared in the strategy as an area of growth.

REGIONAL STRATEGIES SUMMARY: Comprehensive and strategic regional planning is essential and should involve detailed and iterative consultation with local communities. The Regional strategy process to date has included some good examples of public consultation in the early stages, but concerns remain about links with conservation planning and influence of developer lobbyists on final versions. The lack of reference to ESD in the latest Sydney Metropolitan Strategy Discussion Paper is of concern.

Local Environmental Plans

All land, whether privately owned, leased or publicly owned, is generally subject to the controls set out in the applicable Local Environment Plan (LEP).³⁵ Traditionally, principal LEPs (those that cover a whole Local Government Area (LGA)) have tended to differ markedly, with each council creating its own zones, zone objectives and permissible uses for each zone. However, in 2005 the NSW Government changed the law to require the standardisation of LEPs using a Standard LEP.³⁶ The *Standard Instrument – Principal Local Environmental Plan* (Standard Instrument) is a template outlining the form and, to some extent, content that all LEPs must adopt. It contains mandatory provisions, as well as optional provisions that councils may adopt. All councils must use the standard instrument to prepare a new principal LEP for their LGAs by 2011. However, as at 2010, only a few local councils have finalised their LEPs in line with the standard instrument.

Public participation processes relating to the making of LEPs have changed significantly. Previously, all draft LEPs prepared by local councils were placed on public exhibition for a minimum of 28 days. Members of the public were able to acquire a copy of the draft LEP and make submissions to the local council on the draft plan and any local environmental study attached to the draft LEP (which could deal with matters such as environmental conservation, housing and social impacts). This consultation process was mandatory regardless of whether the draft LEP related to minor changes, spot rezonings or principal LEPs. As a result of the 2009 changes, the level of community consultation now differs according to the scale and complexity of proposed LEPs. This has been facilitated through the introduction of a ‘gateway’ system of plan-making. This process essentially involves an upfront assessment by the Minister for Planning of the suitability/viability of a proposed LEP (known as a ‘planning proposal’³⁷) prior to the plan being drafted or assessed.

³⁵ A Local Environmental Plan (LEP) is a legally-binding instrument that controls development in Local Government Areas (LGAs). LEPs restrict the form and location of new development, provide for the protection of environmentally sensitive areas and guide planning decisions for local government areas. An LEP allocates ‘zones’ to different parcels of land. Each zone has a number of objectives, which indicate the principal purpose of the land, such as agriculture, residential or industry. Each zone also lists which developments are permitted with consent, permitted without consent or prohibited. All land, whether privately owned, leased or publicly owned, is generally subject to the controls set out in the applicable LEP. LEPs can also be prepared for particular sites, for example to facilitate the re-zoning of a parcel of land to allow for development that would otherwise be permitted. LEPs are usually prepared by local councils but are ultimately made by the Minister for Planning. LEPs are made under Part 3 of the EP&A Act, which sets out the plan-making process that must be followed. The process for making LEPs (whether principal or otherwise) changed in 1 July 2009.

See Section 30-31, EP&A Act.

³⁶ This was done through the issuing of the *Standard Instrument (Local Environmental Plans) Order 2006* pursuant to section 33A of the EP&A Act.

³⁷ The planning proposal (which is not a draft LEP but merely a proposal to make one) is prepared by a regional planning authority (RPA). The RPA will usually be a local council but the Planning Minister can appoint the Director-General or a joint regional planning panel (JRPP) as the relevant planning authority in certain circumstances, including where the proposed instrument relates to a matter that, in the opinion of the Minister, is of State or regional environmental planning significance: Section 54, EP&A Act. The RPA must explain the intended effect of the proposed LEP and provide justification for the making of the LEP in the planning proposal. The proposal must contain 4 key parts; the objectives or intended outcomes, an explanation

If the Minister decides that the proposal should proceed, the Minister then decides:

- the level of community consultation required (if any);
- which State and Commonwealth authorities will be consulted;
- the necessity for a public hearing by the Planning Assessment Commission or other body; and
- the appropriate timeframes for the various stages of the proposal.³⁸

This means that the extent to which the community is consulted in relation to a planning proposal depends entirely on the opinion of the Minister for Planning.

The Minister can however prescribe ‘standard community consultation requirements’ in the Regulations.³⁹ If standard community consultation requirements are made the relevant planning authority (RPA) (usually the local Council) must consult the community in accordance with those requirements. No such requirements have yet been made. Instead, the Department of Planning has released guidelines outlining the recommended community consultation periods depending on the impact of the planning proposal. The guidelines stipulate that ‘low impact’ planning proposals should typically be exhibited for 14 days.⁴⁰ All other planning proposals will be exhibited for 28 days. However, these are just guidelines and have no statutory force. In the absence of these requirements, the extent to which the community is consulted depends entirely on the Minister’s opinion at the gateway.

The Minister may also make a determination at the gateway stage that *no* community consultation is required.⁴¹ There are two main concerns with this power. First, what is considered ‘minor’ will be a subjective determination that is entirely reliant on the Minister’s opinion, not pre-determined and objective criteria. Second, even if a plan is considered “minor”, community consultation should still be required to ensure that people who may be affected can have a say. What may appear ‘minor’ will in fact have significant consequences on particular people or areas. These impacts can only be determined *after* the community has been consulted.

Where the Minister has prescribed community consultation requirements, the planning

of provisions, justification for the plan and proposed community consultation to be undertaken by the RPA: Section 55, EP&A Act.

³⁸ Section 56, EP&A Act.

³⁹ Section 57, EP&A Act.

⁴⁰ Low impact planning proposals are defined as proposals that, in the opinion of the person making the gateway determination, are consistent with the pattern of surrounding land use zones, are consistent with the strategic planning framework, present no issues with regard to infrastructure servicing, are not principal LEPs, and do not reclassify public land. See:

http://www.planning.nsw.gov.au/lep/pdf/guide_preparing_local_environmental_plans.pdf

⁴¹ Under the amended section 73A, an amending LEP may be made without having to comply with any of the legislative requirements if *inter alia*, the Minister considers that the matters dealt with in the proposed instrument “will not have any significant adverse impact on the environment or adjoining land” (section 73A(c)). Section 73A was initially inserted into the Act in order to remove the need for community consultation where plans were amended to deal with simple drafting errors and spelling mistakes. This section has now been significantly broadened to allow the Minister the discretion to determine that no community consultation is required at the gateway stage for “minor” plans.

proposal must be made publicly available during the period of community consultation. Submissions are made to the RPA (usually the council). However, it is important to note that where the planning proposal is implementing the standard instrument, it is not possible to object to provisions that implement a mandatory provision of the standard instrument.⁴² Moreover, the RPA is not obliged to make the public submissions publicly available, although it may do so.⁴³ A person making a submission can request a public hearing on the issues raised in the submission.⁴⁴ The RPA may grant this request if it believes that the issues raised in the submission are of such significance that they should be the subject of a hearing. A report of the public hearing is to be given to the RPA but does not have to be made public. The RPA must consider any submission made in respect of the planning proposal and the report of any public hearing and can vary the planning proposal.⁴⁵ Further community consultation on the revised planning proposal is not mandatory and is at the Minister's discretion.

Following the gateway process, a draft LEP is prepared by Parliamentary Counsel's Office that reflects the planning proposal. This draft LEP is not subject to a community consultation and exhibition period. The Government's rationale is that the community has already been consulted at the gateway stage so there is no need for further consultation. This reasoning is flawed.

Although the engagement of the community at the strategic end of plan-making is a welcome development, a final LEP is qualitatively different from a planning proposal. An LEP is a legal document that sets the developmental blueprint for an area. It has the potential to significantly affect communities. Allowing the public to engage on the final LEP can also be of much value. The community and other stakeholders can bring to light unintended consequences of provisions, highlight inconsistencies between the final document and the planning proposal, or provide additional local data and perspective.

Regarding **environmental assessment** requirements for LEPs, prior to the recent changes, draft LEPs were to be accompanied by a local environmental study, however this varied in practice and many LEP variations were not accompanied by studies. Where there was a study, it involved an environmental assessment of the potential impacts of the proposed LEP. The local environmental study assessed issues such as environmental conservation, housing and suitable infrastructure development for industry. There was also a mandatory requirement to consult with state government agencies such as the Department of Environment, Climate Change and Water (DECCW).

As a result of the recent 2008-09 changes, the scope and extent of environmental assessment will now depend almost entirely on the Minister's discretion at the gateway. If a planning proposal proceeds through the gateway, the Minister determines the level of environmental assessment, whether any studies should be undertaken and the extent of consultation with

⁴² Section 57(3), EP&A Act.

⁴³ Section 57(4), EP&A Act.

⁴⁴ Section 57(5), EP&A Act. The RPA may also arrange a public hearing on any issue whether or not a person has made a submission concerning the matter.

⁴⁵ If the RPA does vary the planning proposal, it has to forward the revised planning proposal to the Minister.

public authorities.⁴⁶ The Minister will determine the level of assessment tailored to the individual plan commensurate with risk, scale and sensitivity. That is, the more complex a draft LEP is, the more rigorous the assessment and consultation process will be. Conversely, small and ‘minor’ plans will be subject to limited assessment. As above, the Minister can even determine that no environmental assessment is required where in the opinion of the Minister, the plan is not likely to have adverse impacts.

There are several key problems with the new ‘tailored’ approach. First, there are no specific criteria upon which the Minister makes a determination, meaning decision-making discretion is unfettered. Second, it is not possible to determine whether a proposed LEP is complex or significant *prior* to an environmental assessment being done. It is the process of environmental assessment itself that determines what the impacts of a plan are likely to be. Third, ‘minor’ plans do not necessarily have minimal environmental/social impacts, especially in environmentally sensitive areas and areas of high conservation value.

There is no longer a mandatory requirement for councils to generally consult with other agencies on proposed LEPs. The only essential consultation is a requirement for the RPA to consult with the Director-General of the DECCW if, in the opinion of the RPA, critical habitat or threatened species, populations or ecological communities or their habitats “will or may be adversely affected by the proposed instrument”.⁴⁷ As with community consultation, there is no consultation with government agencies on the final draft of an LEP where this has occurred at the gateway stage.

At present **climate change** is not required to be directly addressed in LEPs. Few LEPs even contain a passing reference to climate change issues either from a mitigation or adaptation perspective.

Case study: References to ‘climate change’ in LEPs.

In 2008, the EDO, in conjunction with the Sydney Coastal Councils Group (SCCG) conducted a legislative review to determine the extent to which climate change is incorporated into Australian legislation.⁴⁸ Specifically, the report examined federal, state (NSW) and local legislative instruments to identify instruments that contained the words ‘climate change’, ‘sea level rise’ and ‘greenhouse’ and then determined the responsibilities these references placed on local councils. Only five LEPs contained provisions that referred to climate change. No LEPs were found to contain appropriate mitigation provisions. That is, no LEPs codified strategies for reducing emissions from projects or required an in-depth assessment of emissions from a proposed development. The report found that the few times

⁴⁶ Section 56, EP&A Act.

⁴⁷ Section 34A, EP&A Act.

⁴⁸ NSW Environmental Defender’s Office, *Coastal Councils and Planning for Climate Change: An Assessment of Australian and NSW Legislation and Government Policy Provisions Relating to Climate Change Relevant to Regional and Metropolitan Coastal Councils* (2008). A copy of this report can be obtained from info@sydneycoastalcouncils.com.au.

⁴⁹ For example, under the *Standard Local Environment Plan*, which will apply across NSW, a council must recognise and accommodate coastal processes and climate change in its consideration of development in the coastal zone (Clause 5.5, *Standard Instrument – Principal Local Environmental Plan*). Specifically, a council can not

that climate change was referred to in LEPs was within aspirational objects clauses, which are not of themselves enforceable, or as matters for consideration which can be given minimal weight at the discretion of decision-makers.⁴⁹ The EDO's analysis found that the current approach is therefore ad hoc and predicated on aspirational provisions in objects clauses and matters for consideration, rather than on robust principles and clear legal requirements.⁵⁰

There are several impediments preventing councils from introducing robust climate change and other environmental provisions into their LEPs. The Standard Instrument, which is now mandatory for all LGAs, places some constraints on Councils by limiting the additional provisions that can be included in principal LEPs.⁵¹ Additional provisions may only be included if they are “not inconsistent” with the mandatory provisions. This clause ostensibly prevents local councils from including objectives in their zonings that are more restrictive than the Standard Instrument. The inability for councils to be flexible and develop appropriate standards for their area to deal with climate change will have significant ramifications for councils attempting to address climate change.

Case study: Standard Instrument

In the Byron Shire there has been a coastal planned retreat policy for several years. This policy, involves not allowing new permanent structures, and planning for the staged removal of existing buildings and other structures, in coastal areas likely to be inundated during peak events, with stricter controls the closer land is to the existing erosion impact line. It also includes a blanket prohibition for new development within the 20m coastal erosion area.⁵² However, it may not be possible for this policy to be incorporated into the new Byron Principal LEP, as it may conflict with the Standard Instrument, which does allow development in the coastal zone as long as certain matters are considered. The Standard LEP may therefore stifle innovative and proactive action by councils to address climate change.

It is not just innovative climate change provisions that may be inconsistent with the Standard Instrument, but broader environmental protections as well. The Blue Mountains Conservation Society is concerned that application of the Standard Instrument to the Blue Mountains LGA will actually lower development standards compared with the current locally-tailored instrument. In their opinion:

The Blue Mountains LEP 2005 is a “place-based” plan which reflects the complexity and sensitivity of the Blue Mountains environment. Converting it to the Standard Template, is highly likely to weaken the local

grant consent to a development unless it has considered, *inter alia*, the effect of coastal processes and coastal hazards, including sea level rise, on the development. However, this does not prevent development from being approved as long as councils can show sufficient consideration of potential climate change impacts.

⁵⁰ NSW Environmental Defender's Office, *Coastal Councils and Planning for Climate Change: An Assessment of Australian and NSW Legislation and Government Policy Provisions Relating to Climate Change Relevant to Regional and Metropolitan Coastal Councils* (2008). A copy of this report can be obtained by emailing info@sydneycoastalcouncils.com.au.

⁵¹ Clause 5, *Standard Instrument (Local Environmental Plans) Order 2006*.

⁵² Byron Shire Council, *Development Control Plan 2002, Part J – Coastal Erosion Lands*.

*provisions that protect and prevent the loss of areas of local or regional environmental significance. For example, many residential areas are covered by a subzone called Living Bushland Conversation which protects areas of environmental significance, while still enabling dwellings to be built in less sensitive parts. Subzones are no longer permitted in revised LEPs and it will be extremely difficult to find adequate zones to provide the same protection for bushland on large parts of a lot. The 'closest fit' from the Standard Template is likely to contain mandated uses that could result in inappropriate development in environmentally significant areas. A major concern is that land currently zoned for "Environmental Protection" will be degraded if any zone other than Environmental Protection (E2) is used. The Standard Template will also make it more difficult to protect areas such as scheduled vegetation communities through the use of protected overlays. The current LEP 2005 overlay clauses will be replaced with 'model' standardised and simplified clauses that will not adequately protect areas of environmental significance in this city within a World Heritage National Park.*⁵³

Many community members have also raised concerns about the Standard Instrument, including that it only requires "consideration" of objectives, and has optional clauses etc.

In terms of climate change mitigation there is nothing in individual LEPs or the Standard Instrument to encourage emissions reductions or climate friendly development. As mentioned above, the Standard Instrument does not enable local innovative planning solutions to climate change because the standard LEP removes the ability for councils to develop innovative local approaches. For example, a significant amount of current building is the demolition and rebuilding of existing homes. The building industry and the resource consumption involved in constantly building new houses from scratch significantly contributes to landfill, with the industry contributing 40% of landfill waste. The building industry also produces around 40% of emissions to the atmosphere.⁵⁴ The Standard Instrument does not address such issues and does not encourage retrofitting to re-use existing buildings as much as possible.

There are a range of other environmental issues that are not sufficiently addressed in LEPs such as: standard clauses to assist with solar access,⁵⁵ better building design, bushfire, and water use; although we note that natural resource management (NRM) provisions for LEPs are being developed to integrate NRM into local planning.

The operation of LEPs is also hindered and confused by the application of local Development Control Plans (DCPs)⁵⁶ to an area of land, over and above LEP requirements. This can be confusing where more than one DCP exists (although this is being streamlined

⁵³ Opinion provided to EDO by the BMCS 7th October 2010.

⁵⁴ See K. Clark, "Out with the new and in with the old houses", in the Sydney Morning Herald, 4 January 2010.

⁵⁵ See Adrian J Bradbrook, "Solar Access Law: 30 Years on" (2010) 27(1) *EPLJ* 5. In his review of solar access in NSW LEPs, Bradbrook found that while many LEPs had provisions to protect overshadowing, few were designed to clearly protect solar access for energy generation devices such as solar panels. Only some LEPs limited overshadowing at various parts of the day, and the *Sydney LEP 2005* sought to regulate overshadowing on a percentage basis. He contrasted this with the approach taken in the USA where some States has specific solar access property rights and legislative protections such as the *Solar Access Act* of 1981 in Wisconsin. He concluded that there was a need for law reform in this area.

⁵⁶ Development Control Plans are policy instruments which do not carry direct statutory force. Development Control Plans are intended to elaborate the provisions of Local Environmental Plans.

to ensure only 1 DCP applies to a site).

LEPs SUMMARY: While there are benefits from having standard zone names (especially in neighbouring LGAs), there are concerns about standardization of LEPs lowering existing protections and inadequate integration with Natural Resource Management (NRM), climate change, air and water quality considerations. Many concerns have been raised over the 'gateway' process. In order to better implement ESD (particularly regarding social and environmental impacts), there is a need to reinstate LEPs as thorough community-informed processes where local councils can make requirements specific to their area and impose mandatory locally specific ESD objectives.

3. Development Assessment

There has been a trend since 2004 of reform proposals for streamlining development assessment processes, cutting 'red tape', reducing the regulatory burden on business and improving the efficiency and expediency of planning processes. This trend can be clearly linked to industry lobbying. It has also stemmed from discussions at the Council of Australian Governments (COAG) level, findings by the Productivity Commission and provision by the Commonwealth Government of 'urgent' infrastructure stimulus funding through the *Nation Building and Jobs Plan* that is tied to strict timeframes for delivery.⁵⁷

As a result, the planning regime in NSW has been significantly amended to 'speed up' and 'simplify' development assessment processes, and reduce perceived bureaucratic hurdles to development. This has led to a privileging of economic considerations and developer certainty, which has come at the expense of community consultation and comprehensive environmental assessment. It has been noted that, rather than aiming to strengthen the role of ESD in decision-making, recent trends in planning reform both in Australia and overseas appear to prioritise short term economic growth while reducing environmental concerns to secondary considerations.⁵⁸ Commentators have argued that opportunities to better implement ESD have been missed, that there has been a reduction in the capacity of planning systems to properly deal with complex contemporary land use issues and that this has caused planning to deviate from its chosen paradigm.⁵⁹ This is particularly evident regarding assessment processes under Part 3A, as explored in the next section.

⁵⁷ For EDO responses to the COAG and Productivity Commission Discussion Papers, see: <http://www.edo.org.au/edonsw/site/policy.php#4>.

⁵⁸ Cowell, R. & Owens, S. (2006) 'Governing space: planning reform and the politics of sustainability', *Environment and Planning C: Government & Policy*, 24(3), pp: 403-421; Baird, M. (2008) 'Proposed Amendments to the Environmental Planning and Assessment Act 1979 (NSW)', *Local Government Law Journal*, 14, pp: 5-7; and Ghanem, R. (2008) 'Amendments to the NSW planning system – sidelining the community', *Local Government Law Journal*, 14, pp: 140-149.

⁵⁹ Gleeson, B. & Low, N. (2000) *Australian Urban Planning: New Challenges, New Agendas*, Allen and Unwin, St Leonards; Hamnett, S. (2000) 'The late 1990s: competitive versus sustainable cities', in S. Hamnett & R. Freestone (Eds.), *Australian Metropolis: A Planning History*, Mansell, London; and Williams A, (2010) *Ecologically sustainable development, planning reform and the role of planners: NSW – A case study*. Planning Dissertation, University of Sydney.

Part 3A

Part 3A projects are those projects that, in the opinion of the Planning Minister, are of “State or regional environmental planning significance”.⁶⁰ They are often large government infrastructure projects, such as roads, pipelines, desalination plants and dams, but also include private developments which range in size from minor subdivisions to major urban renewal projects.⁶¹ Part 3A projects are therefore the largest projects with the greatest potential social, economic and environmental impacts. Part 3A logically should therefore capture major public infrastructure projects and attract a higher level of scrutiny and assessment. EDO experience suggests this is not occurring and furthermore, the blurring of the line between public and private developments is problematic.

The main effect of Part 3A is that it removes major projects from assessment and approval under the Part 4 and Part 5 of the EP&A Act, and concentrates control of these projects in the Planning Minister. The Planning Minister is the consent authority for the vast majority of major projects and critical infrastructure.⁶² If a project has been declared a Part 3A project, the Minister can make an additional declaration that the project is also a ‘critical infrastructure project’ if the Minister is of the opinion that the project is essential for the State for economic, environmental or social reasons.⁶³ Projects which have been declared to be critical infrastructure projects include the Kurnell Desalination Plant and the Royal North Shore Hospital redevelopment site.⁶⁴

Case study – Part 3A reporting by the NSW Department of Planning⁶⁵

Up until October 2010, there have been approximately 260 Part 3A determinations, with 1 refusal (Bickham coal mine). There have only been 6 refusals in total since Part 3A commenced.⁶⁶

The Department of Planning “Major Development Monitor” for 2008-09 reports the following statistics:

- 121 projects determined – 119 approved, 2 refused (Currawong, Moruya East Village) – 98% approval rate;
- 9308 submissions made on projects;

⁶⁰Section 75B(2), *EPA Act*.

⁶¹ Section 75A, Section 75B(2), *EPA Act*. Development (or a category of development) can be declared to be subject to the Part 3A assessment process under a SEPP or a Ministerial Order of the Planning Minister. *SEPP (Major Development) 2005* states that Part 3A applies to developments that, in the opinion of the Minister, are of a kind described in Schedules 1, 2 or 3 or 5 of the SEPP.

⁶² The Planning Assessment Commission has been granted the role of determining project applications under Part 3A in some limited circumstances, including where the proposed project is in the Minister’s electorate or where political donations have been made. All major projects, which include a sub-category of critical infrastructure projects, are assessed and approved under Part 3A provisions.

⁶³ Section 75C, *EP&A Act*.

⁶⁴ *State Environmental Planning Policy –Major Developments*, cl. 6, 6A; Sch 5. There are others listed in the SEPP.

⁶⁵ See: http://majorprojects.planning.nsw.gov.au/index.pl?action=search&status_id=10&dyear=2010

⁶⁶ Stamford Plaza Double Bay, Somersby Quarry, coastal development in Cronulla, Bickham coal mine, Currawong, Moruya East Village.

- \$6 billion in concept plan approvals;
- \$10 billion in project plan approvals;
- 27,702 potential jobs from approved concept plans;
- 26,551 potential jobs from approved project applications;
- 12 critical infrastructure declarations; and
- 13 proposals were withdrawn prior to determination.

Capital investment value, construction jobs and operational jobs numbers are summarised in tables, including economic and job value of refused projects. The report states that the reason there are negligible refusals under Part 3A is because “inappropriate or poorly-explained proposals are regularly removed from the system before a final refusal is made”. However no evidence is publicly available to support this proposition.

It is clear that the current reporting focuses very much on economic outcomes. What is missing in the development monitor is any indication of the environmental and social costs of Part 3A projects. For example, a description of the impacts of converting farm land to mining in rural communities, and the impacts that Part 3A projects have on biodiversity, habitat loss and water extraction and pollution. Reporting should also include more analysis (for example, not just the total number of submissions received, but include a break-down of how many submissions were in favour or opposed to a proposal and key responses). Given that Part 3A covers the largest and most intensive developments in NSW, that have many identifiable impacts on communities, biodiversity and the environment, it is critical that these costs are quantified and reported accurately. This is consistent with ESD and triple-bottom line reporting.

The only mandatory **community consultation** requirement in relation to a Part 3A project relates to exhibition of the proponent’s own assessment.⁶⁷ As was clear from the *Reconnecting with the Community Report* feedback, the community is extremely concerned about public participation under Part 3A. As Part 3A projects are usually large in scope and they are accompanied by much technical documentation, 30 days is insufficient for the community to be able to provide meaningful comment. Members of the community also do not generally have the technical or financial resources to comprehensively assess the proposed project in such a short period. It is impossible for community groups to engage experts in particular to comment an EAR within 30 days.

Case study – Coal Mine project notification

The EDO has received reports from communities concerned about large new coal projects proposed for their local areas under Part 3A. In some cases, residents were not notified individually and did not see the advertisement as it appeared over December/January when many residents were away, and therefore lost the opportunity to make submissions on the

⁶⁷ The Director-General issues Environmental Assessment Requirements (EARs) to proponents who propose to undertake a Part 3A project. Once a proponent has completed the environmental assessment, and the Director-General is satisfied that the report complies with the EARs, the report is publicly exhibited for 30 days during which member of the community may make submissions.

new mine.

There is no explicit requirement for the Minister for Planning to consider public submissions when making his or her decision whether or not to approve a Part 3A project. The Minister is only required to consider:

- The Director-General's report of the project;
- If the proponent is a public authority, advice provided by the Minister responsible for that authority; and
- Any findings or recommendations of the Planning Assessment Commission (PAC) following a review of the project.⁶⁸

There is no reference to the inclusion of public submissions in the Director-General's report.⁶⁹ However, where the PAC has held a public hearing, the PAC's report must contain a summary of any submissions received by it in relation to the subject-matter of the review.⁷⁰ This is the only possibility for public submissions (albeit only a summary of them) to be before the Minister when he or she is considering whether to approve a project.

Case study: Submissions “summary”

EDO's experience is that where a “summary of submissions” (rather than the submissions themselves) are forwarded to the decision-maker, and the decision-maker therefore does not have get the full picture. The summaries simply do not seem to accurately reflect the submissions with some developments – for example, regarding development at Catherine Hill Bay, the vast majority of submissions opposed the project, and only a handful supported, and it was still approved.

The PAC may hold a public hearing in relation to a Part 3A project when the project is referred to the PAC by the Minister for assessment. The PAC will often invite third party objectors to address the hearing, but this is entirely at the PAC's discretion. The PAC must publicly advertise the location of a hearing and the subject matter and may indicate that it will accept public submissions for at least 14 days after notice is given. However, although the public may generally attend, if the PAC is satisfied that it is desirable to do so in the public interest (because of the confidential nature of any evidence or matter or for any other reason), the PAC may direct that part of a public hearing is to take place in private and give directions as to the persons who may be present.⁷¹ This means that whether members of the public can make submissions to the PAC or appear before it is at the PAC's discretion.

⁶⁸ Section 75J, EP&A Act. The PAC is an independent body appointed by the Minister for Planning. It comprises up to 8 members having expertise in planning, architecture, heritage, environment, urban design, land economics, traffic and transport, law, engineering, tourism or government and public administration.

⁶⁹ Section 75I, EP&A Act. The Director-General's report must include, the proponent's environmental assessment, advice provided by public authorities, a copy of any report of the Planning Assessment Commission and any environmental assessment undertaken by the Director-General.

⁷⁰ Clause 268V, EP&A Regulation 2000.

⁷¹ Clause 268R, EP&A Regulation 2000.

Case study: PACs and hearings

Members of local communities have raised concerns with the EDO about non-public PAC hearings. In relation to a contentious application to extend an underground coal mine around Bulli for example, BHP gave their submissions in private.

Concerns have also been raised regarding independence of the PACs. The EDO is aware of an inadequate response about a perceived bias/conflict of interest of a PAC member provided to one of our clients.

Furthermore, court documents for an EDO client (Wallerah 2) indicate a disinclination of the PAC to subpoena experts to give evidence. Our client also received an email from the acting PAC chair which stated: "However as a matter of general principle, the PAC public hearings provide an opportunity for members of the public to inform the Commissioners on the matters they think are relevant concerning the proposal. The hearings have no other purpose".

While PACs have produced extensive reports and recommendations that have influenced decision making, it appears the public hearing phase is regarded as minor or even token – and this leads to the public perception that the PAC can lack substance and credibility.

In addition to concerns about participation in the assessment process, the community expressed strong concern about **appeal rights**. The ability for the community to appeal to the Land and Environment Court, on either the merits or legality of an approval, in relation to a Part 3A project is significantly limited.

Merits appeals are only available for Part 3A projects if the project would otherwise be designated development under Part 4. Moreover, there is no merits appeal right for objectors if a concept plan has been approved for the project, if it is a critical infrastructure project or where the PAC has held a public hearing.⁷² This essentially removes merits appeal rights for objectors for the majority of Part 3A applications. To date only a handful of class 1 cases have occurred.

There are well documented benefits of having judicial review rights in the planning system.⁷³ Allowing people to exercise review rights has not ‘opened the floodgates’ for vexatious

⁷² Section 75L, EP&A Act.

⁷³ Preston CJ of the Land & Environment Court has identified a number of benefits of environmental litigation including that it can: help to realise a truly democratic process; enforce legality in governance, maintain institutional integrity and ensure executive accountability; assist in the principled and progressive development of environmental law and policy; expose weaknesses in the law and suggest law reform; improve the quality of executive decision-making; explicate and give force to environmental values; promote environmental values by putting a price on them; ensure rational discourse on environmental issues and disputes; encourage society to debate public values, national identity and a sense of place; have positive social effects; foster environmentalism and environmental consciousness in society; and promote achievement in other areas of endeavour. See: “The role of public interest environmental litigation” 23 *EPLJ* 337.

litigants.⁷⁴ However, under Part 3A, the widespread use of concept plans and public hearings means that objectors who are dissatisfied with a determination by the Minister cannot appeal to the LEC on the merits of poor decisions. While merits review may not overturn a decision, stricter environmental conditions can be imposed on the project, leading to better environmental outcomes.

Case study: Merits appeals

Various benefits of merits review have been identified as including: enhancing the quality of reasons for decisions, providing a forum for full and open consideration of issues of major importance, increasing the accountability of decision-makers, clarifying the meaning of legislation, ensuring adherence to legislative principles and objects by administrative decision-makers, focusing attention on the accuracy and quality of policy documents, guidelines and planning instruments, and highlighting problems that should be addressed by law reform.⁷⁵ Even though only a small percentage of matters go to appeal, the fact that the right exists helps to ensure decisions are properly made. The two case studies below illustrate some benefits of merits review. (The second case study also illustrates how some of the benefits can be undermined by Part 3A).

Beemery

In *Beemery*, the EDO acted for Mr Wilson who appealed on the merits against a consent for a cotton farm at “Beemery” near Bourke on the grounds that it was not ecologically sustainable. The development included a large water storage facility for irrigation and, due to the risk of salinity, had a limited lifespan. The matter finalised with the parties agreeing on stringent consent orders, including conditions for groundwater monitoring, controls on clearing and the ban of the use of herbicides in the irrigation area.

The conditions contained in the settlement set the standard against which future cotton developments will be measured, making it an important milestone in the quest for sustainability. As Chief Justice Pearlman said about *Beemery*:

In my opinion, this is a very important case. It concerned a very serious development, in terms of its potential environmental impacts, it highlighted the important role that third

⁷⁴ According to the Local Development Monitor, in 2008-09: there were 15 class 1 appeals brought by third parties or objectors. 85% of these appeals were successful. These represented only 3% of total class 1 appeals, and there were 12 class 4 appeals brought by third parties or objectors. See: McClellan, The Hon Justice Peter “Access To Justice In Environmental Law: An Australian Perspective” Commonwealth Law Conference 2005, London, 11-15 September 2005; Stein AM, The Hon Justice Paul “The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest and Environmental Law” 13 *Environmental Planning & Law Journal* 179; and *Building Owners & Management Association (Aust) (Ltd) v Sydney City Council* (1985) 54 LGERA 444 at pp 449-450 per Priestley JA.

⁷⁵ Preston, B. and Smith, J, “Legislation Needed for an Effective Court” *Promise, Perceptions, Problems and Remedies. The Land & Environment Court and Environmental Law 1979-1999*, NCC Conference Proceedings, December 1999.

party objectors can play in protecting our natural resources, and it demonstrated that the Court's processes were effective in managing the environment.⁷⁶

*Hub Action Group v the Minister for Planning and Orange City Council*⁷⁷

The EDO represented The Hub Action Group, a group of local residents opposed to a proposal to develop 'the Hub' regional waste facility on agricultural land near Molong. The proposal had an anticipated lifespan of 40 years with a 1.5 million tonne capacity. The right to appeal was founded under Part 4. The proposal was opposed primarily because it was likely to limit the ability to use the land for agricultural purposes, even after closure of the facility. The group argued that productive agricultural land is a scarce resource which needs to be protected for future generations.

Justice Preston of the Land and Environment Court agreed that the proposal was not sustainable, partly because it was likely to adversely affect the long term use, for sustained agricultural production, of the area and the adjoining prime crop and pasture land.

Although the residents group was successful in the case, the proposal was subsequently resubmitted under Part 3A, which effectively subverts the merits review process.

Community participation is essentially non-existent once a project is designated as "critical infrastructure". No merits appeal rights exist. However, of most concern is the inability of a member of the public to commence judicial review proceedings in relation to critical infrastructure projects except with the permission of the Minister for Planning.⁷⁸ As it is unlikely that the Minister will approve a legal challenge to his or her own decision, these provisions seemingly oust judicial review rights for critical infrastructure projects, even where it can be shown that there has been a breach of the law, a legal error in the process of approval or a breach by the proponent of conditions of consent. However, the High Court decision in *Kirk*⁷⁹ now entrenches such rights irrespective of the privative clause. Notwithstanding the retained jurisdiction of the Supreme Court, it is of concern that the Land & Environment Court jurisdiction is removed as the LEC has the expertise to specialize in planning matters.⁸⁰

The limitation of public participation under Part 3A means that decisions do not have the benefit of full public input and review. The multitude of benefits of good public consultation have been well documented in many jurisdictions.

⁷⁶ The Honourable Justice Pearlman AM, Chief Judge of the Land and Environment Court of New South Wales *Managing Environmental Impacts - The Role of the Land and Environment Court of New South Wales* delivered as a Keynote Address at the Australia - New Zealand Planning Congress Wellington, New Zealand 9 April 2002.

⁷⁷ [2008] NSWLEC 116.

⁷⁸ Section 75T, *EP&A Act*.

⁷⁹ *Kirk v Industrial Relations Commission of NSW & WorkCover NSW* [2010] HCA 1 (3 February 2010).

⁸⁰ The significant role of specialized environmental courts and tribunals in making major contributions to access to justice, environmental governance, and protection of the environment around the world, has been recently documented. See *Greening Justice: Creating and Improving Environmental Courts and Tribunals* by Pring G and Pring C, The Access Initiative, January 2010.

Case study: NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government⁸¹

This recently released report presents 13 case studies of how the United States National Environmental Policy Act (1970) (NEPA) vastly helped improve government decision-making through public comment and vetting ideas with other agencies. The case studies outlined in the report demonstrate that the real genius behind NEPA is that it requires government to listen to the public and seek comment before acting. The case studies use ordinary government decisions from various federal agencies to show the importance of giving the public a voice in government decision-making. Benefits of public consultation demonstrated by the case studies include:

- the public can often provide unique information, perspective and experience to assist public servants;
- the requirement for agencies to respond to submissions means that “*alternatives* are considered that government officials may not have identified on their own, that *data* are discovered that government may not have otherwise identified, and that *environmental issues* are studied that government agencies may not have identified or studied;”
- the public identify errors in underlying data or analysis;
- the existence of review rights has led to better, more accountable decision-making; and
- mitigation measures have been identified and implemented, minimising environmental impacts and improving public acceptance of the proposal.

The report concludes “because of NEPA, bad decisions have sometimes been avoided and good decisions have often been made better.”

Similar benefits have long since been observed in NSW, with specific benefits including:

- The public has an important ‘watchdog’ function in relation to administrative agencies which may exceed or abuse their discretionary power;
- Citizen participation can provide insight into the long-term effects of a decision which would have been overlooked;
- Local communities can provide different outlooks on an impact of a proposal from that of the bureaucrat or specialist expert;

⁸¹ *NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government*, August 2010. Author: The Partnership Project, the Grand Canyon Trust, and the Environmental Law Institute. Available at: http://www.elistore.org/reports_detail.asp?ID=11405.

⁸² Pain N, “Third party rights – public participation under the *Environmental Planning and Assessment Act 1979*. Do the floodgates need opening or closing?” (1989) 6 EPLJ 26.

- Early engagement may increase the chances that the ultimate decision will be acceptable to the general community; and
- Justice must be seen to be done if public cynicism with planning process is not to become widespread.⁸²

In addition to serious concerns about public participation under Part 3A, **environmental assessment** under Part 3A is ad hoc, discretionary and unstructured. There is no clearly defined environmental framework within which decisions are to be made. When a major project application is lodged, the Director-General prepares Environmental Assessment Requirements (EARs) (also referred to as Director General's requirements (DGRs)). The EARs require an environmental assessment to be prepared by or on behalf of the proponent and outline the scope of the matters to be addressed in the assessment. The Director-General may also require the assessment to include a statement of the commitments the proponent is prepared to make to minimise or manage the environmental impacts of the development.⁸³

In prescribing EARs the Director-General is to have regard to any guidelines published by the Minister for Planning in the NSW Government Gazette with respect to environmental assessment requirements for the purpose of the Minister approving projects (including levels of assessment and the public authorities and others to be consulted). In making the guidelines the Minister must consult with the Minister for Environment. However, as at August 2010, no guidelines have yet been published. The consequence of this is that the Director-General has largely unfettered discretion in setting EARs because there are currently no criteria the Director-General must have regard to in setting the environmental assessment requirements. For example, there is no mandatory requirement to require an assessment of threatened species and critical habitat.

When preparing EARs, the Director-General must consult with relevant public authorities and have regard to any issues that they raise.⁸⁴ However, the failure by the Director-General to consult with these authorities will not invalidate an approval.⁸⁵ Nor is there a practice of involving public comment on the DGRs. In addition, important licensing and approval requirements from other agencies are not required for Part 3A projects under s75U.⁸⁶ Some authorisations do still apply, but must be substantially consistent with a Part 3A approval, which means they cannot be refused.⁸⁷

Case study: Director-General's Requirements

In the EDO's experience, we have identified a number of problems with Director Generals

⁸³Section 75F, EP&A Act.

⁸⁴ Relevant public authorities might include DECCW or the RTA.

⁸⁵ Section 75X(5), EP&A Act.

⁸⁶ Section 75U, EP&A Act. These include permits under *Heritage Act 1977*, *National Parks and Wildlife Act 1974* and the *Water Management Act 2000*.

⁸⁷ These include an aquaculture permit under section 144 of the *Fisheries Management Act 1994*, a mining lease under the *Mining Act 1992*, an environment protection licence under Chapter 3 of the *Protection of the Environment Operations Act 1997* and a consent under section 138 of the *Roads Act 1993*. Section 75V, EP&A Act.

Requirements (DGRs).

DGRs tend to be quite standard and the reports in response are likewise fairly generic. We are not aware of a report by the Director General where he says a report does not comply with his requirements (the Director General must give a statement of compliance to the Minister). Often clients complain about the adequacy of consideration of issues in the environmental assessment but it is difficult legally to challenge this. We have also been made aware of cases where there is misleading information in the environmental assessments but again it is difficult to mount a case on this basis because it is a separate offence under the Regulations (cl. 283) and the law is not favourable on this front.

The EDO has found that when conditions are placed on developments, the enforcement of them is poor or non-existent. Often non-compliance is accepted such as the recent Camberwall inquiry into the cumulative impact of coal mining in that area.

What is also of some concern is when proponents have a significant say in writing conditions for their proposals so that they are satisfactory to them. This was certainly the case with the Iron Cove Bridge where the RTA drafted suitable conditions and then forwarded them to the Department of Planning.

Of significant concern is the finding of Pain J in *Gray v Minister for Planning*, that failure to comply with DGRs does not invalidate a decision. In the absence of a requirement that strict compliance with the EARs are mandatory, this means non compliance with the EARs is largely inconsequential.

The result of these provisions is that environmental issues such as pollution, heritage, water and threatened species are potentially subject to insufficient or less detailed assessment. Inter-agency concurrences and consultation requirements constitute important safety nets, and help to ensure that all the potential impacts of a development are adequately considered when the Minister makes his or her decision. The public authorities that are responsible for granting these additional approvals have the necessary expertise to adequately assess issues such as pollution, heritage and threatened species licences.

In addition, critical infrastructure projects are exempt from the usual range of administrative orders which can be used by public authorities to enforce other environmental laws. For example, interim protection orders and stop work orders to protect threatened species, and environment protection notices to reduce pollution, cannot be issued against a critical infrastructure project.⁸⁸

Another significant failing of Part 3A in relation to environmental assessment is the concept plan process. Part 3A allows projects to be approved as concept plans that need only describe the proposed development in 'broad brush' terms. Detailed information about the development is not needed.⁸⁹ A concept plan approval is taken to indicate 'in principle' approval of a proposed project, which the proponent can rely on prior to drawing up more

⁸⁸ Section 75U(3), EP&A Act.

⁸⁹ Section 75M, EP&A Act.

detailed plans.⁹⁰ The Act also allows a single application to be made for approval of a concept plan and approval to carry out the project.⁹¹ This means that projects can be approved on the basis of concept plans without the need for further assessment. This makes the effective assessment of these projects difficult, or even impossible, since the breadth of the environmental effects of the proposed project is unclear.

There is no mandatory requirement to consider **climate change** under Part 3A, either from a mitigation and adaptation perspective. As noted, the Minister is only required to consider the Director-General's assessment report, any advice provided by a public authority and any findings or recommendations of the Planning Assessment Commission following a review of the project.⁹² The Courts have interpreted this section as also requiring the Minister to consider the public interest, which could lead to ad hoc consideration of ESD and climate change by the Minister.⁹³ However, this is insufficient.

Case study – *Minister for Planning v Walker*

A Court of Appeal decision, *Minister for Planning v Walker*, has confirmed that a failure to consider ESD, including the impacts of climate change and sea level rise on a proposed Part 3A project, does not necessarily invalidate the Minister's decision to grant approval under Part 3A.⁹⁴

This consequence of this decision is that there is no mandatory requirement for the Minister to consider greenhouse gas emissions of a particular development, including any viable means of reducing emissions (such as through renewable energy alternatives) or the effect of climate change on the project as part of the Minister's approval decision (although often a climate change assessment does occur as part of the environmental assessment). As long as there is a passing reference to climate change and ESD in the Director-General's assessment report, the Courts are likely to find that this is enough to show the Minister did consider the issue. There is therefore no need for a comprehensive assessment of emissions and how they can be reduced.

Part 3A does not consider the cumulative impacts of major projects. This is a key impediment to achieving sustainable outcomes under Part 3A. It is very much a project-based process that assesses individual projects in isolation. Most Ministerial approvals contain an assessment of the climate change impacts but justify the project (such as mines and power stations)⁹⁵ on the basis of the value of the development and the jobs at stake.

⁹⁰ When determining whether to approve a concept plan, the Minister must decide what further assessment is required before final approval is given. Final project applications for stages or elements of the concept plan may be determined by the Minister or by the local council.

⁹¹ Section 75M(3A).

⁹² Section 75J, EP&A Act.

⁹³ *Minister for Planning v Walker* [2008] NSWCA 224, and *Aldous v Greater Taree Council* [2009] NSWLEC 17

⁹⁴ *Minister for Planning v Walker* [2008] NSWCA 224. The Court of Appeal ruled that, although the Planning Minister must make decisions in the public interest, not having regard to ESD principles does not necessarily constitute a breach of that obligation.

⁹⁵ Currently Part 3A and in particular the critical infrastructure requirements regulate all new gas and coal fired power stations.

This is because any one project will not necessarily contribute significantly to climate change on a global scale, even though cumulatively each of these projects is contributing to the problem. Part 3A also only requires the Minister to look at the specific development application presented and not to consider whether there are feasible and prudent alternatives for the proposed project that will lead to fewer environmental impacts, including less clearing of vegetation and fewer greenhouse gas emissions.

Without considering cumulative impacts, this essentially means that no high-emitting projects such as power stations and mines, will be rejected or modified on the basis of their individual contribution to climate change. The failure to consider cumulative impacts is broader than just climate change, but also occurs in relation to cumulative impacts on biodiversity under Part 4 as well as Part 3A.

PART 3A SUMMARY: Part 3A is demonstrably failing to implement ESD and is skewed in favour of economic outcomes over social and environmental impacts. Public participation is severely limited, especially regarding review rights, and the type of environmental assessment is discretionary. Instead of providing a robust regime requiring comprehensive public consultation and environmental assessment for the largest public infrastructure projects with the greatest impacts, the category of Part 3A projects keeps expanding to include private projects in response to ‘streamlining’ pressures and desired financial outcomes.

Part 4

Part 4 of the Act sets out the procedures for assessing and approving the majority of development applications that do not come under Part 3A. There are various categories of development under this Part and different processes for development assessment and approval apply to each category. Councils are generally the decision-makers under Part 4 in the majority of cases. The category of development that applies to a particular proposed development is set out in the relevant LEP applicable to the local government area. SEPPs may also apply and they usually override provisions in LEPs, for example, the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*. The various categories of development under Part 4 are:

- *Exempt development*⁹⁶ - Exempt development applies to minor forms of development where there is no need for planning or construction approval to be obtained if the development satisfies pre-specified standards.

⁹⁶ Exempt development must be of ‘minimal environmental impact’: Section 76, EPA Act. Exempt development categories are identified in LEPs and SEPPs. In 2008 the Government released *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP)*. (This followed on from SEPP 4 and SEPP 60). This SEPP provides state-wide exempt development categories that may be carried out without consent regardless of requirements in individual LEPs (as long as the standards are met). There are currently 41 categories of development identified as exempt development under the SEPP. These include air-conditioning units, pergolas, barbecues, carports, driveways, hot water systems, rainwater tanks and portable swimming pools: Part 2, *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*. The *State Environmental Planning Policy (Infrastructure) 2007* also prescribes some public authority developments as exempt development.

- *Complying development*⁹⁷ - Complying development is development of a minor nature that is approved if pre-set standards are complied with.
- *Designated development*⁹⁸ - Designated development is development that is considered to be of high environmental impact and is therefore subject to more intensive assessment processes. (Most designated development now falls under the Major Project SEPP and therefore is assessed under Part 3A).
- *Integrated development* - Integrated development is development of a type that needs approvals from other public authorities, such as a licence to pollute or to destroy Aboriginal cultural heritage from DECCW, or a mining lease in addition to development consent. These approvals must be obtained before consent can be granted. If the other approval is not granted, then development consent cannot be granted under Part 4.
- *Advertised development*⁹⁹ - Advertised development is development that needs to be publicly advertised. This category comprises the majority of development applications determined by councils.
- *Regionally significant development*¹⁰⁰ - As a result of the recent planning changes, a new category of development was created by the *Major Development SEPP*. Regionally

⁹⁷ Similarly to exempt development, complying development does not require a development application to be lodged. However, there is a need to obtain a complying development certificate which is a simpler and faster process (7 days) than development consent. A complying development certificate can be issued by either a council or an accredited certifier when it is determined that all development standards have been complied with. The *Codes SEPP* introduced state-wide complying development codes. Under this SEPP new detached single and two-storey houses and home alterations and additions on specific lot sizes and in certain zones are classified as complying development. The NSW Housing Code, introduced by the SEPP, applies to residential developments including: Detached single and double storey dwellings, Home extensions, and Other related development, such as swimming pools. This means that these developments will be categorised as complying development regardless of requirements for consent in LEPs. Also, as above, the *Infrastructure SEPP* also prescribes some public authority developments as complying development.

⁹⁸ Designated development is either identified in an environmental planning instrument or under Schedule 3 of the *EPA Regulation 2000*. Categories of designated development include agricultural produce industries, cement works, chemical industries, concrete works, extractive industries, marinas and petroleum works. JRPPs are the consent authority for all designated development under the Major Development SEPP.

⁹⁹ The public notification requirements are usually contained in a Development Control Plan (DCP). This grants the opportunity for the public to make submissions on proposed development in their neighbourhoods.

¹⁰⁰ A regional panel consists of 3 persons appointed by the Minister, each having expertise in at least 1 of planning, architecture, heritage, the environment, urban design, land economics, traffic and transport, law, engineering, tourism or government and public administration, and 2 council nominees of an applicable council, at least one of whom has expertise in planning, architecture, heritage, the environment, urban design, land economics, traffic and transport, law, engineering or tourism. The categories of regionally significant development include:

- Designated development
- Development with a capital investment value (CIV) over \$10 million
- development with a CIV over \$5 million including certain public and private infrastructure, Crown development, development where council is the proponent or has a conflict of interest and ecotourism
- Subdivision of land into more than 250 lots; and
- Certain coastal developments

For regionally significant matters, councils will still undertake the assessment of the application, as well as the community consultation processes. However, once their assessment is complete, councils must forward it to the JRPP who will make the final decision.

significant development is development of regional significant that are determined by Joint Regional Planning Panels (JRPPs).

Public participation varies considerably depending on the relevant category of development.

Regarding *exempt and complying development*, no development application is required, and there is no formalised public participation process. However, for complying development, notice is usually given of the granting of a complying development certificate within 7 days. For exempt development there is no notification process. As mentioned above, state-wide codes now apply which have significantly broadened the reach of exempt and complying development. The Government has announced quantitative goals of getting certain percentages of development coming under the Codes. This has the potential to considerably reduce the opportunities for members of the community to comment on proposed developments in their LGAs. Applying state-wide codes 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. For example, 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. Moreover, under the codes there is no assessment of 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”. Lastly, it is inappropriate to remove community consultation processes for potentially a large percentage of development applications in neighbourhoods.

Case study: Exempt and complying development

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

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

For development identified as *designated development* the community must be notified and given the opportunity to comment on the application.¹⁰¹ The consent authority is the relevant joint regional planning panel (JRPP). Community members who make a submission

¹⁰¹ The exhibition period is a minimum of 30 days. The notice of designated development must contain information including a description of the land on which the development is proposed to be carried out and the name of the applicant.

on the proposal (known as ‘objectors’) are given a right to challenge an approval granted to designated development within 28 days. This appeal under Class 1 of the Land and Environment Court involves a Commissioner of the Court stepping into the shoes of council and re-determining the application. This ‘merits appeal’ right grants an opportunity for members of the public who are dissatisfied with a determination by the JRPP to approve designated development to re-argue the merits of the application. On the other hand, any person may challenge a determination of a JRPP in relation to the legality of a decision to grant approval to designated development,¹⁰² although the prospect of costs if the case is lost is a strong deterrent.¹⁰³ These appeals do not consider the merits of a particular application but only whether the decision has followed the correct legal processes and whether it is affected by an error of law.

For *advertised developments*, there is no minimum guarantee of public participation under the Act. However, all councils have made relevant DCPs which prescribe the community consultation procedures for the majority of development applications. These DCPs must be complied with. They usually require notification of adjoining owners and neighbours who could be affected by the proposal. DCPs generally distinguish between types of development. Higher impact development is generally advertised in a local paper and broader notification will occur. For more ‘minor’ development, only notification will occur.

In terms of appeal rights, the community can only appeal on the legality of decisions made by councils to approve development for advertised development.¹⁰⁴ There is no right to a merits appeal for third party objectors as for designated development. However, a yet un-commenced provision of the recent planning reforms proposes the introduction of new limited merits appeal rights for objectors where development standards have been exceeded by at least 25% through the use of *State Environmental Planning Policy No. 1 – Development Standards*. However, only objectors who have owned land in the area for more than 6 months and who live within one kilometre of the development may appeal, among other restrictions. In addition, the appeal itself is to a Joint Regional Planning Panel, not the Land and Environment Court (this is despite the LEC having the internationally recognized specialized skills).¹⁰⁵ This new right is therefore very restricted and will do little to improve broader public accountability. However, we note that the right does not presently exist – this is an extraordinary state of affairs given it was a much touted part of the reform package in 2008.

Case study: Department of Planning Factsheet , May 2008 “Busting the Myths”¹⁰⁶

“MYTH: The planning reforms are pro-developer.

FACT: The planning reforms can hardly be described as pro-developer when they include provisions such as: allowing more neighbourhood challenges to development decisions...”

¹⁰² Section 123, EP&A Act.

¹⁰³ These proceedings fall under Class 4 of the Land and Environment Court and must be commenced within 3 months of a determination being advertised.

¹⁰⁴ Section 123, EP&A Act.

¹⁰⁵ See Pring 2010 *op cit*.

¹⁰⁶ *Planning Reform Bills Guide*, pp2-3.

The provisions establishing neighbourhood challenge rights have not yet commenced, despite 2 years since they were showcased as making planning laws more pro-community.

In 2007, ICAC made a recommendation to the NSW Government that third party merits appeal rights should be extended to improve transparency and accountability of council development approval processes. They recommended the following categories of development should be accompanied by third party merits appeal rights:

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

The Government has not taken steps to implement this recommendation except to introduce the limited neighbourhood appeal discussed above. These have not yet commenced.

The **environmental assessment** under Part 4 also differs depending on the type of development.

There is no environmental assessment undertaken for *exempt development*. There is simply a requirement to comply with pre-set standards. However, under section 76 of the *EPA Act*, exempt development may be carried out only if it is of “minimal environmental impact”. Despite this, there is at present little evidence that the “minimal environmental impact” test is applied or considered in the majority of cases.¹⁰⁷ Authorities must be required to consider these guidelines before commencing exempt development. A lack of guidance opens up exempt development to legal challenge in the Land and Environment Court where third parties can present evidence that particular exempt development will not have minimal environmental impacts.

There is no environmental assessment undertaken for *complying development*. There is simply a requirement for the council or accredited private certifier to determine if the proposed development complies with the pre-set standards within 10 days. Where the development complies, the council or accredited certifier must not refuse to issue a complying development certificate. There is no “minimal environmental impact” requirement. Given the ramifications of complying development, including no community consultation or merits assessment, it is important that complying development be restricted only to development that will have a minor impact.

All applications for *designated development* must be accompanied by an Environmental

¹⁰⁷ The Department of Planning must publish guidelines to assist public authorities in determining whether exempt development will be of ‘minimal environmental impact’ in accordance with the principles of ESD. These guidelines should be made available for public comment before publication.

Impact Statement (EIS) An EIS is required for designated development to give a detailed analysis of all potential environmental impacts of the development. This is prepared by the proponent who usually hires an environmental consultant to conduct the assessment. The EIS must be placed on public exhibition for at least 30 days, during which time the public can make submissions.¹⁰⁸ A copy of the EIS and any submissions are forwarded to the Director-General of Planning, who then reports to the consent authority.¹⁰⁹ Issues relating to the quality of environmental impact statements are discussed below.

An application to carry out *advertised development* must be accompanied by a Statement of Environmental Effects (SEE). The SEE must indicate the environmental impacts of the development, how the impacts have been identified and the steps which will be taken to protect the environment or to lessen harm to the environment. The Department of Planning has recently issued guidelines to provide some prescription as to what an SEE should address. The guidelines stipulate that a key aspect of an SEE should include an outline of any environmental constraints (site analysis) such as flood, slope, bushfire or coastal hazards, native vegetation, conservation or heritage values, etc.¹¹⁰ In some circumstances, a more in-depth assessment than an SEE will be required. If the development is on land containing critical habitat or is likely to significantly affect threatened species, populations or ecological communities listed under the *Threatened Species Conservation Act 1995*, then the development application must be accompanied by a Species Impact Statement. Such a statement is usually prepared by an environmental consultant employed by the proponent. For such development, the concurrence of the Director-General of DECCW must be obtained.¹¹¹

There are inherent problems with the current environmental assessment processes under Part 4, including:

- it is up to the proponent to prepare an SIS or EIS. This creates obvious issues relating to objectivity;
- there are no processes in place to assess the accuracy of EIA after the event. As has been observed, without independent technical assessment the outcome of the EIA process will always remain fraught with suspicion;¹¹²
- there is a clear conflict of interest for consultants who are paid by the proponent to conduct ecological assessments; and
- At present even where an EIS or SIS demonstrates that a development will have potentially devastating impacts on threatened species or the environment, this does not operate as a stop on development. It is merely a procedural process. Consent authorities are only required to take an ecological assessment into account.

Part 4 does not adequately incorporate the consideration of the potential effects of **climate change** into development assessment, from either a mitigation and adaptation perspective.

¹⁰⁸ EP&A Act, ss. 112 and 113.

¹⁰⁹ EP&A Act, s. 113.

¹¹⁰ Department of Planning, Part B- Toolkit for Applicants- the Development Proposal, Statement of Environmental Effects and Standard Development Application Form. Found at: <http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=wEShFW1HPOM%3d&tabid=339>.

¹¹¹ Section 79B(3), EP&A Act.

¹¹² *Ibid* at 463.

Most critically, no climate change assessment is expressly required under section 79C which sets out the list of factors that consent authorities must take into account when assessing a development, including environmental, economic and social impacts. The consideration of the climate change impacts of development is currently occurring in an ad hoc manner under a general requirement to consider environmental impacts. In assessing development applications under Part 4 there is therefore no *explicit* obligation to consider climate change, no requirement to assess the climate change implications of various design options and no assessment of the impacts that climate change will have on proposed developments, such as sea level rise and increased coastal erosion.¹¹³

Part 4's failure to incorporate climate change has led to an increased reliance on the Courts to interpret the EP&A Act in an expansive way in order to incorporate the consideration of climate change. Courts have found that the requirement to consider the public interest in section 79C requires the consideration of the principles of ESD which would in turn necessitate the consideration of climate change.¹¹⁴

Despite the lack of clear requirements in the Act, in terms of considering mitigation and adaptation options, there has been some progress with the recent development of policy guidelines, as outlined below.

Case study: Sea level rise policy

The NSW Government recently released a *NSW Sea Level Rise Policy Statement*.¹¹⁵ The Sea Level Rise Policy Statement provides guidance to local council by prescribing the projected sea level rise for NSW. The Statement projects for sea level rise of up to 40 cm by 2050, and 90 cm by 2100, for the NSW coastline. In addition to the Statement, the Department of Planning has released a draft guideline entitled *Draft NSW Coastal Planning Guideline: Adapting to Sea Level Rise*¹¹⁶ to assist local councils in planning for the expected impacts of climate change on coastal communities. The planning guideline requires councils to update their immediate hazard lines to take into account climate change impacts and provides some guidance to councils in how to take into account sea level rise impacts when undertaking strategic planning and development assessment. However, these policy documents are not legally binding but only serve as guidelines to assist councils. As they have no statutory force, these policies do nothing in real terms to revise the framework for decision-making for development in coastal zones. Indeed, the NSW Government has made it clear that the intent of the *NSW Sea Level Rise Policy Statement* and the Planning Guideline is not to restrict or prohibit development, even in high risk areas. One of the stated objectives of the Sea Level Rise Policy Statement is in fact to *encourage* appropriate development on land projected to be at risk from sea level rise.¹¹⁷

¹¹³ We note there are building sustainability initiatives Like the BASIX scheme that do apply to new developments.

¹¹⁴ *Aldous v Greater Taree Council* [2009] NSWLEC 17.

¹¹⁵ <http://www.environment.nsw.gov.au/resources/climatechange/09708sealevrisepolicy.pdf>

¹¹⁶ <http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=1Mz7Sun64mw%3D&tabid=177>

¹¹⁷ <http://www.environment.nsw.gov.au/resources/climatechange/09708sealevrisepolicy.pdf>

In any event it is preferable to have a clear statement in an Act or regulation rather than policy guidelines, as shown in the case study below.

Case study: Including climate change considerations explicitly in planning legislation

Although Court decisions have gone some way to implanting climate change considerations into Part 4, NSW is lagging behind other jurisdictions who have introduced comprehensive climate change development assessment processes. For example, the UK has introduced The *Infrastructure Planning (Environmental Impact Assessment) Regulations 2009* (UK), which entered into force on 1 March 2010. This Regulation requires environmental impact assessments to include a description of the likely significant effects of the development on the environment resulting from, *inter alia*, the emission of pollutants, as well as a description of the measures envisaged to prevent, reduce, and offset significant adverse effects on the environment.¹¹⁸ Moreover, the UK instrument requires new airports, power station or other projects to show how they will mitigate and adapt to climate change before they are approved.

PART 4 SUMMARY: There are benefits to the Part 4 approach of having different categories of development that attract different mandatory assessment and consultation processes. However there are problems with the environmental assessment process (such as independence of consultants, proponent driven assessment, quality of EISs, independence of private certifiers, role of the JRPP, and enforcement) that potentially undermine good environmental assessment. This is further undermined by quantitative (percent of total developments) goals rather than qualitative standards for exempt and complying development. In relation to considering climate change impacts there has been some progress in policy documents, but these are not statutory. Part 4 would better implement ESD if it required better consideration of cumulative impacts and broader climate change impacts.

Part 5

Certain development, such as the construction of roads or electricity infrastructure by public authorities, and some activities, such as mining exploration, do not require development consent under any EPIs. In these cases, decisions on whether to proceed with development are made internally by public authorities. No formalised DA process or application process is required. Part 5 of the Act therefore contains a ‘safety-net’ which sets out a separate environmental assessment procedure that applies to activities where no DA is required under Part 4.

In terms of **public participation**, if an activity is likely to have a significant effect on the environment, an EIS must be prepared and placed on public exhibition for at least 30 days,

¹¹⁸ *Infrastructure Planning (Environmental Impact Assessment) Regulations 2009* (UK), sch 4.

during which time the public can make submissions. This is the only formalised public consultation process under Part 5. Where an EIS is not required, the community is not consulted on the merits of the proposed development.

Under Part 5, public authorities have a duty to consider the environmental impact of activities. Under section 111, a determining authority shall ‘examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity’. Determining authorities usually do this by undertaking a preliminary **environmental assessment** called a Review of Environmental Factors (REF). Clause 228, of the *Environmental Planning and Assessment Regulation 2000* sets out what factors must be considered in undertaking the REF assessment,¹¹⁹ however in practice an REF can be anything from a ‘tick a box’ form to a comprehensive REF. This document is required as part of the standard practice of most public authorities which are bound by Part 5.

Depending on the outcome of the REF, an environmental impact statement may be required if the development is likely to significantly affect the environment (including critical habitat) or threatened species, populations or ecological communities, or their habitats. After considering the environmental impacts, the determining authority can then either approve or disapprove the activity, or, if the determining authority is also the proponent, they can decide to carry out the activity, modify it, or refrain from doing it. The problems identified with environmental assessment under Part 4 equally apply to Part 5. There is also the added concern that the determining authority may also be the proponent.

As noted, under Part 5 there are requirements to consider all environmental impacts of a particular development which would likewise require the consideration of **climate change**. However, climate change is not explicitly mentioned so whether the general requirement to consider the environment would encompass climate change depends on the interpretation of the courts.

PART 5 SUMMARY: The two main problems with Part 5 are that: the proponent can also be the approval authority and the REF process is variable. (We note that an increasing number of Part 5 projects now come under Part 3A).

¹¹⁹ These include any environmental impacts on a community, any environment, any environmental impact on the ecosystems of the locality, any reduction of the aesthetic, recreational, any long-term effects on the environment, any pollution of the environment and any cumulative environmental effect with other existing or likely future activities.

4. Interaction with other environmental legislation

Of course the planning system does not operate in isolation, but is intricately linked with environmental protection legislation.¹²⁰ Related legislation includes:

- *Threatened Species Conservation Act 1995*
- *National Parks and Wildlife Act 1974*
- *Native Vegetation Act 2003*
- *Coastal Protection Act 1979*
- *Mining Act 1992*
- *Water Management Act 2000*
- *Protection of the Environment Operations Act 1997*
- *Heritage Act 1977*
- *Contaminated Lands Act 1997*
- *Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009*

However, the planning system currently undermines the ability of related environmental legislation to effectively protect the environment. This is due to the move away from the integrated development approach (ie, requiring concurrences from other agencies) to the fast track approval approach.

Case study: EP&A Act sections ousting other legislation

Section 75U of Part 3A effectively ousts related legislation:

75U Approvals etc legislation that does not apply

- (1) The following authorisations are not required for an approved project (and accordingly the provisions of any Act that prohibit an activity without such an authority do not apply):
- (a) the concurrence under Part 3 of the *Coastal Protection Act 1979* of the Minister administering that Part of the Act,
 - (b) a permit under section 201, 205 or 219 of the *Fisheries Management Act 1994*,
 - (c) an approval under Part 4, or an excavation permit under section 139, of the *Heritage Act 1977*,
 - (d) an Aboriginal heritage impact permit under section 90 of the *National Parks and Wildlife Act 1974*,
 - (e) an authorisation referred to in section 12 of the *Native Vegetation Act 2003* (or under any Act to be repealed by that Act) to clear native vegetation or State protected land,
 - (f) a permit under Part 3A of the *Rivers and Foreshores Improvement Act 1948*,
 - (g) a bush fire safety authority under section 100B of the *Rural Fires Act 1997*,
 - (h) a water use approval under section 89, a water management work approval under section 90 or an activity approval under section 91 of the *Water Management Act 2000*.
- (2) Division 8 of Part 6 of the *Heritage Act 1977* does not apply to prevent or interfere with the carrying out of an approved project.
- (3) The following directions, orders or notices cannot be made or given so as to prevent or

¹²⁰ This report does not include an analysis of each related Act. For various submissions on the operation of the Acts please see: <http://www.edo.org.au/edonsw/site/policy.php>.

interfere with the carrying out of an approved critical infrastructure project:

- (a) an interim protection order (within the meaning of the *National Parks and Wildlife Act 1974* or the *Threatened Species Conservation Act 1995*),
- (b) an order under Division 1 (Stop work orders) of Part 6A of the *National Parks and Wildlife Act 1974*, Division 1 (Stop work orders) of Part 7 of the *Threatened Species Conservation Act 1995* or Division 7 (Stop work orders) of Part 7A of the *Fisheries Management Act 1994*,
- (b1) a remediation direction under Division 3 (Remediation directions) of Part 6A of the *National Parks and Wildlife Act 1974*,
- (c) an environment protection notice under Chapter 4 of the *Protection of the Environment Operations Act 1997*,
- (d) an order under section 124 of the *Local Government Act 1993*.

Note. Under the *National Parks and Wildlife Act 1974*, actions that are essential for carrying out an approved project provide the same defence to actions relating to harm to native fauna (and threatened species) as a development consent under Part 4, or environmental assessment under Part 5, of this Act provide.

(4) A reference in this section to an approved project includes a reference to any investigative or other activities that are required to be carried out for the purpose of complying with any environmental assessment requirements under this Part in connection with an application for approval to carry out the project or of a concept plan for the project.

Other examples of planning law overriding NRM law can be found in the related Acts themselves. For example, as noted above, amendments to the Schedule of the *Native Vegetation Act 2003* have been made to provide that the Act does not apply to land under the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (Seniors Living SEPP). This means even where a seniors living development is proposed for a bushland area, the ban on broadscale clearing does not apply.

Efforts have been made under related legislation to develop more objective decision-making tools to better integrate environmental considerations into land-use planning, however these are currently voluntary initiatives and are failing to attract developer interest. Consequently, they are being progressively weakened.

Case study: Alternative assessment tools under NRM legislation

Environmental Outcomes Assessment Methodology under the Native Vegetation Act 2003

The NV Act has a decision support tool in the form of an objective scientific assessment methodology that underpins any approvals and property vegetation planning under the Act. This tool requires an objective application of environmental assessment which has overcome many problems of subjective inconsistent decision-making under the previous regime.¹²¹ The application of the assessment tool is mandatory and is based on objective scientific criteria.

Biocertification under the TSC Act

The EDO has been consulted by DECCW on recent reforms to the TSC Act in relation to biocertification which is a new approach to landscape scale biodiversity assessment. The

¹²¹ *Native Vegetation Conservation Act 1997*.

biocertification scheme is being developed in response to problems with site by site threatened species assessment, and is therefore a good example of the influence of planning reforms on related environmental legislation. Part of the consultation involved a field trip to look at a proposed biocertification at Wyong/Wamervale. Considerable effort had gone into developing a proposal for strategic long-term landscape scale planning, however, in the opinion of one local developer, the biocertification application was taking too long so they simply excised their land from the proposal and applied under Part 3A instead. Whilst developers can ‘forum shop’ in this way, related environmental protection legislation will struggle to be effective.

We note that robust strategic landscape scale planning takes time and must be based on comprehensive data. The adequacy of the assessment for the original Growth Centres biocertification proposal for an area of Western Sydney containing two critically endangered ecological communities was subject to a challenge in the Land & Environment Court.¹²² The push for such assessment processes to be streamlined, less survey intense, and faster poses a serious threat to the quality of the assessment, which in turn has implications for long-term sustainability.

The use of such assessment tools in the planning system is not yet established. The NV Act methodology only applies to rural land and not urban development; and the current assessment tools for biocertification and biobanking are only voluntary, and are constantly being weakened to have more appeal to developers.¹²³ Examples of ways in which the tools are being weakened include removal of strict “like for like” offset requirements

RELATED LEGISLATION SUMMARY: The EP&A Act, particularly Part 3A, overrides environmental and natural resource management legislation and does not achieve integrated planning as required by effective implementation of ESD.

¹²² See: True Conservation Association v The Minister Administering the *Threatened Species Conservation Act 1995*. 2007. This challenge was overridden by special legislation.

¹²³ For EDO submissions on the native vegetation, biobanking and biocertification methodologies, please see: <http://www.edo.org.au/edonsw/site/policy.php#2>.

Part Two: Can we fix the current Act?

The assessment in Part One demonstrated that the current planning framework in NSW is generally failing to implement ecologically sustainable development, particularly from a public participation, environmental assessment and climate change perspective. To address these serious deficiencies within the current legislative framework, a significant number of amendments would be required.

Below we identify 70 minimum reforms needed to address the inadequacies of current planning tools identified in Part One.

1. Objects

Recommendation #1: Legislative amendment is needed to stipulate that implementing the principles of ESD is the overarching objective of the EP&A Act and ecologically sustainable development (ESD) principles bind the terms of all decisions made under it. Accompanying this, provisions should be introduced to require all decision-makers under the Act to be satisfied that a proposed development (whether Part 4, 5 or Part 3A) or draft LEP, is sustainable (in accordance with the principles of ESD) or it cannot be approved.

Recommendation #2: Amend the object of the EP&A Act from “to provide increased opportunity for public involvement in environmental planning and assessment” to “*guarantee* opportunity.” Strengthen implementation of this object by establishing minimum mandatory consultation requirements that guarantee genuine community involvement in both plan making and development assessment procedures, as well as legislative reform proposals. This should involve a range of public notification methods and a range of consultation techniques be employed.¹²⁴

2. State Environmental Planning Policies

Recommendation #3: The EP&A Act should be amended to prescribe a mandatory consultation and exhibition period of all SEPPs of at least 60 days, except where there is an urgent need to make an interim SEPP to protect the environment.

Recommendation #4: The EP&A Act should be amended to require the concurrence of the Minister for Environment, Climate Change and Water for all SEPPs likely to impact on threatened species, ecological communities or their habitats, climate change or water.

Recommendation #5: There must be an audit of all SEPPs to determine whether they are consistent with the need to minimise greenhouse gas emissions and address climate change impacts where relevant.

Recommendation #6: The Department of Planning should provide better guidance to

¹²⁴ In relation to the issue of improved community consultation, the *Reconnecting the Community with the Planning System* Report identified 40 necessary recommendations for amendment. The Report outlining the amendments will be made available on the EDO website when the Department of Planning has released its Action Plan.

practitioners, local government and communities on when and how SEPPs actually apply, to address the high degree of confusion regarding when SEPPs, such as the Infrastructure SEPP, apply.

Recommendation #7: The use of SEPPs to exclude environmental assessment requirements of related natural resource management legislation should be reviewed.

3. Regional Strategies

Recommendation #8: Regional Strategies must clearly describe how the strategies implement ESD for the relevant region over a 25 year period.

Recommendation #9: For any future regional strategy processes, the Minister for Planning should publish a section 117 direction mandating a minimum standard of community consultation, including consultation on the final versions of regional strategies. Section 117(5) should be repealed so following Ministerial directions is mandatory.

Recommendation #10: Public participation directions should specify/formalise the role of key stakeholders in the development of regional strategies, including developers and the community.

Recommendation #11: For any future regional strategies, the Minister should issue a section 117 direction requiring comprehensive environmental assessment processes prior to the making of regional strategies. This should include assessment of: biodiversity/vegetation management, threatened species mapping, wetlands of significance, flood risk areas, climate change bushfire risk, and areas suitable for infill development. This assessment (equivalent to a regional conservation strategy) should be used to determine conservation goals and priorities, and identify areas to be protected from development due to their environmental values.

Recommendation #12: The existing regional strategies should be audited to ensure that climate change considerations are further incorporated, including maximising public transport and bicycle access, reducing car use, ensuring new development is sufficiently located away from coastal and bushfire hazards, incorporating co-generation and alternative renewable energy strategies in new communities, minimising waste and encouraging recycling and implementing appropriate green building standards.

4. Local Environment Plans

Recommendation #13: LEPs must be locally informed documents based on comprehensive local environmental assessments. The *Standard Instrument (Local Environmental Plans) Order 2006* should be amended to allow councils to adopt provisions that impose tighter (but not weaker) controls than the Standard Instrument. Any development must be consistent with relevant zone objectives, rather than just a requirement for “consideration” of certain objectives (as otherwise prevents cases seeking to uphold consistency with zone objectives in

the future¹²⁵).

Recommendation #14: Standard community consultation requirements for planning proposals should be published as soon as possible. Clearly defined and objective circumstances must be prescribed for when consultation will be undertaken and for what period.

Recommendation #15: The power for the Minister to determine that no community consultation is needed in relation to planning proposals under section 73A should be restored to its original form to only encompass drafting errors and spelling mistakes.

Recommendation #16: The EP&A Act should be amended to require the relevant planning authority (RPA) to publicly release all submissions made on planning proposals. Moreover, where the RPA has held a public hearing, the report of that hearing should also be released publicly prior to a Ministerial decision.

Recommendation #17: The EP&A Act should be amended to stipulate that where a planning proposal has been amended after community consultation, it should be re-exhibited.

Recommendation #18: The EP&A Act should be amended to require mandatory community consultation on a final LEP in addition to consultation on planning proposals at the gateway stage.

Recommendation #19: The process for ‘spot rezoning’ should be reviewed and require specific community consultation and environmental assessment requirements, with adequate time for consideration. Cumulative impacts of spot rezonings must also be more comprehensively considered.

Recommendation #20: All substantive changes to an LEP that have an environmental impact should require an environmental study.

Recommendation #21: The EP&A Act should be amended to remove the ability under section 73A for the Minister to determine that no environmental assessment is required.

Recommendation #22: The Act should be amended to require consultation with relevant state government agencies at the gateway stage.

Recommendation #23: The Act should be amended to require consultation with government agencies on a final LEP in addition to consultation at the planning proposal stage.

Recommendation #24: A mandatory clause should be inserted into the Standard Instrument that applies to all coastal risk regions in NSW.¹²⁶ The clause should require councils to be satisfied that development will avoid or minimise exposure to coastal processes before it can be approved; and should require the *refusal* of all development applications for proposed

¹²⁵ For example, see: *Conservation of North Ocean Shores Inc v Byron Shire Council & Ors* 167 LGERA 52; [2009] NSWLEC 69.

¹²⁶ Coastal risk regions should be defined as all land seaward of the updated 2100 hazard line, or bushfire prone, or in danger of flooding or inundation.

development that is located seaward of the coastal area that is identified as being at immediate risk.

Recommendation #25: The Standard LEP should be amended to include a mandatory clause outlining a comprehensive and systematic process of assessment for developments that are likely to generate significant water and air emissions, and provisions requiring consideration of prudent or feasible alternatives.

5. Part 3A

Recommendation #26: Part 3A should be repealed. A new regime for assessing major *public* infrastructure should be developed with input from local communities and not just developers. (The amendments listed below therefore relate to a revised part applying to major public infrastructure projects.) Private infrastructure projects are more appropriately assessed under Part 4.

Recommendation #27: A revised Part would involve the repeal of critical infrastructure provisions, the repeal of concept plan provisions, the restoration of broad legal and merits appeal rights for the community and the publication of gazetted Minister's environmental assessment requirements to mandate comprehensive environmental assessment.

Recommendation #28: The Act should be amended to extend the consultation period for major public infrastructure projects to at least 60 days, with a notification requirement to residents nearby in addition to the local paper.

Recommendation #29: The EP&A Act should be amended to require the Director-General's report to the Minister to include a summary of all public submissions. This must be accompanied by an explicit duty for the Minister to consider public submissions.

Recommendation #30: The PAC process should be reviewed in light of objectivity, independence and transparency concerns.

Recommendation #31: The EP&A Act should be amended to remove the ability for the Planning Assessment Commission (PAC) to determine that the community cannot attend a public hearing, introduce a mandatory submission period of at least 30 days and allow objectors to appear before the hearing to voice their concerns.

Recommendation #32: The EP&A Act should be amended to remove the restrictions on third party merit appeal rights in relation to major projects where a public hearing has been held or where a concept plan has been approved. Equivalent merits appeal rights to Part 4 should be reinstated. In addition, merits appeal rights should be broadened in line with the 2007 recommendations of ICAC.

Recommendation #33: The critical infrastructure provisions in the Act should be repealed. At the very least, the Act should be amended to remove the restriction on merits and legal appeals for critical infrastructure projects.

Recommendation #34: The EP&A Act should be amended to ensure that early engagement and consultation does not result in forfeiture of review rights at a later stage.

Recommendation #35: The Act should require more detail be provided by the proponent to facilitate genuine consultation on concept plans and planning proposals.

Recommendation #36: Undertake a review of existing timeframes with a view to adopting minimum timeframes, but not maximum timeframes, to ensure more equality between the time developers spend discussing proposals with planning officials and the time the community gets to discuss a proposal.

Recommendation #37: Extend major project consultation timeframes beyond 30 days to ensure genuine consultation with community groups.

Recommendation #38: Ensure that there are mandatory public hearings for major projects.

Recommendation #39: Reinstate fixed minimum mandatory criteria for environmental assessment to assure the community that all relevant factors have been considered. Determinations must be objective and bound by specific criteria.

Recommendation #40: The Minister for Planning must publish environmental assessment guidelines as soon as possible, further explaining the mandatory criteria. These guidelines should be publicly exhibited before gazettal and must require Environmental Assessment Requirements (EARs) to include a comprehensive environmental assessment covering issues such as threatened species and climate change.

Recommendation #41: The Act should be amended to reinstate the requirement for public approvals under other legislation for major projects, including permits under the *Heritage Act 1977*, *National Parks and Wildlife Act 1974* and the *Water Management Act 2000*.

Recommendation #42: Section 75V of the Act should be amended to allow public authorities the discretion to refuse to issue relevant authorisations in relation to major projects. These include an aquaculture permit under section 144 of the *Fisheries Management Act 1994*, a mining lease under the *Mining Act 1992*, an environment protection licence under Chapter 3 of the *Protection of the Environment Operations Act 1997* and a consent under section 138 of the *Roads Act 1993*.

Recommendation #43: Section 75X(5) should be removed from the Act to ensure that consultation with relevant public authorities in setting EARs is a mandatory requirement.

Recommendation #44: The Act should be amended to allow public authorities to issue administrative orders in relation to major projects, such as environmental protection notices and stop work orders to protect threatened species.

Recommendation #45: The concept plan provisions in Part 3A should be repealed to ensure that projects are not assessed and approved prior to the actual detailed design of a project being decided.

Recommendation #46: The Act should be amended to require the Minister for Planning to consider prudent and viable alternatives when determining whether to approve a major project.

Recommendation #47: The Act must be amended to explicitly require the Minister to consider ESD when determining whether to approve a major project. In addition, there must be a specific requirement to consider climate change under Part 3A, both from a mitigation and adaptation perspective. This must include a duty to consider viable alternative designs for major projects that will minimise energy use and emissions.

Recommendation #48: The Act should be amended to codify a comprehensive and systematic system of assessment for major projects that are likely to generate significant emissions, such as new coal mines and power stations. This would involve the introduction of criteria that require major projects to use proven best practice technology and also prescribe mitigation measures and/or appropriate conditions that must be considered before a project can be approved, including explicit consideration of other alternatives that are less hazardous or intensive.

Recommendation #49: Major projects must be prohibited in coastal areas seaward of an immediate hazard line; and the Minister for Planning must be satisfied that a project will avoid or minimise exposure to coastal processes or it cannot be approved.

Recommendation #50: The Act must incorporate an objective process for considering cumulative impacts of major projects.

6. Part 4

Recommendation #51: The *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* should be reviewed. Categories of exempt and complying development should be identified at the local level by councils after taking into account the individual character of their LGAs.

Recommendation #52: The Standard Instrument should be amended to include standardised community consultation requirements in a new mandatory clause. This clause should apply to all categories of development that are not exempt or complying development.

Recommendation #53: Third party merits appeal rights under Part 4 should be broadened to include developments relying on significant SEPP 1 objections, developments where council is both the applicant and the consent authority, or where an application relates to land owned by a council; major and controversial developments, and developments that are the subject of planning agreements. Wherever there is a performance standard that is not met (like SEPP 1s) then there should be a right of merits appeal to objectors.

Recommendation #54: The Department of Planning should publish guidelines to assist public authorities in determining whether exempt development will be of ‘minimal environmental impact’. These guidelines should be made available for public comment before publication.

Recommendation #55: A requirement for complying development to be of “minimal environmental impact” should be introduced.

Recommendation #56: The Act should be amended to establish a more rigorous regulatory regime that applies to environmental impact assessment under the Act.

Recommendation #57: The Act should be amended to require all environmental consultants conducting assessments under the Act to be accredited. (This could be a DECCW accreditation scheme or an approved industry-based scheme, for example administered by Ecological Consultants of Australia).

Recommendation #58: Accredited consultants should be independently allocated to assess major projects from a pool of consultants, and not chosen by the proponent.

Recommendation #59: DECCW should have a review/audit role of environmental impact assessments prepared under the Act. DECCW should have broad powers to reject an unsatisfactory EIA. A broad and effective audit role will have resource issues for DECCW that need additional allocation.

Recommendation #60: The Act should be amended to require consent authorities to refuse consent to development proposals where an environmental assessment has shown that there will be a significant deleterious impact on threatened species, critical habitat, water, climate change or the environment etc.

Recommendation #61: The Act should include mechanisms to provide Councils with funds to commission environmental assessments from independent experts.

Recommendation #62: To enhance independence, the Act should limit the earnings a consultant can derive from one developer or government department per year, and former Council planners should be prohibited from operating as consultants in their own areas for 5 years after they resign from Council.

Recommendation #63: The offence of providing “false and misleading statements”¹²⁷ should be broadened to “misleading or deceptive conduct” so that, among other things, omissions are more easily captured and the jurisprudence under the *Trade Practices Act* can be drawn upon. This offence should be in the body of the EP&A Act and attract a significant maximum penalty and appropriate remedies.

Recommendation #64: The Act should be amended to provide that climate change is a mandatory consideration to be taken into account by decision-makers under s79C. This must include an explicit requirement to consider and assess the greenhouse gas emissions resulting from various design options.

Recommendation #65: All further development should be prohibited by legislation for areas identified as being seaward of an immediate coastal hazard line. Such an approach is consistent with the precautionary principle and will protect high risk communities from

¹²⁷ See clause 283 *EP&A Regulation 2000*.

future environmental, social and economic impacts. This requirement should apply regardless of whether the development is assessed under Part 4, 5 or 3A or whether the consent authority is a local council, a public authority, the Minister for Planning, Joint Regional Planning Panels or the Planning Assessment Commission.

7. Part 5

Recommendation #66: The Act should be amended to give statutory force to Reviews of Environmental Factors and require determining authorities to release these for public comment before decisions are made under Part 5.

Recommendation #67: The Act should be amended to explicitly require climate change and water use/impacts to be assessed under Part 5. Any guidelines or best practice criteria made under Part 4 should also apply.

8. Interaction with related environmental legislation

Recommendation #68: Restore concurrence requirements with agencies that administer related environmental legislation and therefore have the assessment expertise.

Recommendation #69: Delete section 75U of Part 3A. This would reinstate the need for specialist approvals under relevant environmental legislation.

Recommendation #70: Remove Seniors Living SEPP from the *Native Vegetation Act* excluded areas schedule.

Recommendation #71: Ensure development of landscape scale environmental assessment methodologies, designed to be used for assessment and planning decisions, are based on robust and objective scientific criteria and are consistent with the objects of the TSC Act.

Recommendation #72: Conduct an audit of interaction of planning legislation with related environmental and natural resource management legislation. The audit, for example, should review the extent to which related environmental laws are overridden or excluded by current planning laws, and the extent to which legislation objectives and implementation are in conflict.

As is therefore apparent, to begin to restore the balance in implementing ESD under the current legislation, would require a large number of amendments. An alternative to attempting to make improvements within the current framework is to consider drafting a new best practice planning Act. This is discussed in **Part Three**.

Part Three: A new Act

In light of the analysis and evidence of problems with the current planning system presented in Part One, and the long list of amendments identified in Part Two, our conclusion is that instead of applying a triage approach to the current system, NSW needs a new Planning Act.

Part Two identified 70 preliminary amendments that would be needed to begin to restore the balance to planning in NSW. Our analysis and case studies demonstrate that the current legislation is: failing to achieve its objects, not prioritizing implementation of ESD, often failing to prevent significant environmental impacts, marginalizing and alienating community input, and failing to fully consider cumulative impacts, especially in relation to climate change. Tinkering within the current framework may result in improvements in relation to certain processes under the Act, but will not address the systemic imbalance that currently prioritises speedy assessment times and economic gains over the sustainability of the environment and local communities. Nor will it comprehensively deal with the layers of illogicality and internal inconsistency that has built up as a result of constant incremental amendment over 30 years. A systematic overhaul is needed in the form of a new Planning Act.

In this Part we identify 10 key elements of a new planning Act.

1. A focus on Strategic Planning
2. Implementing ecologically sustainable development
3. Improving the objectivity, credibility and cumulative impact review of environmental impact assessment
4. Genuine, appropriate and timely public participation
5. Transparency and accountability for major public projects
6. Recognising the pre-eminent role of the Land & Environment Court
7. Applying a meaningful 'maintain or improve' test to key developments
8. Making planning law climate ready
9. Ensuring integration with other environmental legislation
10. Regular review of the Act

A focus on Strategic Planning

A new Act, should have at its core, good strategic planning from which all other decisions flow, instead of ad hoc developer driven planning. The starting point for implementing ESD is to have a comprehensive medium and long-term strategic planning based on comprehensive local data. State level strategic planning can provide useful goals at the big picture level, but implementation is dependent on related legislation and disciplines. Regional strategies, done well and informed by proper biodiversity mapping, and incorporating climate ready strategies are key documents and should have legislative weight. Local Plans should in turn complement and supplement regional plans with specific local considerations. There are multiple benefits from outlining clear regulatory environmental assessment and

public consultation requirements for strategic planning, and from taking the time to produce high quality strategic planning. These benefits include: long-term sustainability for a region, buy-in of local communities, and plugging the economic drain associated with conflicts over land-use planning. A new Act should therefore stipulate processes for developing strategies (including mandatory public consultation and environmental assessment processes), give appropriate legislative weight to plans, ensure decision-making consistency with approved plans, and include review provisions so that plans can be kept up to date (and track cumulative impacts).

Implementing ecologically sustainable development

To be given proper effect, ESD needs to move beyond the realm of merely being a consideration in decision-making. A new Act would clearly state that the principles of ESD are the guiding principles of the Act and that they bind the terms of all decisions made under it. Strategic plans must describe how ESD will be operationalised through planning decisions for regional and local areas. Accompanying this, provisions should be introduced to require all decision-makers under the Act to be satisfied that a proposed development is sustainable in accordance with the principles of ESD or it cannot be approved. This will ensure that the Act leads to sustainable outcomes, and that economic, environmental and social considerations are properly integrated into all decision-making processes.

Improving the objectivity, credibility and cumulative impact review of environmental impact assessment

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

Genuine, appropriate and timely public participation

Community consultation and public participation is recognised both domestically and internationally as an important and integral part of environmental decision-making and should be a core operating principle of a new Act. There is considerable evidence that open, early engagement with local communities improves decision-making processes. Early engagement can minimise conflict during the assessment process and improve local community acceptance of proposals. The public can play a key role in providing additional local data that may not otherwise be considered. Providing merits appeal rights for third parties (including checks and balances to ensure that vexatious merits appeals do not occur) has the capacity to deliver better environmental outcomes as well as increasing the transparency and accountability of decision-making. Genuine public consultation can lead to bad decisions being avoided and good decisions being improved with appropriate local conditions. It is essential therefore that a new Act mandate genuine, open and early public consultation both on strategic planning processes and development assessment processes.

Transparency and accountability for major public projects

It is appropriate that a new Act has a part designed to deal with assessment of major public infrastructure projects. As these projects will be large and have significant environmental, social and economic ramifications, they should attract a more rigorous assessment process, with comprehensive public participation and review rights, and consideration of cumulative impacts. There must be clear parameters and provisions to prevent ‘forum shopping’ by developers.

Recognising the pre-eminent role of the Land & Environment Court

The NSW Land & Environment Court is internationally recognised as a best practice jurisdiction regarding ESD, and as a specialist body, it is best equipped to deal with the difficult task of translating ESD into practice. It has 3 decades of experience in hearing planning and development issues and therefore has unparalleled expertise and well established processes. A new Act must recognise the primacy of the LEC as a review body, over and above any specialist commissions or panels (such as PACs or JRPPs) and also jurisdiction of other Courts (such as the Supreme Court). This is essential for the application of consistent, transparent, and impartial decision-making standards.

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

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

Making planning law climate ready

A new Act should require a comprehensive assessment of the climate change implications of all development, the incorporation of climate change considerations into strategic planning, and the introduction of best practice criteria and standards that all proposed development must comply with in order to proceed. These provisions must apply to all categories of development. Climate change (and the cumulative impacts thereof) must be a mandatory consideration under a new Act.

Ensuring integration with other environmental legislation

A new planning Act should complement related environmental and natural resource management legislation, and not override it. Concurrences should be required for

developments that impact on issues under related legislation (for example, threatened species, water), and the Department of Planning should defer to other departments that have relevant expertise in assessing environmental impacts. This is an essential part of developing a whole of government approach to implementing ESD across all departments for a sustainable and well-planned NSW.

Regular review of the Act

There must be a clear process set out in the new Act for an independent review to be undertaken every 5 years, as exists at the Commonwealth level (for example, under the *Environment Protection & Biodiversity Conservation Act 1999*). Reviews must be independent and involve significant stakeholder and community consultation, and involve an independent assessment of whether the new Act is effectively implementing ESD.