



Office of
Environment
& Heritage

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Mr T Moore
Co-Chair
Planning System Review
GPO Box 39
SYDNEY NSW 2000

24 APR 2012

Dear Mr Moore

I am responding to your letter sent to the Minister for the Environment on 6 December 2011 enclosing a copy of the Issues Paper of the NSW Planning System Review. The Minister has asked me to prepare a response from her portfolio agencies to respond to the issues you have raised and to contribute to the next phase of the planning review.

The *Environment Planning and Assessment Act 1979* has for over 30 years been the foundation of the way strategic planning and development control has been undertaken in NSW. It has been amended on a number of occasions. With the introduction of the Government's NSW 2021 plan and its well articulated priorities for community engagement and localism it is indeed timely for the Act to undergo a complete review.

The issues paper certainly reflects matters that have been raised about the planning system by stakeholders and indeed staff within both the Office of Environment and Heritage and the Environment Protection Authority when interacting with the NSW planning system over the years. The questions you have asked go to the heart of designing a planning regime.

An effective planning system should provide a clear and robust framework to encourage enterprise and community activity and wellbeing, whilst also taking an ecologically sustainable approach so future generations may continue to enjoy the social and natural capital available to current generations.

There have been significant improvements in our capacity to measure and assess environmental impacts over the past 30 years. Robust and scientifically rigorous methods are more available for biodiversity, water quality, air quality, noise levels and other environmental parameters. The adoption of these approaches has clear benefits for industry through the establishment of clear and predictable standards. The community also benefits as the community can have greater confidence in the credibility of the assessment approach whether that assessment is undertaken by a council for a regional plan or a developer for a particular site. These methods, such as biodiversity certification and biodiversity banking, also provide the opportunity to establish a credible offsets regime.

Recent examples of good planning processes and environmental outcomes demonstrate that where possible planning is best done on at a regional or landscape scale. For example, biodiversity certification of the Albury and Wagga Wagga local environmental plans provides

conservation benefits into the future and greater planning and development certainty for these growing cities. The certified plans protect high conservation value vegetation and regional biodiversity corridors up front and switch off the need for threatened species assessment in those areas available for development. The growth centres of western Sydney also have biodiversity certification, dramatically reducing red tape and improving housing affordability.

From a conservation perspective the planning system should place the greatest emphasis on the protection of areas most intact in terms of biodiversity, Aboriginal cultural heritage and native vegetation and land with the highest conservation values. This includes proactive protection within the broader landscape of areas protected gazetted and managed under the *National Parks and Wildlife Act 1974*. Where possible the planning system should also support the establishment and protection of conservation corridors in line with the Government's commitment to build and maintain conservation corridors within a mix of both public and private land conservation.

The conservation of our Aboriginal and non-Aboriginal heritage is linked to the planning system. There are significant opportunities through a regional planning approach to align the aspirations of Aboriginal communities for the conservation of their culture with the planning system, resulting in broad social benefits. As you would be aware the Government is undertaking a review of the Aboriginal culture and heritage legislative provisions. This reform will need to go hand in hand with any proposed changes to the planning system.

In relation to non Aboriginal heritage, the planning system currently provides the regulatory protection for over 95% of listed heritage places in NSW. As a result it is critical that heritage is identified as a head of consideration in planning law for all stages of planning and development control.

It would assist all involved in the planning system if there could be greater clarity about the various scales of plans and how these plans nest together. For example, a more formal link between the planning system and the natural resource management planning approach in the Catchment Action Plans would assist with priority setting. Additionally, integration of Coastal Management Plans with the planning system would reduce duplication.

The Minister for the Environment is currently leading a Ministerial Coastal Taskforce that is examining how to manage current and future coastal hazards, including beach erosion and coastal flooding. To avoid these risks increasing in the future, it is important that such hazards are effectively considered within the planning system.

The Ministerial Taskforce is considering the relationship between Local Environment Plans and Coastal Zone Management Plans prepared by councils, which identify areas vulnerable to these current and future hazards, as well as actions to manage current hazards. Serious consideration is being given to incorporating the Coastal Zone Management plan provisions into Local Environment Plans. The review of the planning system should consider the relationship between issue specific and general environmental management plans with a view avoiding duplication and reducing red tape.

It is clear that the Government wishes to improve accountability and integrity in the planning system through enhancing transparency and community involvement. The Act already has as one of its objectives to provide increased opportunity for public involvement and participation in environmental planning and assessment. New communication methods and technologies for sharing information and enabling on-going discussions such as social media should be facilitated within a new planning system. This should provide more members of the community including those in regional and remote communities with opportunities to participate in planning matters.

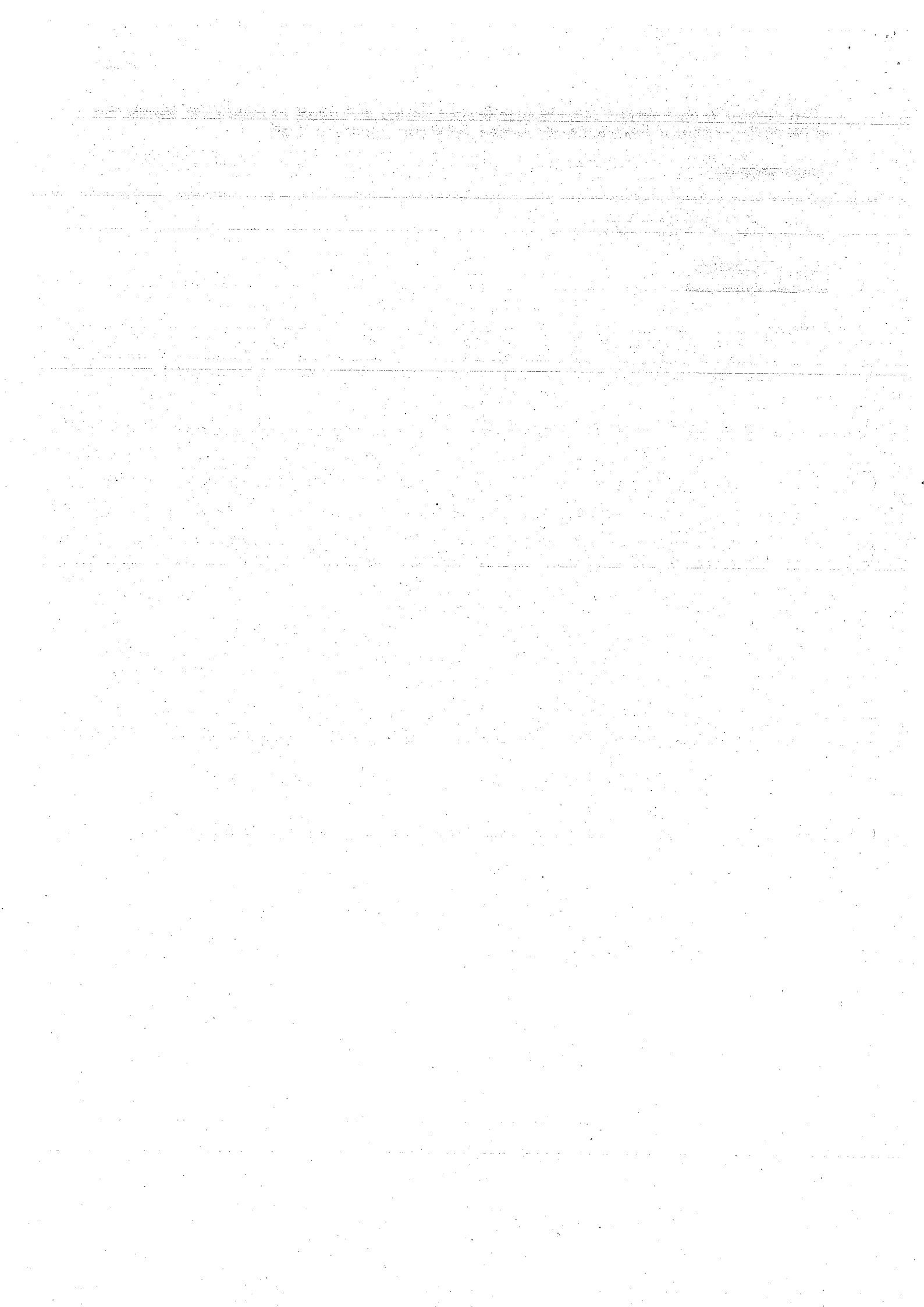
I enclose a document setting out a summary table of comments from the Office of Environment and Heritage and the Environment Protection Authority on specific questions raised in the issues paper relating to the responsibilities of the environment portfolio.

I look forward to next stage of the Planning System Review and would be pleased to discuss any of the matters raised in this submission in more detail with you or your staff.

Yours sincerely

SALLY BARNES
A/Chief Executive

Enclosure



OFFICE OF ENVIRONMENT AND HERITAGE

SUBMISSION TO THE NSW PLANNING SYSTEM REVIEW

Introduction

The Office of Environment and Heritage (OEH) and EPA have a number of roles and undertake a number of activities under the *Environmental Planning and Assessment Act 1979* (EP&A Act) including:

- an assessment role for Integrated Development where an environment protection licence under the *Protection of the Environment Operations Act 1997* or a permit under s. 90 of the *National Parks and Wildlife Act 1974* or an approval under the *Heritage Act 1977* is required;
- a concurrence role for determinations/development consents where threatened species are likely to be significantly impacted or where an item is listed in the State Heritage Register;
- a compliance role with respect to clearing of, and impacts on, biodiversity, due to statutory responsibilities under the *Native Vegetation Act 2003* and the *Threatened Species Conservation Act 1995*;
- a proponent and determining authority role for activities in lands reserved under the *National Parks and Wildlife Act* and lands within the Western Sydney Parklands and the Royal Botanic Gardens and Domain;
- a development consent role for the NSW Coastal Panel (secretariat services provided by OEH) through the *State Environmental Planning Policy (Infrastructure) 2007*;
- an advisory role on the development of environmental planning instruments;
- an advisory role in minimising impacts on the environment and heritage for major projects;

OEH has set out its submission under the four key areas identified by the Planning Review Team. Possible improvements to the planning system which could be made have been set in the context of the wider COAG policy agenda, NSW 2021 and include a focus on:

- improved consistency and transparency in assessments and predictability of required outcomes
- better use of strategic approaches including under the *Environment Protection and Biodiversity Conservation Act* (EPBC Act) to streamline processes for developers and deliver better outcomes for the environment
- clearer focus on matters of genuine environmental and heritage significance particularly at national and state scales.

What should be the underpinning objectives and philosophy of a new legislative structure?

Key outcomes and principles of a planning system

A revised planning system or framework should be designed to deliver the following outcomes:

1. ecologically sustainable development
2. protection of the environment and heritage
3. protection of places and natural resources of value to communities, including to Aboriginal communities
4. quality urban and rural environments in the long-term
5. design excellence in development.
6. appropriate allocation of land uses and avoidance of land use conflicts
7. increased opportunities for the community to engage with the planning system including mechanisms for achieving beneficial negotiated outcomes
8. responsiveness to change, including demographic change, change in the knowledge base, and resilience to the impacts of climate change

In addition, there are a number of principles that should underpin a new planning system including:

1. adequate resources for proper planning and assessment and appropriate rules to guide development;
2. a strategic role for government in determining new precincts, land release areas, town centres etc, including infrastructure identified up-front in the planning process;
3. development levies – stable, transparent, affordable;
4. Government policy decisions considered in planning and assessment processes. Regional strategies need legislative backing and relevant authorities should be empowered to undertake land supply arrangements to deliver strategies – including explicit provisions to require offsetting;
5. land use changes, assessment and determination of development proposals must have predictable, consistent and transparent methodologies;
6. decision making should be de-politicised through the use of Planning Assessment Commission and Joint Regional Planning Panels;
7. a methodology for considering and managing cumulative impacts; and
8. insignificant or no-impact development should be removed from the assessment system.

A revised planning system should assist in delivering State Plan goals including:

- Goal 4 – Increase the competitiveness of doing business in NSW including reducing red tape by improving times for development assessment and plan making, and reducing duplication between state and Federal processes;
- Goal 22 – Protect our natural environment
- Goal 26 – Foster opportunity and partnership with Aboriginal people
- Goal 27 – enhance the cultural and natural heritage of NSW.

The Planning Act

A new Planning Act should:

- be cohesive and structured;
- have relevant and measurable objectives supported by benchmarks (or required outcomes) in subordinate plans;
- implement the guiding principle of Ecologically Sustainable Development (ESD);
- enable a system where the level of process is proportionate to the complexity of the matter;

- focus on achieving good planning, heritage and environmental outcomes, rather than being process focused;
- be able to implement interstate and international best practice;
- provide the ability for all agencies to recover costs associated with assessing development applications;
- provide for funding mechanisms for strategic planning approaches; and
- securing and managing conservation areas or offsets and heritage conservation outcomes in perpetuity.

How should plan making be undertaken?

Environmental Planning Instruments

A hierarchy of state, regional and local environmental planning instruments (EPIs) can work effectively. The State Environmental Planning Policies (SEPPs) that apply across multiple local government areas or the whole state (for e.g. SEPP 14 – Coastal Wetlands, Infrastructure SEPP) provide useful frameworks for delivering targeted outcomes.

To further deliver on sustainability principles, consideration should be given to extending BASIX (through the SEPP) and applying it to all new buildings, precinct level planning and new building standards to mitigate and adapt to the impacts of climate change (e.g. increased temperatures and storm events).

Legitimate physical or biological constraints to development identified at the strategic planning level should be acknowledged at all stages of the planning process.

Regional level plans

The cornerstone of a new planning system should be statutory strategic regional land use and infrastructure plans (or strategies) across the State. Provision for statutory regional plans should be provided for in the Planning Act. Existing Regional Strategies need to be linked to clear implementation frameworks to ensure that the objectives of the regional strategies are implemented at the local scale and new ones developed where Regional Strategies currently do not exist. These could be supported by vertically integrated local plans to deliver the required outcomes. Strategic regional plans should be appropriate for the region, rather than a one-size-fits-all model.

Strategic regional land use plans should be:

- Statutory and whole-of government plans, with responsibility for delivering key parts of the plan clearly allocated to state agencies and reporting arrangements in place to track delivery of infrastructure and other agreed outcomes;
- developed with appropriate stakeholder and community participation, including Aboriginal communities, from initial planning and consultation through to the landscape and cultural assessment;
- appropriately resourced in the development and implementation, monitoring and reporting phases (across all agencies);
- underpinned by thorough environmental assessment and robust science and supported by standards that set out the information requirements;
- spatially explicit to provide clear identification of areas where development can and cannot take place, including areas:

- appropriate for urban development, industry, infrastructure corridors (roads, rail, pipelines, renewable energy projects, transmission lines), prime agricultural land and mining;
- which need long term protection including places with high conservation values, with local or state cultural heritage and heritage significance and those needed for species adaptation to the impacts of climate change, and areas needed for water management; and
- at risk of sea level rise and coastal inundation and flooding which are constraints to development;
- at increased risk or changing risk due to increases in severity or incidence of extreme events as a result of climate change;
- aligned with NRM values and targets, linked to catchment action plans and climate change adaptation strategies ;
- able to provide for better assessment and consideration of cumulative impacts;
- clear that the outcomes and landuse allocation decisions are independent of individual pecuniary interest; and
- a dynamic document that can be updated with improved information as it comes to hand.

A funding mechanism for undertaking strategic assessment as part of the strategic regional land use plan could be developed which comprises contributions from various industry sectors and stakeholder groups, as well as Government.

Components of a strategic regional land use plan

Vision	Strategic regional plans should provide a vision for the region to which it applies to drive the development of the plan and guide the decision-making process. Strategic regional plans should be integrated with the State Plan to assist in achieving the vision and identified targets.
Strategic assessment	<p>Strategic regional plans should be informed by comprehensive environmental, social, cultural heritage and economic assessments. A new planning system needs to provide for realistic timeframes and provide adequate resources to ensure thorough assessment of issues. Environmental assessment undertaken at this stage can cascade down through the tiers of decision making and can be used in an environmental impact assessment at a development proposal stage providing savings further down the track.</p> <p>Modelling land-use scenarios at this stage can assist in determining impacts of various development options (the where and how) on air and water quality, biodiversity and threatened species and heritage, as well as help define the infrastructure needs of the region.</p> <p>Strategic regional land use plans should address/include:</p> <ul style="list-style-type: none"> ● Biodiversity/native vegetation, including climate change related adaptation needs) ● threatened species mapping ● wetlands of significance ● flood risk areas ● bushfire threat ● impacts of climate change on climate hazards including sea level, bushfire and flood risk and biodiversity ● water management issues

	<ul style="list-style-type: none"> • air quality • noise management issues • heritage and conservation including identification of heritage places (Aboriginal and non-Aboriginal) of local and state heritage significance, not only those that are currently listed • potential archaeology of local and state heritage significance • proximity of development to protected areas • land capability (e.g. slope, erosive soils, poor load-bearing soils, coastal erosion and land slip prone areas) • infrastructure needs, including emerging energy opportunities (transport, utilities, medical, educational etc) • compatibility of adjacent developments/land uses • productive landscapes, including agricultural and mineral values • demographic and social trends
Informing and consulting the public	Appropriate mechanisms for consultation with a range of stakeholders will be essential. Stakeholders include the community including Aboriginal communities, local government, industry (agricultural, mining, production etc), peak bodies and the urban development industry.
Determining impacts	Using the baseline data from the environmental assessment and the outcomes from any modelling, determine acceptable environmental, social and economic impacts and any offsets to mitigate or minimise those impacts.
Decision making	A transparent framework in which to make the decisions about land uses and to negotiate trade-offs is needed. The key principles of ESD and transparency will need to underpin the decision making framework.
Monitoring, evaluation, review	Strategic regional land use plans will need to be: <ul style="list-style-type: none"> • monitored to ensure outcomes are being achieved • evaluated for their effectiveness in achieving outcomes • reviewed regularly in order to update environmental assessments and provide for consideration of new issues/policies etc. – perhaps a mid-term review at 5 years and a statutory re-make every ten years

Cultural Heritage Management

OEH is currently conducting a review of the Aboriginal culture and heritage legislation. This is partly to ensure Aboriginal cultural heritage is addressed in a more strategic way. This reform process and the review of the planning system can inform and complement each other.

The assessment of harm to Aboriginal cultural heritage can be better supported by formal opportunities in the planning and heritage conservation system for Aboriginal communities to work towards agreement on long term priorities for protecting heritage. This should include active participation in decision-making and conservation activities, and in monitoring the effectiveness of the conservation approaches and outcomes.

The development of regional and local area based Aboriginal cultural management plans can enable long term, systematic protection of the cultural values of places,

and provide opportunities for Aboriginal people communities to inform decisions about the management of cultural values of areas that hold special cultural significance to them. To facilitate and improve the assessment of harm to cultural heritage, the existence of cultural heritage values across the landscape needs to be mapped and the full range of values assessed.

The process of making local area cultural management plans will provide an opportunity for Aboriginal communities to discuss issues and reach agreements with local governments and landholders about site protection. Landscape or area based management planning can build on the benefits of statutory protection of sites and objects, and can improve regulatory and cultural heritage value management outcomes for Aboriginal people and the whole community. Integrating the management of Aboriginal cultural heritage within a broader planning framework is also likely to increase the integration and effectiveness of natural resource management and land use planning outputs.

Land use planning should also consider and integrate heritage into its objectives, processes and outcomes.

Local Environmental Plans

OEH considers that the Standard Instrument Local Environment Plan (SI LEP) is an effective tool, however, it could provide more appropriate flexibility. LEPs can be more 'place-based'. For example, development of additional zones, use of "subzones" and more flexible local provisions. There needs to be consistency across the State in the application of zones.

LEPs should also:

- ensure that the outcomes identified in strategic regional plans and catchment action plans can be delivered;
- deliver the 'one-stop-shop' approach for proponents, providing clear direction on planning requirements that apply to a parcel of land in a single instrument; and
- have robust heritage schedules (and protected disclosure systems for Aboriginal cultural heritage) that capture the range of local heritage items/places to provide certainty to owners and managers, as well as the community.

Once new principle LEPs are in place, the ability to spot rezone should be limited. The "gateway system" should be strengthened to provide justification as to why land should be spot rezoned to ensure the gateway is not simply used to "upzone" land to raise its value, regardless of location, need or intent to develop. The requirement that councils have to endorse a spot rezoning request before it is forwarded to the Department Planning and Infrastructure (DP&I) for a gateway determination is supported.

The existing shared governance of the state's heritage places between local and state government provides the opportunity to make determinations based on the established level of heritage significance of places as follows:

- local councils to continue to list and manage places of local heritage significance under the Planning Act (listed on the Local Environmental Plan); and
- the Heritage Council to list and manage places of state heritage significance under the Heritage Act (listed on the State Heritage Register).

To reinforce and empower local councils (who manage the bulk of the state's identified heritage assets) the following improvements to a Planning Act should be considered:

- Improve consistency with established models, to improve community certainty and informed decision-making through the process for listing heritage items of local or state significance;
- Consider how to properly implement and strengthen the mechanisms for councils to deal with demolition of unlisted places with potential heritage values;
- Streamline heritage provisions of both the planning and heritage legislation to provide better alignment with the State heritage listing process.

Strengthened provisions to ensure that minimum maintenance and security standards are enforceable, consistent with State heritage legislation, would empower councils to reduce instances of demolition by neglect, and delisting actions to allow demolition based on poor condition.

The Minister for the Environment is currently leading a Ministerial Coastal Taskforce that is examining how to manage current and future risks from coastal hazards, including beach erosion and coastal flooding. There are two complementary strategies for managing these risks: The first is to minimise future risk exposure by ensuring that any new development in areas vulnerable to these hazards has been designed to accommodate potential impacts. The second strategy focuses on managing risks to existing development. This may include actions such as building coastal protection works such as seawalls.

Councils currently prepare coastal zone management plans which map areas vulnerable to coastal hazards for inclusion in planning instruments, and develop strategies to manage risks to current development. The Ministerial Taskforce is considering the relationship between Local Environmental Plans and coastal zone management plans by councils.

There are currently no provisions in the SI LEP for including mapping of coastal hazards to support the standard instrument's current clause relating to development in the coastal zone. This contrasts with the model clause for managing flood hazards, which links to hazard mapping. Consideration should be given to including a coastal overlay in the SI LEP, to ensure that LEPs more effectively manage risks from coastal hazards to new developments.

How should applications for proposals for development be assessed and determined?

Development Assessment

Environmental Assessment

Good quality environmental assessment is needed to deliver good outcomes. Options for achieving good environmental assessments (EAs) include:

- Development of a set of assessment metrics for a range of issues, with criteria and assessment methodologies provided to ensure all relevant issues are considered in the EA to an appropriate standard. Guidelines for weighting

environmental, social and economic impacts, cumulative impacts and climate change will be necessary);

- State Government should be provided with the power to reject EAs which do not meet agreed and published criteria;
- Alignment of assessment processes under different pieces of legislation according to the extent of impacts or risk of a given development activity or type. For example, consistency between any schedule identifying designated development (or any development requiring the preparing of an Environmental Impact Statement) and activities identified in Schedule 1 of the POEO Act;
- Tools should be developed to monitor and evaluate the impacts of major development (at regular intervals during construction and operation) and assess these against environmental assessment predictions.

OEH has developed a number of standard assessment methodologies, including those for biodiversity certification and the biobanking scheme (under the *Threatened Species Conservation Act*), and the Environmental Outcomes Assessment Methodology (EOAM - under the *Native Vegetation Act*) and Aboriginal cultural heritage (under the *National Parks and Wildlife Act*). These methodologies set assessment expectations upfront and provide the basis for transparency and consistency.

Assessment pathways

If strategic assessment and land use planning is undertaken at a regional level, and legislatively enacted through environmental planning instruments, development assessment will be simplified.

Consideration should be given to having four levels of development assessment with the degree of environmental impact assessment commensurate with the complexity and associated impacts of the proposal:

- Major or state significant development with
 - statutory timeframes for consultation with state agencies (including review of EIA), the community and other stakeholders;
 - transparent consideration of submissions and EAs – decision making should be justified and made public;
 - modification of existing development applications over a certain proportion of the site or financial threshold
- Locally significant development – assessment by local councils with community consultation
- Minor (or complying) development – some level of assessment and community consultation
- Exempt development – no assessment or community consultation required

Determining the basic question of whether development consent is required and by which authority is very complicated in the existing planning system because of multiple pieces of overlapping state legislation, codes, policies and assessment pathways that have been created over time. This is further complicated because each exemption SEPP or similar has its own unique applications, exclusions, requirements and ability to over-ride other state laws or policies. For a more user-friendly system, and to assist in cutting red tape, it will be important for:

- state policies, codes or schedules that establish when consent is not required to be rationalised into a single stand-alone schedule of exempt and complying

- development that is amended as necessary when any further exemptions are required
- local and state planning controls to be integrated through a web-based GIS mapping system as has been established for Victoria.

The series of state codes and policies for exempt and comply development require review for compatibility with heritage conservation in order to prevent exemption of works with potential to degrade the significance of heritage items and conservation areas without any prior government assessment. The NSW Heritage Council should be consulted to ensure that codes and policies are consistent with heritage management policy.

Consideration could also be given to an assessment pathway for non-conforming development – this type of development should be carefully assessed against the outcomes of a strategic regional land use plan and required to demonstrate that the proposal meets or better the identified outcomes/standards. This type of development could also apply in special circumstances such as on land forming a critical infrastructure function (such as land that forms part of the Hunter Valley Flood Mitigation Scheme).

Consideration should be given to how to better align the conditions of consent for activities that require an Environment Protection Licence under the POEO Act and the conditions of those licences. This could include the EPA having a concurrence or determination role in developments which it will subsequently regulate through a licence under the POEO Act. The planning system should allow for audits against environmental assessment predictions of impacts from development. The system should also allow scope to amend consent conditions to require upgrades in the event that the impact predictions are not met.

Offsetting

Offsetting is fundamental to a strategic planning approach, as it allows for the weighted consideration of environmental, social and economic impacts to generate gains where environmental impacts cannot be avoided.

A new planning system should provide for a robust and transparent offsetting regime that is recognised and accepted by all planning and consent authorities, using agreed principles underpinning the “avoid, minimise, offset” approach.

There are a number of existing legislated schemes with offsetting mechanisms already in place. These include the biodiversity banking scheme under the TSC Act, and the EOAM under the NV Act. OEH is also currently trialling an offset policy for major developments in conjunction with DP&I and the Commonwealth Department of Sustainability, Environment, Water, Populations and Communities.

The “Neutral or Beneficial Effect” approach is used in the Sydney Drinking Water Catchment to ensure water quality is not degraded when development is undertaken. Such an approach could be considered for other environmental media.

Alternatively, trading schemes for air emissions or water impacts in a geographic area could result in improvements to existing activities to minimise impacts in order to allow new activities to start up in the area. The amenity noise criteria in the *Industrial Noise Policy* should guide the level of development where cumulative noise impacts

are an issue. The planning legislation should continue to make provision for negotiated agreements with residents where proposed developments cannot meet the relevant environmental criteria.