



CLAYTON UTZ

A NEW PLANNING SYSTEM FOR  
NEW SOUTH WALES



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# NSW's long-awaited new planning system has been unveiled in the form of a White Paper and draft Bills

On 16 April 2013, the NSW Government released its White Paper and Exposure Draft Bills in relation to the proposed reform of the NSW planning system. The reform's objective is to establish a new planning system with an emphasis on evidence-based strategic planning in the preparation of plans, community and stakeholder engagement and decision-making. Submissions on the White Paper and Draft Bills are open until **28 June 2013**.

The Planning Bill 2003 and the Planning Administration Bill 2003, however, in many respects, represent a rewrite of the existing Environmental Planning and Assessment Act 1979 (EP&A Act). Indeed, the framework of the EP&A Act and its provisions in relation to plan making (Part 3), environmental assessment (Part 4), infrastructure (Part 5) and those parts concerning certification and enforcement will look very familiar.

So what has changed? Essentially the proposed reform of the existing planning regime is intended to result in a change in culture and approach to environmental assessment; from combative to collaborative, and from a system based on prescriptive development assessment to one focused on strategic planning. This takes more than just changes to the black letter of the law.

The changes to the planning system in NSW focus on five key areas:

- strategic planning;
- community consultation and participation;
- reform of assessment tracks including the new development code assessment;
- major projects and infrastructure; and
- reform of the contributions regime.

The White Paper and Exposure Draft Bills reflect an indirect approach to planning reform in NSW. Many of the processes and procedures currently enshrined in the EP&A Act will continue to apply under the new Planning Bill. Essential reform will be delivered through the overhaul of planning policies, with local plans taking on a significantly greater burden in delivering not only local outcomes but also regional and indeed State objectives. Further, to overcome widespread public apathy and antipathy to the planning process in NSW, the Government intends to place significant focus and resources in earlier strategic consultation.

The success or otherwise of the proposed reforms to the NSW planning system will therefore very much depend on the Government's ability to reform strategic plan-making and engage the community at a much earlier stage of the planning process. This requires as much a cultural and attitude change as it does reform of the EP&A Act.

# A new approach to strategic planning

Part 3 of NSW's draft Planning Bill is essentially a rewrite of Part 3 of the EP&A Act regarding the making of planning instruments.

One of the main differences however, is the intention to have strategic alignment of all plans through the adoption of a set of planning principles to guide the implementation and delivery of a limited number of core Government strategies. Those planning principles give precedence to promoting the State's economy through facilitating delivery of development in a sustainable way. This includes integrating development with infrastructure and streamlining approval of development which is consistent with agreed plans with a focus on early community consultation.

## A new hierarchy of plans

While we are familiar with a hierarchy of environmental planning instruments that currently exist under the EP&A Act, there will be a new hierarchy of plans under the Planning Bill:

- **NSW planning policies:** these are a set of integrated policies that represent the State's broad planning objectives, priorities and policy directions. They are intended to be in line with other key NSW policies (such as transport) and incorporate where relevant the strategic elements of existing State environmental planning policies (SEPPs) and section 117 directions. There is intended to be a small number of core planning issues of State significance such as housing, employment/growth, environment, agriculture, energy and infrastructure.
- **Regional growth plans:** these will provide a high-level vision for each region, establish objectives and planning

policies relating to housing, employment, the environment and infrastructure, and identify key regional shapers of significance (such as ports, agriculture and so on). These plans will not directly zone land or contain regulations on development.

- **Subregional delivery plans:** these provide the delivery framework for regional growth plans. These will identify actions and obligations for the subregion such as housing targets. There is particular focus on integrating infrastructure and these plans will set mandatory development parameters to shape subsequent development. These plans will be developed by subregional boards, a new planning body to be established under the Planning Administration Bill, comprising representatives from councils in the subregion and State representatives. This is intended to be the "new partnership" model for collaboration between the various tiers of government and associated agencies.
- **Local plans:** these will be the key planning instruments which gives **legal** effect to the plans and policies applicable to the area to which they relate. All planning and infrastructure requirements are to be accessible in the local plans. Accordingly, one of the challenges presented by the reform of the planning regime is to ensure that the local plans are consistent with, and adequately reflect, the higher order plans.

## All roads lead to ...

The primacy afforded to Local Plans is a noticeable departure from the existing planning regime where SEPPs would commonly be relied on to overrule LEPs. As a consequence of this change, it is considered no longer necessary for the Planning Bill to contain a provision equivalent to section 36 of the EP&A Act to resolve inconsistencies between planning instruments.

Local Plans will comprise four key parts:

- **The strategic context:** This is intended to summarise and give effect to the policies and objectives of the higher order plans, including the Subregional Delivery Plans;
- **Statutory planning controls:** It is proposed that these controls be simplified with a shift to fewer, broader zones to increase compatibility of development. The number of zones will reduce from 35 to 13;
- **Development guides:** This will incorporate all existing State wide exempt and complying development categories. Development guides will also be performance based rather than prescriptive. Performance criteria will be specified with "acceptable solutions" which illustrate the preferred way of complying with performance criteria. Applicants, however, can come up with their own solutions that satisfy those criteria; and
- **Contributions** for local and regional infrastructure.

Councils will be responsible for certifying that the Local Plan complies with the policies and objectives of NSW planning policies, Regional Growth Plans and Subregional Delivery Plans.

## ePlanning

To assist with making information about strategic planning accessible to the community, the Department of Planning and Infrastructure is to establish a portal which provides electronic access to planning information, including development controls. In this way, information about planning assessment should be readily accessible and capable of being embedded in relevant Local Plans.



## A new approach to community participation

The NSW Government recognises that in order to achieve effective reform of the planning system, there needs to be a change in the way in which the community is consulted in relation to planning matters.

The existing public consultation regime in the planning approval process has been extensively criticised from all quarters – broad elements of the community regard it superficial and lacking any transparency and accountability, whereas the property sector believes that the “one size fits all” approach to consultation unnecessarily delays the assessment of developments which are otherwise permissible within the relevant zone. Consequently public consultation during the planning process is frequently perceived as adversarial.

The Government proposes to reform the existing consultation requirements in the EP&A Act in two significant ways:

- to enact a Charter which sets out a number of key principles in relation to community participation in the planning process. That Charter will underpin participation plans that local councils and other planning bodies need to prepare to ensure that the community are appropriately engaged; and
- to shift the emphasis on consultation to the strategic phase of the planning process rather than at the back end of development assessment. Consequently, the Government proposes a regime of proportional participation.

The Bill imposes a statutory obligation on planning authorities to act consistently with the Charter when undertaking strategic planning and development assessment. Community participation plans are to be prepared based on the Charter and it is those plans which will provide proportionate levels of consultation with emphasis on community involvement in strategic planning rather than complying and code assessment developments. This will be critical if the Government is to achieve its target of having

80% of all development applications determined in less than 25 days within five years of commencement of the new Act.

The effectiveness of public consultation, however, is only as good as the level of and opportunities for genuine engagement. There is clearly a need for the Government and planning authorities to overcome widespread public suspicion and antipathy to the planning process in NSW. Cultural change is as important as changes to the process of public consultation.

In an effort to deal with the vexed issue of public consultation, the Government proposes to establish a new Deputy Director-General position in the Department responsible for cultural change, and to require planning authorities in preparing their community participation plans to identify alternative methods of community engagement to maximise the opportunities for, and effectiveness of, that consultation.

By broadening the public’s awareness of and involvement in the strategic planning phases of the planning approval process, there should be less need for public consultation in the later stages, and proposed amendments to the assessment tracks reflect this thinking.

# Streamlining approvals: Code Assessment Development

In addition to the exempt, complying and merit assessment development tracks that we are familiar with under the existing EP&A Act, the Planning Bill includes a new assessment track called “code assessment”.

The objective of including this new assessment track is to enable the Government’s target of having 80% of development applications assessed as either complying or code assessment development achieved within five years.

## Code assessment

Code assessment developments will effectively be another category of what would otherwise be merit assessment, but a more standardised development that meets pre-approved performance criteria. This is meant to take out of the merit assessment track those developments that do or can be made to satisfy those pre-approved performance criteria.

The code will prescribe the performance criteria of the specific aspects of a development, and identify what it considers to be acceptable solutions to satisfy those performance criteria. If a development incorporates those acceptable solutions to achieve the performance criteria, a council cannot refuse the development application; nor can it impose conditions on the development other than what will be prescribed as standard conditions. Code assessment development must be assessed and determined within 25 days.

There are other consequential amendments to facilitate code assessment development. Councils cannot stop the clock in relation to a code assessment development, nor will there be any opportunity for public submissions in relation to such a development application. The view taken by the Government is that if the community has been consulted in relation to the identification of what is “code assessment development”, then there is no further need for it to be consulted about any specific code assessment development. It is sufficient that neighbours are “informed” of the fact that an application for code assessment development has been received by council.

## Merit assessment

Apart from the introduction of code assessment development, the Government has also proposed to streamline the merit assessment process to limit the number of opportunities for a council to stop the clock and to require the council to notify an applicant to amend the application to meet certain performance criteria.

Further, in assessing the merit of development applications, the council is to have regard to the code assessment guidelines. Any public consultation in relation to the development application would be limited to those aspects of the development which do not meet the performance criteria for code assessment development. To the extent that a development application meets the performance criteria in the code assessment guidelines, the council cannot refuse approval in relation to that aspect of the development.

## Approvals under other legislation

Development that requires approvals under other legislation will continue in large part to continue to require referral to the other agency. The Government however intends to undertake a review of the need for referrals under other legislation, and has already signalled in the White Paper that aquifer interference approvals under the Water Management Act 2000, and approvals to clear native vegetation under the Native Vegetation Act 2003, will no longer be required for State significant development on the basis that these issues would have been appropriately addressed during the strategic planning phase in preparing regional and subregional plans.

In addition to undertaking a comprehensive review of current referral requirements, a “one stop” referral shop would be established within the Department of Planning and Infrastructure. This office will effectively operate as a clearing house for referrals and obtain general terms of approval so that there is a single set of those terms. Relevant agencies will continue to assess applications and provide advice but this will be done via the Department.

**Code assessment is meant to ensure 80% of development applications are assessed as either complying or code assessment development achieved within five years.**



## Major projects and infrastructure

As a result of the repeal of Part 3A of the EP&A Act in September 2011, two new categories of major project development were created:

- State significant development (**SSD**) under Division 4.1 of Part 4 of the EP&A Act;
- and State significant infrastructure (**SSI**) under Part 5.1 of the EP&A Act.

The White Paper and the Planning Bill set out three categories of development for the environmental impact assessment of major projects:

- State significant development;
- State infrastructure development (**SID**); and
- Public priority infrastructure (**PPI**).

It is also important to discuss the manner in which “activities” under Part 5 of the EP&A Act are dealt with under the Planning Bill.

### State Significant Development

SSD is carried through as a concept under Part 4 Division 4.6 of the Planning Bill, and the environmental impact assessment process for SSD under the Planning Bill is essentially the same as the process for SSD under Division 4.1 of Part 4 of the EP&A Act.

The key differences are:

- SSD under the Planning Bill may be declared by the planning control provisions of a local plan, as opposed to a NSW planning policy (the equivalent of a State environmental planning policy (**SEPP**) under the current SSD provisions of the EP&A Act);
- Not all SSD will require an environmental impact statement (**EIS**);
- More flexibility for determining staged development applications for SSD under section 4.31 (which is similar to the Part 3A concept plan regime under section 75P);
- an approval for SSD under the Planning Bill will dispense with a requirement to obtain an aquifer interference approval under the Water Management Act 2000. In this regard, the White Paper states that “an aquifer

interference approval... will be better integrated into the comprehensive and rigorous assessment of State significant developments and a separate approval will not be required”;

- under the EP&A Act, “objector” appeals were limited to those categories of development that were SSD as well as designated development. An objector appeal is available to a person who lodges a submission to an EIS when it is placed on public exhibition and entitles that person to commence an appeal in the Land and Environment Court within 28 days of the grant of the determination of the application for SSD. This is a merit review in which the Court stands in the shoes of the decision-maker and makes the decision afresh. Under section 9.8 of the Planning Bill, all SSD development that requires an EIS is included in the definition of “EIS assessed development” which creates objector rights of appeal. This appears to contradict a statement in the White Paper: “Applicant and objector merit appeals will remain unchanged in the new development assessment system with parties having the standard six months to appeal. Objector appeal rights for EIS assessed development will be the same as the current appeal rights for designated development”.

## State Infrastructure Development

The process for SID under Part 5 Division 5.2 of the Planning Bill is very similar to the environmental impact assessment process for SSI under the EP&A Act.

As with SSD under the Planning Bill, SID under the Planning Bill may be declared under the planning control provisions of a local plan, as opposed to a NSW planning policy (or a SEPP under the current EP&A Act).

Importantly, although the Planning Bill hierarchy for strategic planning includes a NSW planning policy, which is designed to be the equivalent of SEPPs, the pathway to SID is through a Local Plan. This may create an **inflexibility in the planning process** for the declaration of SID under the Planning Bill.

## Public Priority Infrastructure

The entirely new category of development in the Planning Bill is Public Priority Infrastructure (**PPI**) (Part 5 Division 5.3). The creation of this new category of development is designed to simplify the planning process for the highest priority infrastructure projects.

It is designed to progress delivery of infrastructure that is essential to State development and the economy and it will encompass projects that are agreed by governments and identified in the highest level of NSW Government strategies such as the State Infrastructure Strategy and the NSW Long Term Transport Master Plan.

PPI is a different process that does not result in the issue of an approval. However, PPI attracts the protections that currently apply for critical SSI under the EP&A Act. These include limiting the right of legal challenge, and restricting

the circumstances in which certain notices under environment protection legislation can issue. PPI also has the benefit of the provisions which apply to SSD/SID which state that certain statutory approvals are not required and certain statutory approvals must be issued consistently with the SSD/SID.

For planning purposes, the declaration of development as PPI will authorise the carrying out of projects to which it applies, without the need for further planning approval. The environmental assessment will then focus on the environmental management measures to minimise any adverse impacts of the Project.

The stated benefit of PPI is that environmental assessments will be based on the risks of impacts that are underpinned by robust methodologies and standard management measures.

The White Paper indicates the PPI process will take two years. However, before carrying out development for the purposes of PPI the proponent must prepare a Project Definition Report on the carrying out of the development, which must be publically exhibited for at least 28 days. The Project Definition Report is to set out a number of matters, including:

- the description of the development (including any staging or the carrying out of the development);
- the measures that the proponent will take to avoid, minimise or mitigate any adverse impacts of the development; and
- the monitoring, auditing and reporting that the proponent will undertake in relation to the environmental impacts of the development during the construction and operation stages of the development and any other matters prescribed by the regulations.

## Part 5

Part 5 of the EP&A Act is concerned with “activities” (defined in similar terms to “development”) which are primarily carried out by or on behalf of public authorities.

“Activities” will now be assessed under part 5 Division 5.1 of the Planning Bill as “relevant development”. The duty to assess the environmental impacts of an “activity” under section 111 of the EP&A Act have been, to a certain extent, circumscribed by the Planning Bill which now requires a determining authority in its consideration of any relevant development “to examine and take into account the matters affecting or likely to affect the environment because of the carrying out of that development”.

Section 111 of the EP&A Act is in broader terms, although the courts have read down the scope of the duty under section 111 to examine or take into account matters to the fullest extent “reasonably possible”. Consequently, there is little change between the EP&A Act and the Planning Bill between Part 5 and the new Part 5 Division 5.1 of the Planning Bill.

**Public Priority Infrastructure is an entirely new category of development which is designed to simplify the planning process for the highest priority infrastructure projects.**



# Infrastructure contributions

NSW's White Paper and exposure draft Planning Bill intend to simplify and streamline the regime for contributions for infrastructure.

The setting of contributions will be guided by a number of principles to be included in a NSW planning policy on infrastructure. Contributions will be limited to a number of specific categories of infrastructure; they are the only ones upon which contributions can be sought.

Contributions will be based on standardised benchmark costs to be set by IPART, and councils will need to justify any departure from those benchmark costs for specific infrastructure.

There will be three kinds of infrastructure contributions:

- local infrastructure (such as roads and drainage);
- regional infrastructure (such as regional and state roads, transport infrastructure, schools and regional open space);
- regional growth funds.

Contributions can be applied to development under Part 4 and private State infrastructure development under Part 5.

Councils will only be able to impose contributions for local infrastructure if they have a local infrastructure plan, with those contributions required to be applied within three years. The Land and Environment Court will continue to have jurisdiction to hear appeals against conditions requiring contributions and be able to set aside contributions if it considers them unreasonable, even if authorised under a local infrastructure plan.

**Infrastructure contributions will undergo significant changes, and if not kill, then certainly wound, voluntary planning agreements.**

## Growth infrastructure plans

Underpinning regional infrastructure contributions will be growth infrastructure plans. These plans will identify ten and five year spatial infrastructure requirements to assist in developing a contributions schedule for regional infrastructure. These plans will also include a requirement for contestability assessment which provides an opportunity for the private sector to participate in the delivery, design, construction and operation of regional infrastructure.

## The death of VPAs?

While the Planning Bill retains the provisions in the EP&A Act in relation to voluntary planning agreements, the White Paper makes clear that regimes to impose contributions outside the contributions plan regime will be discouraged.

Consequently, contributions required through conditions of consent or voluntary planning agreements will be discouraged or not accepted. It is proposed that voluntary planning agreements will only be available in relation to State significant development.



## Changes to the offence provisions

The Planning Bill proposes to introduce three tiers of offences, similar to the regime that currently operates under the Protection of the Environment Operations Act.

Tier 1 offences, the most serious which result in, or are likely to result in, environmental harm or death or serious injury. The maximum penalty for corporations for such an offence will be \$5million, and \$1million for an individual. This is a significant increase on the current maximum penalty for a breach of the EP&A Act which is \$1.1 million.

Tier 2 offences involve less serious breaches and attract maximum penalties for corporations of \$2 million and, in the case of an individual, \$500,000.

Tier 3 offences which involve breaches of procedural or administrative character will attract maximum penalties of \$1million for a corporation and \$250,000 for an individual.

One notable omission from the Planning Bill is any provision regarding executive liability for offences of corporations. Unlike other primary environmental protection laws, such as the Protection of the Environment Operations Act 1997 or the Contaminated Land Management Act 1997, there is no provision which deems a director or executive of a corporation to have committed the same offence as the corporation in certain circumstances.

The Land and Environment Court will also be provided with a broader range of orders available to it to deal with criminal conduct. This includes orders for restoration of the environment, publication of orders or requiring attendance at a relevant training course.

In addition to enforcement of the Act for a criminal proceedings, there remains the right for any person to bring civil proceedings in the Land and Environment Court to remedy or restrain a breach of the Act. The equivalent provision in the EP&A Act, section 123, has been a principal means of enforcement of breaches of the Act, including decisions to approve development which has been used extensively by the community and interest groups to challenge large and contentious projects.

**The Planning Bill proposes to introduce three tiers of offences, similar to the regime that currently operates under the Protection of the Environment Operations Act.**



## ESD remodelled

Ecologically sustainable development has now been simplified to the concept of “sustainable development.”

In a significant departure from the EP&A Act and other environmental protection legislation, the Planning Bill eschews the currently accepted definition of ecologically sustainable development (ESD) and, in particular, the principles of ESD such as intergenerational equity and the precautionary principle.

Considerable jurisprudence has grown up in recent years around these principles and how they are to be applied in the development assessment process. It remains to be seen whether that jurisprudence will continue to be relevant having regard to the manner in which the concept of sustainable development has been defined.

In essence, ESD has now been simplified to the concept of “sustainable development”. That concept is expressed in the context of the objects of the Act as being achieved by the “integration of economic, environmental and social considerations, having regard to present and future needs, in decision-making about planning and development”.

Rather than the specific ESD principles, there are now three broad but interdependent “pillars” underpinning the concept of sustainable development:

- **environment:** protecting threatened species and habitats, using natural resources wisely and minimising, mitigating or addressing environmental impacts;
- **economic:** promoting the development of the economy and the wellbeing of all communities by facilitating housing, business employment and other forms of activity and improving productivity; and
- **social:** facilitating housing that meets the needs of the whole community, creating high quality build environment that promotes health of all communities and ensuring accessibility for services and employment opportunities.

Although subtle, the change in emphasis towards economic development and, in particular, housing, would suggest that the Government was intending to rebalance how sustainable development is seen in the context of development assessment and approval.

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