Submission No 66

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

Organisation: Local Government and Shires Association of NSW

Name: Mr Noel Baum

Position: Acting Assistant Secretary General

Telephone: (02) 9242 4000

Date received: 20/02/2009

Local Government
Association of NSW

Shires Association of NSW

Ref: R04/0066.jb OUT-16927

16 February 2009

Ms Rachel Simpson
Director
Standing Committee on State Development
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Simpson

Please find enclosed the Local Government and Shires Associations of NSW submission to the Legislative Council Inquiry into the NSW Planning Framework being conducted by the State Development Committee.

The Associations appreciate the opportunity to provide this submission to the Inquiry and look forward to assisting the Committee in its deliberations on this important issue.

Yours sincerely

Noel Baum
Acting Assistant Secretary General

GPO Box 7003 Sydney NSW 2001
L8, 28 Margaret St Sydney NSW 2000
Tel: (02) 9242 4000 • Fax: (02) 9242 4111
www.lgsa.org.au • lgsa@lgsa.org.au
ABN 49 853 913 882

Local Government Association of NSW

Shires Association of NSW

Local Government and Shires Associations of NSW

Submission to the Inquiry into the New South Wales Planning Framework

By

Standing Committee on State Development, Legislative Council, Parliament of NSW.

Index

Executive Summary

The Local Government and Shires Associations of NSW (LGSA) believe that there is a need for wide ranging and comprehensive reform of the planning system to ensure it can meet the needs of NSW communities into the 21st century.

At the time of its enactment in 1979, the *Environmental Planning and Assessment Act* was a far sighted piece of legislation, which sought to promote a better environment and the social and economic welfare of communities. It recognised the right of the public to be involved in environmental planning and assessment and promoted the sharing of responsibility for environmental planning between State and Local Government.

However, myriad amendments and additions to the Act over the past 30 years have compromised many of the key objectives of the legislation and resulted in a planning system that is one of the most legalistic and complex in Australia.

The planning system of NSW needs to be reviewed and legislation revised to reflect the challenges and opportunities presented by the 21st century.

NSW Local Government is facing major challenges including a real infrastructure funding crisis; an inadequate revenue base, exacerbated by rating pegging; deficient federal assistance grants; cost shifting; skills shortages; and ever increasing demands from the community and other spheres of government. These challenges exist alongside opportunities provided by advances in technology and the increasing investment by the Australian Government in urban development and infrastructure.

The LGSA supports an overhaul of the NSW land use planning system and legislation that would:

- Strengthen the principles and practices of ecologically sustainable development as it relates to land use and management, resource management and urban and building design. Climate change should be recognised as a primary environmental consideration in planning and development in NSW.
- Strengthen the development of sustainable communities through better alignment of strategic land use planning processes with councils' Community Strategic Plan.
- Review the balance of responsibilities between State and Local Government with reference to the principle of subsidiarity i.e. a central authority should perform only those tasks that cannot be performed effectively at a more immediate or local level.
- Strengthen the capacity of Local Government and State agencies to carry out their planning responsibilities according to best practice planning principles and practice.
- Simplify and remove inefficiencies in plan making and development through the development of integrated and spatially expressed natural resource plans at a scale consistent with local land use plans.
- Remove duplication and improve transparency, probity and consistency in the development assessment and decision making processes at Commonwealth, State and Local levels.
- Take advantage of the opportunities provided by increased investment in e-planning initiatives.

The LGSA appreciates the opportunity to provide this submission to the Inquiry into the NSW Planning Framework and looks forward to working with the Committee on this important issue.

1. Introduction

The Local Government Association of NSW and Shires Associations of NSW are the peak bodies for NSW Local Government.

Together, the Local Government Association and the Shires Associations represent all the 152 NSW general-purpose councils, the special-purpose county councils and the regions of the NSW Aboriginal Land Council. The mission of the Associations is to be credible, professional organisations representing Local Government and facilitating the development of an effective community-based system of Local Government in NSW. In pursuit of this mission, the Associations represent the views of councils to NSW and Australian Governments; provide industrial relations and specialist services to councils and promote Local Government to the community and the media.

The need for a systematic review of NSW planning legislation in New South Wales was first raised in the NSW Legislative Council in June 2008, during debate on the *Environmental Planning and Assessment Amendment Bill 2008.* During the passage of the legislation through the Parliament, the LGSA called for a parliamentary inquiry into the proposed amendments to the planning legislation. The LGSA believed that the scale and impact of the changes were extensive, and Parliament lacked the necessary detail on the subordinate legislation. Although the request for this limited inquiry into the impact of the changes on the planning system was not supported by the majority of members, the Legislative Council subsequently supported a review of the NSW planning framework, which is the subject of this inquiry.

The LGSA appreciate the opportunity to provide this submission to the inquiry by the NSW Parliament's Legislative Council Standing Committee on State Development into the NSW planning framework. This submission canvasses general issues associated with the NSW planning framework as well as addressing the specific terms of reference of the inquiry.

2. General comment

The LGSA believes that there is a consensus amongst representatives of Local Government, industry, environmental groups and the community on the need for comprehensive reform of the planning system in NSW to bring it into the 21st century.

At the time of its enactment in 1979, the *Environmental Planning and Assessment Act* was a far-sighted piece of legislation that provided a sound and equitable framework for environmental planning in this State.

However, myriad amendments and the addition of new parts to the legislation over the past 30 years have compromised a number of the key objectives of the Act, while new challenges and opportunities have arisen that are not recognised in the legislation or the planning system generally. The current system is characterised by its complexity, multi-layering of plans and consent bodies and the lack of integration of planning and environmental legislation.

There is a strong argument for a thorough revision of NSW land use planning system and legislation to:

- Strengthen the principles and practices of ecologically sustainable development as it relates to land use and management, resource management and urban and building design. Climate change should be recognised as a primary environmental consideration in planning and development in NSW.
- Review the balance of responsibilities between State and Local Government with reference to the principle of subsidiarity i.e. a central authority should perform only those tasks that cannot be performed effectively at a more immediate or local level.
- Strengthen the capacity of Local Government and State agencies to carry out their planning responsibilities according to best practice planning principles and practice.
- Strengthen the development of sustainable communities through better alignment of strategic land use planning processes with councils' Community Strategic Plan.
- Simplify and remove inefficiencies in plan making and development through the development of integrated and spatially expressed natural resource plans at a scale consistent with local land use plans.
- Remove duplication and improve transparency, probity and consistency in the development assessment and decision making processes at Commonwealth, State and Local levels.
- Take advantage of the opportunities provided by increased investment in technology as it relates to land use planning and development functions.

2.1. Strengthening capacity

The capacity of Local Government to meet its current and future obligations in relation to the NSW planning system is directly related to the broader issue of the financial sustainability of Local Government in NSW.

In September 2005 the LGSA commissioned an independent inquiry into the Financial Sustainability of Local Government in NSW (Local Government Inquiry). The Inquiry was undertaken by a panel chaired by Professor Percy Allan and was commissioned in response to widespread concerns about Local Government's financial capacity to meet the growing demand for infrastructure and services. The inquiry was conducted from 21 September 2005 to 30 April 2006.

The report of the Inquiry clearly identifies that NSW Local Government faces major challenges:

- a real infrastructure funding crisis;
- an inadequate revenue base, exacerbated by rating pegging;
- deficient federal assistance grants;
- cost shifting;
- skills shortages; and
- ever increasing demands from the community and other spheres of government.

The report's findings and recommendations confirms a long held view that Local Government faces a crisis in infrastructure renewal, resulting from restraints on rate

revenue, community demand for new services, and a lack of equitable share in tax revenue. The report's major finding is that Local Government in NSW faces a huge infrastructure renewal backlog of more than $6 billion that continues to grow by $500 million per year.

Planning and other reform programs – legislated by the NSW Government but required to be implemented and administered by NSW councils – generally fail to recognise and account for the cost and resourcing impacts of these changes on local councils and their communities. These impacts are exacerbated by the financial constraints on councils, the ongoing and piecemeal nature of planning reform agendas and the shortage of skilled planners and development professionals, particularly in the rural areas of NSW.

The recent planning reforms in NSW have had an almost singular focus on regulatory changes. Little attention has been paid to strengthening the capacity of State agencies and Local Government to better carry out their planning and development roles.

The LGSA would welcome and support a greater focus in the NSW planning system on:

- sharing knowledge and information through the development of best practice planning codes and guidelines;
- improvements to business processes including greater investment at the State level in e-planning related initiatives;
- initiatives to address skills shortages in planning and development, particularly in rural areas; and
- strengthening the financial and resource base of Local Government in NSW.

2.2. Integrated Planning

Strategic land use plan making and policy development in NSW, particularly at the state and regional level, is not well integrated with other planning processes, such as:

- planning and provision of funding for infrastructure to meet the needs of growing communities;
- natural resource planning; and
- broader community planning as will occur under the new planning and reporting framework (known as Integrated Planning and Reporting) currently being introduced to NSW Local Government.

The new Local Government integrated planning and reporting system will replace councils' Management Plan, Social Plan and State of Environment Report with an integrated framework. The Community Strategic Plan sits at the top of the planning hierarchy. The purpose of the plan is to identify the community's main priorities and expectations for the future and to plan strategies for achieving these goals. In doing this, the planning process will consider the issues and pressures that may affect the community and the level of resources that will realistically be available to achieve its aims and aspirations. While a council has a custodial role in initiating, preparing and maintaining the Community Strategic Plan on behalf of the community, it is not

wholly responsible for its implementation. Other partners, such as state agencies and community groups may also be engaged in delivering the long-term objectives of the plan.

A wide-ranging review of the NSW land use planning framework for NSW would provide the opportunity to better align land use planning at the regional and local level with the new integrated planning framework being adopted by councils. Planning for sustainable communities is a key challenge for all levels of government. It is critical that the NSW planning framework is updated to ensure it enables, rather than hinders, government and communities to meet that challenge.

3. Reference 1(a)

The need, if any, for further development of NSW planning legislation over the next five years and the principles that should guide such development.

The LGSA are committed to an efficient and effective planning system for NSW that recognises and respects the role of both Local Government and State agencies in protecting the environment, building communities where people want to live and promoting the economic well being of NSW.

3.1. Principles for Planning Reform

The following guiding principles for planning in NSW have been adopted by the LGSA:

1. The aim of all planning and infrastructure decisions should be to achieve:
   - economic and environmental sustainability;
   - social justice;
   - equitable access to housing and employment;
   - optimum quality of life for local communities.
2. Local Government believes that there is a limit to sustainable population growth and that all planning and development decisions need to consider whether this limit has been reached.
3. Strategic metropolitan and regional planning is best carried out at a regional level in a partnership approach between Local and State Government.
4. Local Government should have a lead role in planning for local communities with other spheres of government as it is:
   - best placed to inform the planning process of the needs and expectations of local communities;
   - democratically accountable to local communities; and
   - the advocate for its community to other spheres of government.
5. Local Government should retain autonomy in the making of local planning decisions.
6. Adequate financial resources must accompany the devolution of planning powers and responsibilities to Local Government.
7. All spheres of government have reciprocal obligations to recognise and respect the legitimate objectives and strategies of each other.

3.2. The need for reform

The *Environmental Planning and Assessment Act 1979* established the framework for the planning system in NSW and included a set of clear and, at the time, far sighted objectives for the planning system of NSW.

However, over the past 30 years, the Act has been the subject of numerous and significant amendments and additions. Some of the changes to the legislation have compromised the original objectives as well as contributed to its increasing complexity. The NSW planning legislation is now widely criticised as being one of the most legalistic and complex systems in Australia.

The recent series of planning reforms by the State Government had the stated aims of making the planning system in NSW 'more efficient and accountable and easier for families and small business to navigate'[1]. The LGSA strongly support a reduction in the 'red tape' that surrounds the current planning system and reforms that improve transparency and lead to greater accountability in planning and development decisions.

However, Local Government has a number of key concerns with the planning changes including:

- Community rights – the reduction in the role of council and community in the planning process.
- Complexity – rather than simplifying the development assessment (DA) process the reforms will make it more complex and difficult to navigate. Many of the real problems with the development assessment and approval process have not been addressed by the legislation, which relies on reducing the role of councils and the right of local communities to have a say over development.
- Probity – greater corruption risks due to the expanded role of appointed panels and the introduction of planning arbitrators.
- Increased costs – borne by councils and their communities, due to changes to the development contributions framework and costs associated with supporting regional planning panels and planning arbitrators.

3.3. Specific areas of reform

The LGSA considers the following aspects of the planning system in NSW are in need of reform. Proposals for improving the system, within the context of a broader review of the Act and in line with the stated principles, would assist in moving NSW towards a sustainable planning framework for the 21st century.

3.3.1. Plan Making

The NSW planning system is characterised by a multi layered system of controls that regulate land use and development, including statutory instruments such as State Environmental Planning Policies (SEPPs), Regional Environmental Plans, Local

[1] NSW Department of Planning 2007 Discussion Paper: Improving the NSW planning system.

Environmental Plans (LEPs) and Development Control Plans (DCPs) and non-statutory plans such as regional and sub-regional strategies.

Recent reforms have aimed to reduce the quantity of plans, reduce their complexity and avoid duplication e.g. proposed abolition of REPs, reduction in the number of SEPPs, standard template for LEPs and review of the number of referrals to State agencies. However the system is still enormously complex and it is difficult for landowners to readily identify and understand the planning controls relevant to their property.

The problems noted above were discussed in the *Final Report of the Independent Inquiry into the Financial Sustainability of NSW Local Government*[2]. A number of options for improving the plan making system were canvassed in the Local Government Inquiry Report including:

- The introduction of a single planning document to apply to whatever land use control format is adopted – replacing SEPPs, REPs and LEPs with a single planning document.
- Using a land parcel or locality model instead of zoning controls as the format for land use control.
- A combination of the above where land use controls, where feasible, would be integrated into the LEP thus reducing the need to refer to multiple documents.

Electronic planning tools such as web based access to maps, planning instruments and guidelines and electronic processing of development applications may, in the future, provide a means of improving access to and navigating the currently complex and multi layered NSW planning and development system.

3.3.2. Local Environmental Plans

The Department of Planning has introduced changes to streamline plan making in NSW, key among these being the introduction of the Local Environmental Plan Template. The Department set a deadline of 2010 for the revision of all councils' LEPs, although it now appears that this timetable may not be achievable.

The LGSA accept in principle that a level of standardisation is necessary across councils on the format, structure and content of comprehensive LEPs. However, the LGSA do not support the level of standardisation imposed by the rigorous implementation of the Template across rural, regional and metropolitan councils.

The level of standardisation presently imposed:

- oversimplifies local planning controls and transfers some controls to DCPs where their standing becomes advisory rather than statutory;
- fails to address local expectations and issues; and
- fails to recognise council planning staff expertise and experience.

Allowing more flexibility within the Template will not erode the principles of simplicity, legibility and consistency between plans. Tailoring LEPs to account for local

[2] Report available at Strengthening Local Government website: www.lgsa-plus.net.au

differences based on good planning principles will increase flexibility while still maintaining certainty and clarity for all stakeholders. The greater use of electronic mapping and online access to planning instruments can assist in achieving these objectives.

3.3.3. Regional and sub-regional planning

A major and ongoing criticism of the State Government's strategic planning process – including the development of regional and sub-regional plans by the NSW Department of Planning – is the lack of engagement of Local Government in the development of the strategies that directly affect local communities.

Housing and employment targets have been set in the sub-regional and regional strategies however they are not supported by integrated transport and infrastructure plans with secured funding under the State Infrastructure Strategy. Local Government is required to meet these targets through their comprehensive LEPs, and it needs to be engaged as an equal partner in the process.

There is a need for:

- A more integrated and coordinated approach to planning across NSW, including consideration of the interrelationships between the Greater Sydney region and other regions of the State, and the extension of strategic planning to non coastal regions.
- Development of comprehensive social and transport strategies to support the regional and sub-regional strategies, and better integration with catchment action plans.
- Independent and ongoing review of the objectives and targets contained in the sub regional and regional strategies.
- Consultation and public participation that achieves community acceptance and endorsement of the objectives of the strategies.

3.3.4. Planning for communities

Planning is the mechanism for creating communities. Planning decisions impact on the social fabric of communities, creating spaces for living, education, recreation and work. Recognition of the social impacts of planning decisions is essential to creating environments that positively enhance the way of life, culture and cohesion of a community. The myriad of planning reforms that have taken place since the *Environmental Planning and Assessment Act* was first introduced in 1979 have gradually diluted the significant role of planning in addressing social justice.

For Local Government 'social justice' is based on the application of the following four principles:

- Equity - fairness in the distribution of resources, particularly for those in need.
- Rights - equality of rights established and promoted for all people.
- Access - fair access for all people to economic resources, services and rights essential to their quality of life.
- Participation - opportunity for all people to genuinely participate in the community and be consulted on decisions which affect their lives.

Social Impact Assessment is important for building better communities and for better planning. Social impacts should be considered as an integral part of any planning decision, assessing how a development is likely to affect people's living, working and leisure environments. The relationships between environmental, social and economic aspects of community life need to be adequately considered during the planning process. Social objectives identified in State Environmental Planning Policies, Local Environmental Plans and other council policies can be addressed through Social Impact Assessment.

Healthy communities
Planning can be a tool to positively impact on the lifestyle and wellbeing of community members, by consciously creating environments that enable and encourage healthy lifestyles and activities, such as cycling. The Premiers Council for Active Living – *Designing Places for Active Living* proposes the use of 'key design considerations for urban places in metropolitan, regional and rural areas that have the potential to positively impact individual and community health and wellbeing in the broadest sense, thereby meeting multiple health, environmental and social objectives. Importantly, this approach does not necessarily require additional resources for implementation, rather incorporation of the key design considerations into the planning, design and development stages of minor and major brownfield and greenfield projects.'

Cultural development
Planning processes should also recognise the concept of local distinctiveness and reflect how each and every place is unique. Local distinctiveness enhances the identity, morale and social cohesion of local communities.

Cultural development should also be recognised as an integral part of planning for the overall wellbeing of a community. This extends beyond planning for physical infrastructure for cultural activities; cultural development includes recognising local heritage, history, sport, business, family, linguistic backgrounds, arts, cultural and Aboriginal sources, as essential elements to be incorporated into the development of a plan for an area.

Planning for a sense of place for Aboriginal Communities
Objects and places may be of particular value for the Aboriginal community in an area. These values may be tangible, that is associated with particular objects, or intangible, including places where no physical evidence remains but that have particular meaning for the Aboriginal community. The planning process should ensure that the sense of place for Aboriginal people is acknowledged and preserved. Decisions made at the development application stage can be more easily justified if they have been supported by an understanding of the cultural significance of an area at a strategic level that has been incorporated in land-use planning.

Given the disadvantage experienced in some Aboriginal communities (including discrete Aboriginal villages), the planning process needs to consider the special requirements of these communities. While appropriate service design and equitable service delivery is important, accessibility to services is critical to Aboriginal people. Accessibility is not just about location and design. For Aboriginal people it is about

the development of an environment that positively promotes services to Aboriginal people and manages the distrust Aboriginal people have of government services generally. [3]

3.3.5. Decision making in planning and development

The LGSA believe that the recent package of reforms to the decision making processes under the *Environmental Planning and Assessment Act* will not reduce 'red tape' but significantly worsen the regulatory maze. The cost of the additional regulation and increased number of regulatory bodies will be high and largely will be borne by NSW councils and their communities.

Recent changes to the *Act* provide for:

- the establishment of joint regional planning panels (JRPPs);
- the introduction of planning arbitrators;
- the establishment of a Planning Assessment Commission that only will determine applications for major projects involving a developer that has made a political donation in the past two years and applications where the Minister has a conflict of interest; and
- widening the scope of exempt and complying developments by the imposition of a standardised Housing Code that applies the same controls to all areas of the State, with limited recognition of local differences.

Chart 1 (in Appendix 1) highlights the complexity of the new development assessment and decision-making process being introduced by the State Government under recent planning reforms. The LGSA proposes an alternative and simpler model of development decision-making (Chart 2) which is consistent with the leading practice model for development decision making and the principles of good planning.

Joint Regional Planning Panels (JRPPs)

The LGSA has a number of concerns with the proposal to appoint JRPPs to exercise the decision making powers of the council for developments valued at over $10m. The LGSA believes that the JRPPs are an unnecessary additional public body to exercise a role that could be done by council with a compulsory IHAP or a subcommittee of the PAC. Over time, JRPPs are likely to be subject to many complaints to the ICAC and Ombudsman. As well, the JRPPs will distort council priorities by placing mandatory demands on staff. Panel members are protected from liability although they act in the name of the council.

There are some key probity issues associated with JRPPs:

- It is unclear whether the JRPP is an independent hearing body, an appointed council, or representative of the State Executive branch.
- At the present time, there is no specific requirement to provide due process or reasons for decisions. This presents a high probity risk.

---

[3] Department of Local Government 2007 *Engaging with Local Aboriginal Communities: Aboriginal place*

- There are none of the transparency provisions of IHAPs .The JRPPs will have permanent, known members who are open to local pressures, and the panel has no real body to which it is accountable (except in the most indirect way) or to monitor its performance. The JRPP is effectively a council without even the need to present at an election.
- Council nominees, if councillors, are in a conflict of interest situation – should they vote for the council's position or make up their own mind? It will be the same with any public service members from a department with policy interests in the area.
- The Minister or council can dismiss nominees at any time *for no stated reason.* There is no judicial type protection. Members could be under considerable pressure to do the Minister's or council's bidding even if they cannot be officially directed. This stands in contrast to the protection given to the now disbanded Commissioners of Inquiry.

The LGSA oppose JRPPs as an unnecessary and expensive decision making body. The Land and Environment Court should be retained for appeal and review work, and councils (using an Independent Hearing and Assessment Panel) could undertake major development decisions as well as local developments in the coastal zone. A sub-committee of the PAC should act as consent authority for those developments where councils have a financial interest or projects are of genuine regional significance.

Planning Arbitrators
The recent planning legislation provides for a completely new system of Planning Arbitrators, using private consultants appointed by the Minister, to conduct hearings on reviews with regard to minor applications. Decisions of the arbitrator become the decision of council. The Department will manage the system but the costs of operating will be left to councils. Council staff and general managers will have to provide assistance to arbitrators and it will be an offence punishable by fine not to provide help. Councils will be required to indemnify arbitrators for costs incur with respect to any legal challenge to their decisions.

The LGSA believe that the system of planning arbitrators is an entirely unnecessary addition to the planning system. The following problems have been identified:
Costs - no justification and no costing have been presented for what amounts to an additional appeal system to be undertaken by private consultants in the name of and at the cost of the council.
Probity concerns – arbitrators will be long term and key players in the decision making system, and there will be considerable opportunities for undue pressures to be brought, despite the specific penalties. Also, the Minister can dismiss them immediately and for no stated reason.
Ambit claims – the process is likely to further encourage ambit claims, as an applicant will have firstly the council, then the arbitrator and then the court on which to press for acceptance of the claim. Given the potential high costs to council of the arbitration process and later the court process, there will be added pressure on councils to accede to ambit claims.
Unknown and ineffective complaints process – there is no clear process with respect to complaints for poor or unprofessional conduct by arbitrators, except in extreme

circumstances. Council has no say over the behaviour of the arbitrator although he or she will be operating in council's name.

The LGSA strongly oppose the proposed system of planning arbitrators as being unjustified, a costly duplication of acceptable appeal processes, and a high probity risk.

4. Reference 1(b): Implications of the Council of Australian Governments reform agenda for planning in NSW.

4.1. Planning, infrastructure and technology

The LGSA sees value in having nationally consistent approaches to planning across Australia where such an approach improves planning practice and outcomes without compromising the diversity and unique characteristics of local communities.

The LGSA welcomes the Commonwealth Government's increased involvement in urban planning and infrastructure issues and looks forward to working through COAG and other forums to improve planning outcomes in NSW. Recent initiatives involving Local Government include:

- An $800 million Regional and Local Community Infrastructure Program. The program will provide funds to local councils to enable them to deliver long-awaited infrastructure projects and upgrades to their communities.
- $30m under the Housing Affordability Fund for electronic development assessment (eDA) systems nationally.
- Establishment of a Major Cities Unit within the Department of Infrastructure, Transport, Regional Development and Local Government, renewing the Commonwealth's focus on the nation's cities and, more broadly, urban development.

Local Government is represented on national forums dealing with planning and development issues. The Australian Council of Local Government Associations (ALGA) represents Local Government on the Local Government and Planning Ministers Council (LGPMC) and is an observer member of the Housing Ministers Conference. Local Government is active members of the Development Assessment Forum (DAF) with representatives from ALGA and each of the state Local Government Associations.

Through its representation on these and other forums, the LGSA have been promoting and supporting the greater uptake and use of e-planning tools through:

- Directing funding to the NSW Department of Planning to develop an e-Planning roadmap to promote and coordinate e-planning initiatives at the Local and State Government in NSW.
- Working with the Department of Planning to develop a business case to the Australian Government for funds for eDA under the Housing Affordability Fund ($30m across Australia).
- Supporting the eDA project of DAF, which is developing a National Communication Protocol to facilitate the electronic processing of development

applications. The project does not aim to create electronic DA systems, but will focus on enabling existing systems and processes to communicate.

4.2. Social inclusion

The Australian Government has stated that the Social Inclusion Agenda will be underpinned by 'an investment in human capital, which will be implemented through a co-operative Federal-State framework based around investment in people and communities. The Government has also stated that this approach will be characterised by 'partnerships with State and local governments, the not for profit and private sectors to deliver targeted and tailored interventions to address localised systemic disadvantage'[4].

Locational disadvantage is one aspect of Social Inclusion that has been identified as a priority for the Australian Government. The Social Inclusion Board agreed that standards for the provision of social infrastructure are important, particularly in new housing estates and areas already suffering from locational disadvantage.

The emerging COAG social inclusion strategy converges with the LGSA's concerns for social justice and related matters, dealt with at 3.3.4 Planning for Communities. The planning process is the ideal mechanism for ensuring that locational disadvantage is overcome by ensuring the 'quality, quantity and diversity of learning, recreational, social, educational, health and employment resources in the community, and planning for public transport infrastructure'[5].

4.3. Closing the Gap

The Close the Gap campaign calls on Federal, State and Territory Governments to commit to closing the life expectancy gap between Indigenous and non-Indigenous Australians within a generation. It is the Australian Government's key policy for addressing social justice for Aboriginal communities. Planning processes will be important in achieving the COAG commitments to Close the Gap, including to:

- Close the gap in life expectancy within a generation.
- Ensure that all Indigenous four year olds have access to early childhood education within five years.
- Halve the gap in employment outcomes between Indigenous and non-Indigenous Australians within a decade.

The goals of social inclusion can be partially addressed through planning. Neighbourhood design which facilitates a healthy lifestyle can contribute to the achievement of improved health outcomes for indigenous (and indeed all) communities. *Healthy Spaces and Places* recommend that planning authorities adopt 'healthy planning' as a core business, acknowledged in mission and visions statements and reflected in planning strategies. For example, increased physical activity can be promoted through:

---

[4] COSS Discussion Paper 2008 *COAG and the National Reform Agenda* September

[5] *Social Inclusion, Origins, concepts and key themes*, October 2008

- Suburbs and neighbourhoods that people can walk easily around and to key facilities such as schools, shops and public transport.
- Provision of walking and cycling facilities e.g. foot paths and cycleways.
- Facilities for physical activity e.g. swimming pools, playgrounds.
- Activity centres with a variety of land uses.
- Transport infrastructure and systems, linking residential, commercial, community and business areas.[6]

Access to education and employment opportunities is crucial to achieving the other Closing the Gap goals. Planning policies at a local level need to consider the physical accessibility of residential areas to education and employment. Accessibility issues can be considered as part of the Social Impact Assessment process. For example, the social impact of locating a new residential subdivision without adequate public transport, employment or education services need to be considered. These impacts may be significant for particular groups within the community (such as indigenous populations) and may have a cumulative impact if larger communities are isolated from important services.

5. Reference 1(c):

Duplication of processes under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* and NSW planning, environmental and heritage legislation

There is significant potential for duplication of processes with the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and NSW environmental legislation (in particular the *Environmental Planning & Assessment Act* and the *Threatened Species Conservation Act*).

The primary tool for managing the overlap in legislation is bilateral agreements. The key function of bilateral agreements is to reduce duplication of environmental assessment and regulation between the Commonwealth and states/territories. Bilateral agreements allow the Commonwealth to 'accredit' particular state/territory assessment processes (assessment bilateral) and, in some cases, state/territory approval decisions (approval bilateral).
On 31 October 2008 the Minister for the Environment, Heritage and the Arts commissioned an independent review of the EPBC Act. The LGSA prepared a submission to this review.[7]

Councils are reporting a general lack of knowledge and awareness of the EPBC Act both within council and the general community. This continues to be a major barrier to the effective implementation of the legislation. The Commonwealth and NSW Governments need to invest in awareness raising activities and must clearly explain Local Governments' requirements under the Act and how the legislation operates in

[6] Planning Institute of Australia, Healthy Places and Spaces *Fact Sheet No 1 – About Health and the Built Environment.*

[7] Submission available at http://www.environment.gov.au/epbc/review/submissions/pubs/077-local-govt-shires-assoc-nsw.pdf

relation to the approval processes under the *Environmental Planning and Assessment Act.*

As the EPBC Act is triggered by an 'action', referrals normally occur at the development application stage, late in the land use planning process. Therefore there is a risk that resources expended on the proposal may be wasted if the proposal is refused or significantly modified under the EPBC Act approval process. The LGSA believe that EPBC referral early in the development process is likely to result in improved biodiversity outcomes and greater certainty for the proponent.

The LGSA note that there appears to be little uniformity between the regulation, definition, implementation and application of 'offsets' under the EPBC Act and the NSW scheme.
As approvals under the EPBC Act focus narrowly on matters of national environmental significance (MNES) it cannot be assumed that an 'offset' which satisfies the NSW approval process will satisfy the requirements of the EPBC Act. As offsets are normally considered early in the planning process, much earlier than the triggering of the EPBC, the potential for costly duplication of the offset calculation and implementation exists. The LGSA submit that there is need for a complementary institutional framework for environmental offsets and that proposals that employ 'offsets' be required to seek a strategic assessment under Part 10 of the EPBC Act.

Although there is general alignment, confusion is generated by the inconsistencies between the schedules of the *NSW Threatened Species Conservation Act,* the *NSW Fisheries Management Act* and those of the EPBC. There needs to be a consistent and objective process for the identification and classification of the conservation status of species, populations and ecological communities that encompasses both systems. It is difficult for the public to understand why an ecological community considered critically endangered in NSW is not considered at all by the Commonwealth legislation. The lack of consistency in the schedules makes the development of efficient processes that cover both Acts difficult, and impedes the desired reduction in duplication.

Land use strategic planning is the most effective means of ensuring sustainable land use allocation. As such, the LGSA recommends the encouragement of LEP biodiversity certification under the NSW planning system. Strategic assessment under Part 10 of the EPBC Act should be undertaken concurrently with biodiversity certification in order to address the issues outlined above.

It is recommended that an assessment and approval bilateral agreement be developed, whereby decisions made consistent with a biodiversity certified LEP has strategic approval under the EPBC Act, and/or is exempted from the EPBC approval processes. This reduction in administrative burden would provide further incentive to Local Government to manage biodiversity conservation at the strategic level.

6. Reference 1(d): Climate change and natural resource issues in planning and development controls

6.1. Climate change

Local Government recognises climate change as a primary environmental consideration in planning and development in NSW.

Climate change needs to be addressed in the planning framework by giving planning authorities more certainty and protection regarding their decisions. The cases and appeals cited in the Discussion Paper prepared for this Inquiry into the NSW Planning Framework highlight the uncertainty currently faced by councils. A developer wishing to develop land that may become subject to inundation under a climate change scenario is unlikely to face the consequences and liability of that decision in 50 or 100 years. However, a council that approves such a development is likely to be held accountable either through the legal system or through the need to use public funds e.g. to undertake protective or remedial work.

The principles of Ecologically Sustainable Development (ESD), and specifically intergenerational equity and the precautionary principle are highly relevant to council planning decisions impacted by climate change. Councils are required, under the *Environmental Planning and Assessment Act* to make planning decisions that consider the principles of ESD. The degree to which ESD considerations are part of the 'public interest', alongside matters such as economic development and social considerations, is clearly still a matter for debate. This is exemplified in the NSW Court of Appeal decision referred to in section 1.19 of the Inquiry Discussion Paper.

While these matters do not solely relate to flooding issues (other issues such as groundwater, drought, wind and inland flooding are also relevant), coastal inundation brings them most sharply into focus. Councils are currently indemnified under section 733 of the *Local Government Act* for decisions that are made in good faith, in a manner consistent with Flooding/Coastline Manuals produced by the NSW Government.

Climate change introduces another layer of uncertainty regarding land that may be subject to inundation during the life of a development. While there is not full scientific certainty regarding climate change impacts or timeframes, councils would be well advised to apply the precautionary principle, as defined in the *Protection of the Environment Administration Act 1991*, which states:

> 'The precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
> In the application of the precautionary principle, public and private decisions should be guided by:
> (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
> (ii) an assessment of the risk-weighted consequences of various options.'

Some form of statutory indemnity for councils similar to that which currently applies for flood-prone land under section 733 of the *Local Government Act*, may be warranted. This implies however that some clear guidance should be provided to councils. The uncertainty of the extent of climate change impacts and the challenges in developing clear guidelines are acknowledged. However this is a task to be tackled sooner rather than later. There needs to be a significant resourcing commitment by the NSW Government to further the scientific inquiry at a macro and a micro scale, and to provide appropriate advice to Local Government.

6.2. Natural resource management

Agency overlap – a difficulty that Local Government confronts in considering natural resources in the planning and development control processes is the overlap in agency responsibility. The plethora of natural resource plans and policies generates confusion that may be difficult for officers of less resourced councils to interpret.

In preparing their plans Local Government is often required to broker agreements between State Government agencies at the intersection of their responsibilities e.g. in the consideration of riparian areas where biodiversity and river function responsibilities merge. What is required is an integrated and spatially expressed natural resource plan produced by the State Government in which all interagency issues have been resolved. The regional strategies perform this function at a broader strategic scale. However, plans at a scale consistent with LEP development are required. Such plans would simplify the natural resource considerations in plan making and development control processes for Local Government, removing inefficiencies and duplication. The existence of such a plan would support the preparation of planning instruments that seek bio-certification and would be invaluable to catchment management authorities in performing their functions

Lack of common principles – another difficulty that Local Government confronts in considering natural resources in the planning and development control processes is the lack of 'common guiding principles'. There are currently a number of 'thresholds' outlined in natural resource management regulation that require consideration in the assessment of development proposals and natural resources e.g. significant impact, maintain or improve, neutral or beneficial effect, no adverse effect. The adoption of 'maintain or improve' resource condition as a common basis to natural resource legislation, policy and programs is suggested. This principle is consistent with the State Plan natural resource condition targets and mirrors a recommendation by the Natural Resource Commission on the performance of the implementation of catchment action plans.

Riparian lands – recent changes to the collection of development contributions have excluded the use of local development contributions (s94 levies) for the acquisition of riparian land. The argument provided is that this land can be protected and managed through planning (zoning and other) controls or be dedicated by the proponent to council. Using planning controls to preserve values will require vigilant monitoring of compliance and is not practical in all cases.

Riparian lands provide recreational space and also serve to preserve ecological values. The specific exclusion of riparian land from se94 plans is unjustified. These

areas are crucial to the functioning of the landscape and provide the location for a wide range of functions. Public ownership and management of this land is critical to achieving effective environmental and social outcomes.

The acquisition and management of riparian corridors is an important policy issue that needs to be urgently addressed by the State Government. The LGSA do not support the exclusion of riparian corridors from the development contributions system because of the resultant difficulties with the management of such land. Options to ensure the appropriate future management of riparian corridors need further investigation.

7. Reference 1(e): Appropriateness of considering competition policy issues in land use planning and development approval processes in NSW

The LGSA support the broad thrust of national competition policy of improving resource allocation and international competitiveness. However, the implementation of competition policy needs to take account of social, environmental and regional economic development considerations. Reforms should only be undertaken when the benefits outweigh the costs.

These issues were canvassed in discussions between Federal, State and Local Governments in 2008. The following key points, prepared by the Planning Officials Group and endorsed by the LGSA, provide a useful contribution to the debate.

The economic use of land is and always has been an integral part of the planning process in assessing and determining the potential, optimum and appropriate land use of a particular site.

However, the recent argument that the planning system may restrict competition appears to fail to understand the underlying and prevailing conditions that have led to the planning laws and zoning systems that operate at a state and Local Government level. These emanate through community and political processes that advocate for physical outcomes that limit adverse impacts on the amenity and promote the well being of individuals and communities

In addition there appears to be a lack of regard to broader planning and societal implications that planning and zoning laws are established to address. These are that:

- Planning and zoning laws do not overtly set out to restrict competition. Other factors such as retail centres hierarchy, social policy objectives, transport, environmental and geographical implications, and the adverse impacts of non-compatible land uses, which do feature as part of planning systems, are designed to limit potentially adverse off-site impacts some uses in certain locations.
- Most planning legislation, and therefore their subordinate zoning systems, has been subjected to National Competition Policy analysis as part of their passage through Cabinet and Parliamentary processes at a state and territory level.

- The application of land use zones provides for the appropriate provision and coordination of infrastructure specific to different land use needs, in particular transport and utilities.
- Typically, planning laws require consideration of economic impacts and the sustainable management of growth, without specific reference to matters of competition being a guiding principle. In this respect planning laws are silent on this subject for the purpose of assessing development proposals on their merits.
- Most if not all planning legislation in Australia restricts the use of competition as a grounds of appeal by those who may be seeking to frustrate a competitor's entry into the market.
- The potential exists that if planning and zoning laws are to be deregulated so as to enable competitors to locate having total disregard for broader urban and societal planning objectives, then it can be anticipated that the restriction on competition as a ground of appeal will also be removed, leading to longer timeframes and increased administrative costs in approvals being obtained.
- The provision of land to enable access for other players to enter the market is not strictly managed through the planning process and is not part of planning or zoning law.
- Deregulation of land use zoning to broaden the opportunity for competitors to enter the market may in fact have a perverse outcome by allowing category killers to find locations in areas they currently get access to due to limitations in land area or other controls, thus reducing diversity in the market place provided by smaller players in local and group centres.
- More significant than any inadvertent restriction planning and zoning laws place on competition is their critical role in providing a level playing field for the market, thus enabling confidence for industry and the community as to what can go where.

8. Reference 1(f): Regulation of land use on or adjacent to airport lands

The issues under this reference primarily relate to airports on Commonwealth land and particularly, Sydney airport. The issues largely arise because these airport lands are exempt from local and state planning controls.

Local Government recognises the importance of Sydney Airport to the region as a whole. However the ongoing development and expansion of the airport cannot be allowed to occur without a clearly defined mechanism for consultation with State and Local Government, allowing for a suitable consideration of the wider effects of airport development on local and regional communities, infrastructure and businesses.

The LGSA believe that Local Government should have a lead role in planning for local communities with other spheres of government. It also should have a major role in developing an integrated approach to issues of regional development, infrastructure co-ordination, growth management and environmental management, including regionally significant developments such as those proposed for Sydney and other airports.

Local Government recognises the importance of Sydney Airport as a regional aviation hub, its significance to the local, regional and Australian economy, and its importance to Sydney as a 'global city'. The airport is also a significant employer with

many of these employees residing in local government areas geographically close to the airport. There are existing and potential economic benefits for local councils as well in related transport and service type industrial development not able to be located within the airport perimeter. Nevertheless the LGSA is adamant that these key economic drivers should not be used to justify development outside conventional, robust and transparent planning procedures that take account of the broader impacts on adjacent local and regional areas.

The LGSA accept the view that the aviation elements of airports are key parts of the nation's infrastructure and their planning is a matter for the Australian Government. However the occurrence in recent years of extensive non-aviation commercial developments does not constitute key national infrastructure and therefore does not justify being excluded from state and local planning regimes.

While we understand the Australian Government's desire to keep control over the planning for airports sites as a whole, the LGSA ask that in relation to commercial developments on airport land the Minister be required to:

- consult with State and Local Government;
- assess consistency with state and local planning policy; and
- take account of the proposed development on nearby residents businesses and other transport infrastructure, including appropriate community consultation.

Consideration should also be given to charging commercial developments on airport land the equivalent of rates or developer contributions to address any infrastructure requirements, such as local or regional road and transport networks and community facilities.

9. Reference 1(g): Inter-relationship of planning and building controls

In 1998 the system of building approvals contained with the *Local Government Act* was transferred into the *Environmental Planning and Assessment Act*. This resulted in councils being required to assess simple building applications against the relatively complex and extensive criteria set out in s79C of the Act. At the same time, a system of private certification was introduced to allow accredited certifiers as well as council building and planning staff to certify particular developments.

Rather than addressing problems with the assessment and decision making processes under Part 4 of the Act, recent reforms have sought to reduce the number of developments that are assessed by councils under Part 4. The Act provides for developments to be determined as 'complying' if they meet the definitions and standards contained within the relevant complying code. Recently the scope of complying development under the Act was expanded significantly with the introduction of the NSW Housing Code [under State Environmental Planning Policy (Exempt and Complying Development) 2008]. Similar to Part 3A and the Major Projects SEPP, the new SEPP and Housing Code establishes separate controls and assessment processes for new houses and alterations and additions. The complying codes will shortly be extended to cover office, retail and industrial premises.

Complying codes
The LGSA support measures to widen exempt and complying provisions for appropriate development types. However, the LGSA oppose the mandating of state wide standard categories of complying development as such measures:

- Override local context and are often 'out of step' with local planning objectives and standards.
- Are 'broad brush' and lower planning performance standards by overriding environmental, planning and heritage controls applicable to precincts and localities.
- Are often too prescriptive and discourage diversity and innovation in design.
- Reduce the opportunities for local residents to have a say in the development process.
- Expand the role of private certifiers even though new controls to improve the accountability and probity of the certification system have yet to be tested.
- Increase the potential for errors and omissions in the certification process.

Developing a uniform set of state-wide codes to apply to areas as diverse as Bourke, Blacktown and Bondi is a challenge. This is evident in the length and complexity of the recently released Housing Code. Early feedback from councils which shows that the codes are unlikely to achieve their objectives of simplifying and speeding up the system or will do so only by compromising or negating planning outcomes already achieved at the local level.

Private certification – during the debate around the recent planning reform agenda, the LGSA put forward a series of submissions to address the real problems experienced by councils and home owners due to the system of private certification. The LGSA have argued that in order to overcome these problems and the failure to adequately discipline accredited certifiers, certificates of compliance should be made to government (usually councils). Government would then issue the consents relying on those certificates as well as making any discretionary judgements required (see Chart 2 in Appendix A).

Dealing with complaints and problems arising from sites under the control of accredited certifiers continues to be a major issue for Local Government and a source of constant aggravation to council staff. Councils have had ongoing problems with the liberal view adopted by many certifiers to clause 145 'not inconsistent with consent'. The introduction of private certification resulted in councils bearing a significant proportion of the costs associated with ensuring accredited certifiers comply with their statutory duties. The cost burden is particularly problematic in areas where the majority of development sites are the responsibility of accredited certifiers or there is a high rate of complaints against certifiers

The recent amendments to the *Environmental Planning and Assessment Act* seek to address the problems that have arisen since the introduction of private certification. These are certainly improvements but the fundamental flaws in the system have not been resolved.

There is a need for a new approach to the system of development approvals under the *Environmental Planning and Assessment Act* that simplifies and better integrates

the separate sets of development controls and assessment processes that apply to *major projects, local development and complying developments.*

10. Reference 1(h): Implications of the planning system on housing affordability

10.1. Local Government's role in the provision of affordable housing

The LGSA consider that the provision of affordable housing is not Local Government's core responsibility and the State Government needs to maintain its position as the key provider of affordable housing. Local Government has a role in providing incentives and opportunities to facilitate the provision of affordable housing as well as providing a level of housing choice to meet the needs of all members of its communities.

The LGSA support working with the New South Wales State Government to provide more affordable housing across the sector.

At the Local Government Associations annual conference in Broken Hill in October 2008, a number of resolutions were made that support measures to improve housing affordability through local planning controls. The measures include:

- Adding 'local clauses' in the local environmental plan to allow councils to choose to mandate the provision of a percentage of certain types of developments being dedicated to affordable rental housing.
- Protecting and increasing current affordable housing stock through use of specific planning controls within their LEPs.
- Establishing a model of an affordable housing partnership, including the identification of a land bank of public owned land that could be developed for affordable housing following consultation, and with the agreement of, the neighbouring residential community.

10.2. Impact of development contributions on housing affordability

The system of developer contributions (known to date as s94 contributions) has often been criticised as impacting on housing affordability, particularly in the new release areas of western Sydney. A cap on the level of infrastructure contributions able to be charged by local councils was announced in December 2008 by the Premier in an attempt to improve housing affordability.

The introduction of section 94 (s94) contributions in the *Environmental Planning and Assessment Act 1979* was an enlightened initiative of the then State Government (although complications meant that they were only fully utilised since 1989). The underlying principles are soundly based in equity and efficiency. The principles and operation of s94 contributions subsequently have been tested and reaffirmed by judicial and administrative reviews. Section 94 plans are a transparent and disciplined mechanism for raising revenue for infrastructure. The principles of nexus and apportionment are rigidly applied under the framework that ensures that contributions are applied to infrastructure specified under the s94 plan.

The LGSA question the conventional wisdom that reductions in development contributions will result in lower prices for new homes. There is a considerable body of expert economic research that challenges that conclusion. This includes the findings of the Productivity *Commission Inquiry Report into First Home Ownership (2004)* which concluded that *'the claimed cost savings and improvements in affordability from reducing reliance on developer charges for infrastructure appear overstated.'*

Although looking to increase housing affordability by streamlining planning processes is desirable, it is likewise imperative to recognise that the quality of the assets purchased through developer contributions is important to the creation of sustainable suburbs. Quality open space and infrastructure can reduce the life cycle cost of house ownership and provide considerable social and environmental benefits.

The LGSA recently has prepared two major submissions on the issue of infrastructure contributions[8].

[8] Submissions available at www.lgsa.org.au/www/html/2266-development-contributions.asp

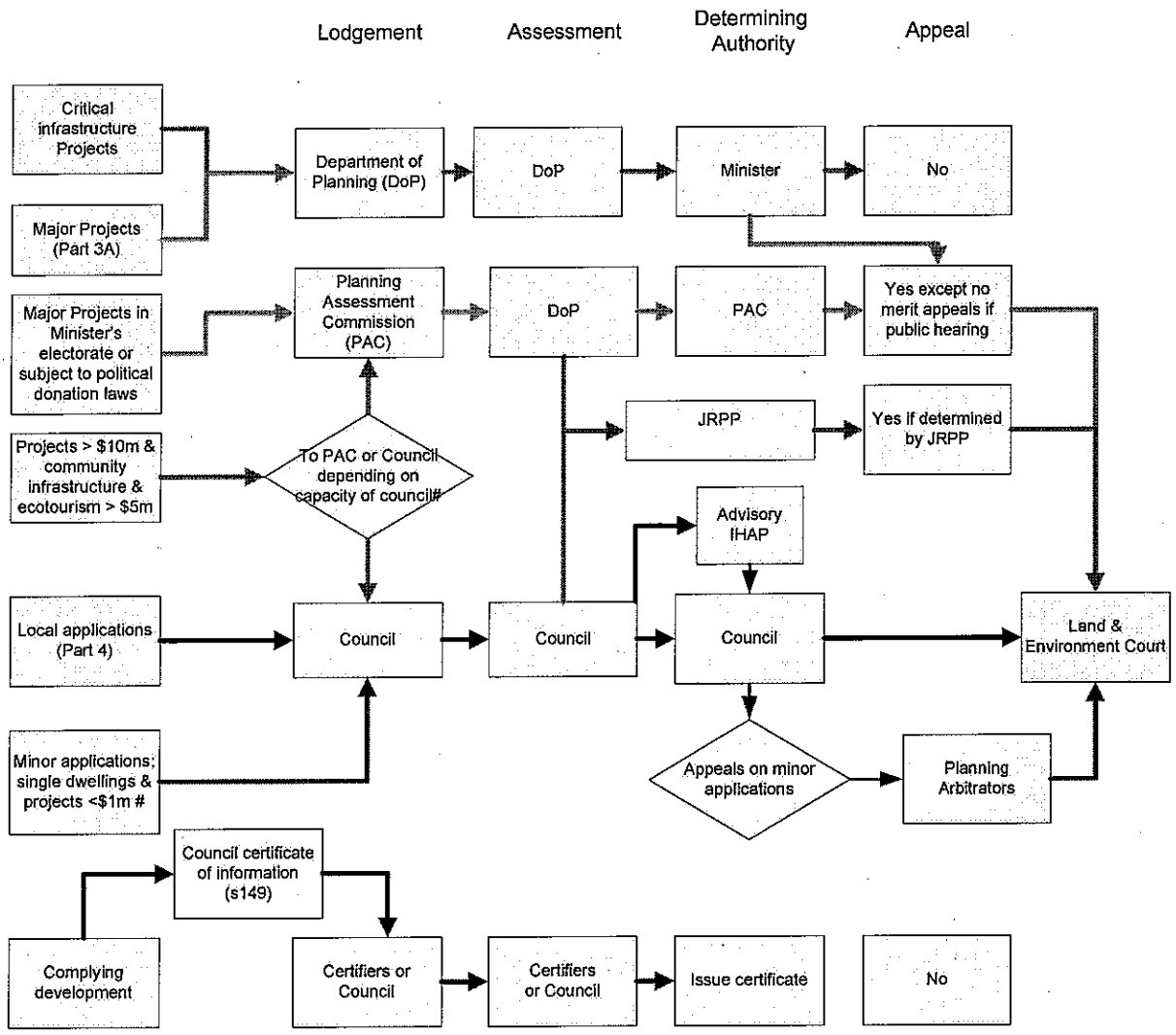
APPENDIX A

DEVELOPMENT DECISION MAKING IN NSW

CHART 1 – DECISION MAKING PROCESSES UNDER PLANNING REFORMS OF 2008/09

CHART 2 – LGSA – ALTERNATIVE DECISION MAKING MODEL

Chart 1 - DA Decision Making Process – 2008/09 Amendments



Details yet to be announced

Chart 2 - DA Decision Making Process – Alternative Option