

# briefing paper



## NSW Parliamentary Research Service

### **NSW Planning Reforms: Infrastructure**

**Briefing Paper No 08/2013**

by Jack Finegan

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# NSW Planning Reforms: Infrastructure

**by**

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## CONTENTS

SUMMARY .....	ii
1 Introduction .....	1
2 Overview of Infrastructure Under New Planning System.....	3
2.1 Stakeholder Comments .....	6
3 Growth Infrastructure Plans.....	7
3.1 Stakeholder Responses.....	10
4 Contestable infrastructure .....	12
4.1 Stakeholder Responses.....	14
5 Public Priority Infrastructure .....	15
5.1 Infrastructure approvals under the current system .....	15
5.2 Essential infrastructure approval under the new system .....	16
5.2.1 Stakeholder Responses.....	19
6 Infrastructure Funding & Contributions.....	21
6.1 Infrastructure funding under the current system.....	22
6.2 Infrastructure funding under the new planning system .....	22
6.2.1 Principles of infrastructure contributions .....	24
6.2.2 Regional / Subregional Infrastructure Funding.....	25
6.2.3 Local Infrastructure Contributions .....	28
6.2.4 Details yet to be finalised.....	31
6.2.5 Stakeholder Responses.....	31
6.3 Planning Agreements .....	45
6.3.1 Stakeholder Responses.....	47
7 Conclusion .....	49
Appendix 1: Summary of the White Paper and Exposure Bills.....	50

## SUMMARY

This is the second of four briefing papers the Parliamentary Research Service intends to publish on the proposed reform of the planning system in NSW. Appendix 1 presents an overview of the proposed system as set out in the Planning White Paper and the relevant Exposure Bills.

In April 2013 the NSW Government entered a new stage of its ongoing reforms to the planning system with the release of *A New Planning System for NSW: White Paper* and two associated Exposure Bills. These documents set out in detail the proposed changes to the planning system. Infrastructure is the focus of a number of major changes, and the reforms are intended to bring about more coordinated and efficient infrastructure planning. This paper considers several aspects of infrastructure planning and delivery under the proposed planning system, and the response from a number of key stakeholders.

The key points of difference between infrastructure planning under the current system and that proposed in the White Paper according to the NSW Government are set out in Table 1 below. A summary of each reform is provided subsequently.

**Table 1 – Summary of changes to infrastructure planning**

Current system	White Paper proposals
<b>Strategic integration of plans</b>	
<ul style="list-style-type: none"> <li>• Infrastructure planning independent of land use planning</li> <li>• Different kinds of infrastructure planned on an individual agency basis</li> <li>• No requirement for coordination of infrastructure provision in greenfield areas</li> <li>• Most infrastructure not shown in local planning instruments (LEPs)</li> <li>• No requirement for different planning documents to be coordinated</li> </ul>	<ul style="list-style-type: none"> <li>• Infrastructure and land use planning to occur in concert with each other</li> <li>• Infrastructure to be planned, prioritised and staged according to housing and employment growth</li> <li>• Planning to occur on spatial basis, with all infrastructure needs for an area determined concurrently</li> <li>• Infrastructure planning to be co-ordinated and consistent across strategic plans (NSW Planning Policies, Regional Growth Plans, Subregional Delivery Plans, and Local Plans), and infrastructure plans (Growth Infrastructure Plans and Local Infrastructure Plans)</li> <li>• Growth Infrastructure Plans to prioritise and identify funding for infrastructure in growth areas</li> <li>• Local Infrastructure Plans to identify proposed local infrastructure required to support growth and act as basis for local infrastructure contributions</li> </ul>
<b>Contestable infrastructure</b>	
<ul style="list-style-type: none"> <li>• Limited opportunities for private sector involvement in some infrastructure provision, primarily in the delivery and operational phases</li> <li>• Rigid development approvals process for major infrastructure restricts innovation in design and delivery</li> </ul>	<ul style="list-style-type: none"> <li>• Greater opportunity for involvement of the private sector in all phases</li> <li>• All Growth Infrastructure Plans to include contestability assessment, which will consider opportunities for private sector involvement at all stages including design, construction and operation</li> <li>• Less restrictive infrastructure approvals will allow for greater private sector innovation after consent has been granted</li> </ul>
<b>Public Priority Infrastructure</b>	
<ul style="list-style-type: none"> <li>• Existing major infrastructure works approved as State Significant Infrastructure (SSI), or critical</li> </ul>	<ul style="list-style-type: none"> <li>• Two forms of infrastructure approval, State Infrastructure Development (modified SSI) and</li> </ul>

<p>State Significant Infrastructure</p> <ul style="list-style-type: none"> <li>• SSI and critical SSI approved by Minister after community consultation and detailed environmental assessment</li> </ul>	<p>a new form of approval, Public Priority Infrastructure (PPI)</p> <ul style="list-style-type: none"> <li>• Declared PPI up front by Minister when identifying infrastructure project</li> <li>• Approval not required once declared PPI</li> <li>• Subsequent PPI assessment focussed on identifying, avoiding and mitigating impacts</li> </ul>
<p><b>Regional infrastructure funding</b></p>	
<ul style="list-style-type: none"> <li>• Regional infrastructure funded by combination of general revenue, and Special Infrastructure Contribution on greenfield development</li> <li>• No regional infrastructure contributions paid by development in infill areas</li> </ul>	<ul style="list-style-type: none"> <li>• Regional infrastructure funded by combination of general revenue, and regional infrastructure contributions</li> <li>• Regional infrastructure to be specified in Growth Infrastructure Plans, and levied for under provisions in Local Plans</li> <li>• Both greenfield and infill development to contribute towards regional infrastructure</li> <li>• Contributions to be levied on regional or subregional basis (larger than LGA)</li> <li>• Two funds to be established for each region, one for general works and one for land acquisition for open space and drainage</li> </ul>
<p><b>Local infrastructure funding</b></p>	
<ul style="list-style-type: none"> <li>• Collected by local governments under s. 94 plans</li> <li>• Limited by \$20,000 cap</li> <li>• Works identified and costed by local councils</li> <li>• No restrictions on spending timeframe</li> <li>• Minimal role for IPART (monitoring small number of plans that exceed cap)</li> </ul>	<ul style="list-style-type: none"> <li>• Collected by local government under Local Plans</li> <li>• No cap imposed</li> <li>• Works identified by Council, costed according to set of benchmark costs calculated by IPART</li> <li>• Funds to be spent within three years, with annual auditing requirements</li> <li>• IPART to have greater role in assessing reasonableness of contributions, including review of all plans</li> </ul>
<p><b>Planning agreements</b></p>	
<ul style="list-style-type: none"> <li>• Consent authorities allowed wide discretion in negotiating voluntary planning agreements with developers for the provision of infrastructure</li> </ul>	<ul style="list-style-type: none"> <li>• Planning agreements will be used only in “exceptional circumstances”, and be restricted to works that are identified in an existing infrastructure plan</li> </ul>

### Growth Infrastructure Plans

Growth Infrastructure Plans will stand outside the formal strategic planning hierarchy. Their precise relationship with strategic plans is unclear, but the White Paper states that GIPs will be prepared concurrently with Subregional Delivery Plans. As outlined in the Planning Bill, GIPs will be prepared by the Director-General (the White Paper comments that they will be “prepared by the NSW Government including UrbanGrowth NSW”), and made by the Minister.

Growth Infrastructure Plans will form the basis of spatial infrastructure planning, a process in which the infrastructure needs of an area are considered as a totality and incorporating a number of infrastructure agencies. They will prioritise infrastructure works in an area, and require the concurrence of the Treasurer or Secretary of the Treasury. As specified in the Planning Bill, Growth Infrastructure Plans must also “identify the regional infrastructure for which a regional infrastructure contribution may be imposed,” as well as contain a contestability assessment. **[3.0]**

### Contestable infrastructure

Contestability assessments are a new element of the infrastructure planning process proposed under the planning reforms. These assessments will consider opportunities for the private sector to design, deliver and operate regional and local infrastructure solutions for new greenfield developments or urban renewal precincts. **[4.0]** Growth Infrastructure Plans will contain contestability assessments for infrastructure, and in some instances local governments will also conduct these assessments.

Much of the detail regarding contestability assessments has not yet been made public. However the White Paper comments that Infrastructure NSW will lead the assessments, and that they are expected to lead to greater efficiency and better value for money in the procurement and operation of infrastructure. **[4.0]**

### Public Priority Infrastructure

The White Paper identifies two streams of major infrastructure development. Projects identified as Public Priority Infrastructure will be those considered essential to the State's economic, environmental or social well-being. Public Priority Infrastructure will not require approval after it has been declared as such by the Minister, and will have a streamlined assessment process; assessment will focus on identifying, avoiding and minimising impacts arising from the project. **[5.0]**

The second stream is called State Infrastructure Development. This is little changed from the current State Significant Infrastructure and, for that reason, is not considered in detail in this paper.

### Infrastructure contributions

Under both the current and proposed planning system, developers can be asked to make monetary contributions or provide works-in-kind for infrastructure to meet a need generated by new development.

The White Paper proposes reforms to the way that contributions towards infrastructure to service new development will be collected and spent. This will include the collection of contributions for regional infrastructure at a regional level, and modifications to the way that local infrastructure is costed.

Contributions towards regional infrastructure are to be collected under the provisions of a Growth Infrastructure Plan, while local infrastructure contributions will come under Local Infrastructure Plans (which will be part of local plans). **[6.0]**



## 1 INTRODUCTION

The NSW Government is currently engaged in reforming the State's planning system. As part of the reform programme, the White Paper and two Exposure Bills were published in April 2013.

This briefing paper describes the changes to infrastructure planning and provision under the proposed new planning system for NSW. These changes are set out in several documents which include, most recently, [A New Planning System for NSW: White Paper](#) ("the White Paper"), the [Planning Administration Bill 2013 – Exposure Draft](#) ("the Planning Administration Bill"), and the [Planning Bill 2013 – Exposure Draft](#) ("the Planning Bill"). This briefing paper also draws upon previous publications including [A New Planning System for NSW – Green Paper](#) ("the Green Paper", published July 2012), and the final report of the independent review into the NSW planning system published May 2012<sup>1</sup>.

The planning and provision of infrastructure is a major component of the new planning system and its prominence in the Planning Bill makes this clear. Whereas infrastructure was absent from the objects of the [Environmental Planning and Assessment Act 1979](#), it has been included as one of nine objects in clause 1.3 of the Bill:

1. The object of this Act is to promote the following:

[...]

- c. the co-ordination, planning, delivery and integration of infrastructure and services in strategic planning and growth management,

Both the White and Green Papers emphasise the need to bring greater certainty and increased cost-efficiency to the infrastructure planning process, and more coordination between infrastructure and land use planning. By doing so the planning reforms aim to build confidence that areas of growth and change will be supported, and in turn encourage and facilitate development.<sup>2</sup> The proposed infrastructure reforms outlined in this paper should be seen in this context.

This paper considers several key infrastructure reforms proposed under the new planning system:

- A tighter integration of infrastructure planning with strategic planning, in part through the introduction of a planning instrument known as a Growth Infrastructure Plan;
- Contestable infrastructure provision, which will expand the range of opportunities for private sector involvement in infrastructure planning, delivery and operation;

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<sup>1</sup> NSW Planning System Review, [The Way Ahead for Planning in NSW: Recommendations of the NSW Planning System Review](#), May 2012

<sup>2</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 7

- A new category of essential infrastructure, Public Priority Infrastructure (“PPI”), with a streamlined approval process;
- The introduction of Local Infrastructure Plans, as part of local plans; and
- Modifications to the operation of regional and local infrastructure funding and planning agreements.

The paper also canvasses stakeholder submissions relating to the proposed infrastructure reforms. It does not purport to be representative of all stakeholder positions. Rather, this paper sets out responses from seventeen key stakeholders which will be considered in the four briefing papers the all Parliamentary Research Service intends to publish on the Planning White Paper and Exposure Bills (shown in Box 1). These submissions were selected using the following criteria:

- A significant subset of the proposed NSW planning reforms, if not all of them, were discussed in some detail;
- Wherever possible, submissions were from stakeholders that represent the views of a number of constituent members; and
- A cross-section of stakeholders were represented, across different interests and perspectives.

The paper also examines commentary from an additional stakeholder, the Independent Pricing and Regulatory Tribunal (IPART). The Tribunal currently assesses certain infrastructure contributions, and will have a significantly expanded role under the new planning system.

There is a degree of unevenness in stakeholder commentary concerned with infrastructure reforms, with a disproportionate amount of discussion in submissions relating to the infrastructure contributions system. This may reflect the more direct involvement of stakeholder interests in this area: many of the stakeholders represent local government or development-oriented industry groups, who are likely to be immediately affected by any changes to infrastructure financing. The weighting given in this paper to submissions on different aspects of the planning reforms reflects this imbalance in the available commentary.

**BOX 1: SELECTED STAKEHOLDERS****Community:**

- Better Planning Network
- NSW Aboriginal Land Council

**Environment:**

- Environmental Defender's Office NSW
- Nature Conservation Council of NSW and the Total Environment Centre (joint submission)

**Governmental:**

- Independent Commission Against Corruption
- UrbanGrowth NSW

**Heritage:**

- Heritage Council of NSW

**Legal:**

- The Law Society of NSW

**Industry:**

- Housing Industry Association
- NSW Business Chamber (joint submission with Sydney Business Chamber)
- NSW Minerals Council

**Local Government:**

- City of Sydney
- Local Government NSW

**Planning:**

- Planning Institute of Australia

**Property/development:**

- Property Council of Australia
- Urban Development Institute of Australia
- Urban Taskforce Australia

**2 OVERVIEW OF INFRASTRUCTURE UNDER NEW PLANNING SYSTEM**

The changes to the NSW planning system outlined in the White Paper and Exposure Bills, released April 2013, include significant reforms to the way that infrastructure is planned, delivered, and funded in NSW.

The objects of the new planning system, as identified in clause 1.3 of the Planning Bill, are as follows:

- a. Economic growth and environmental and social wellbeing through sustainable development
- b. Opportunities for early and ongoing community participation in strategic planning and decision making
- c. The coordination, planning, delivery and integration of infrastructure and services in strategic planning and growth management
- d. The timely delivery of business, employment and housing opportunities (including for housing choice and affordable housing)
- e. The protection of the environment, including:
  - i. the conservation of threatened species, populations and ecological communities and their habitats, and
  - ii. the conservation and sustainable use of built and cultural heritage
- f. The effective management of agricultural and water resources

- g. Health, safety and amenity in the planning, design, construction and performance of individual buildings and the built environment
- h. Efficient and timely development assessment proportionate to the likely impacts of proposed development
- i. The sharing of responsibility for planning and growth management between all levels of government.

A number of these objectives (particularly c, d, h and i) are relevant to the changes made to infrastructure provision under the new system.

Under the 2013 Bill, broadly speaking, infrastructure assessment and approval falls into three streams. These are:

- Local and regional infrastructure, which is outlined in local plans and Growth Infrastructure Plans; in the current system the *Infrastructure State Environmental Planning Policy 1997* designates much of this infrastructure as permissible without consent when carried out by a public body, and it is reasonable to expect that these arrangements will be carried forward into the NSW Infrastructure Planning Policy;
- State Infrastructure Development (previously State Significant Infrastructure), which is declared as such by the Minister or a local plan, requires environmental impact assessment, and is approved by the Minister or Planning Assessment Commission under delegated authority; and
- Public Priority Infrastructure, which is declared by the Minister and does not require approval.

Whereas all categories of infrastructure will require environmental assessment, certain categories will not require Part 4 development approval from a consenting authority. These exempted categories of infrastructure are likely to be identified in the NSW Infrastructure Planning Policy.

### Strategic Infrastructure Planning

An aim of the planning reforms is to bring greater coordination to the strategic planning process. A hierarchy of four strategic plans is proposed: NSW planning policies, Regional Growth Plans, Subregional Delivery Plans and Local Plans. The Planning Bill provides for consistency between plans at different levels:

1. A relevant planning authority is to give effect to:
  - (a) NSW planning policies when preparing other draft strategic plans, and
  - (b) regional growth plans when preparing draft Subregional Delivery Plans and local plans, and
  - (c) Subregional Delivery Plans when preparing draft local plans.<sup>3</sup>

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<sup>3</sup> NSW Government, [Planning Bill 2013 – Exposure Draft](#), April 2013, cl. 3.8

It is also the intent of the reforms that infrastructure and land use planning will be more coordinated under the new system, with infrastructure planning to be included in the strategic planning process. This aim is made explicit in the Planning Bill, where infrastructure planning is the second of ten principles that are to guide the preparation of strategic plans:

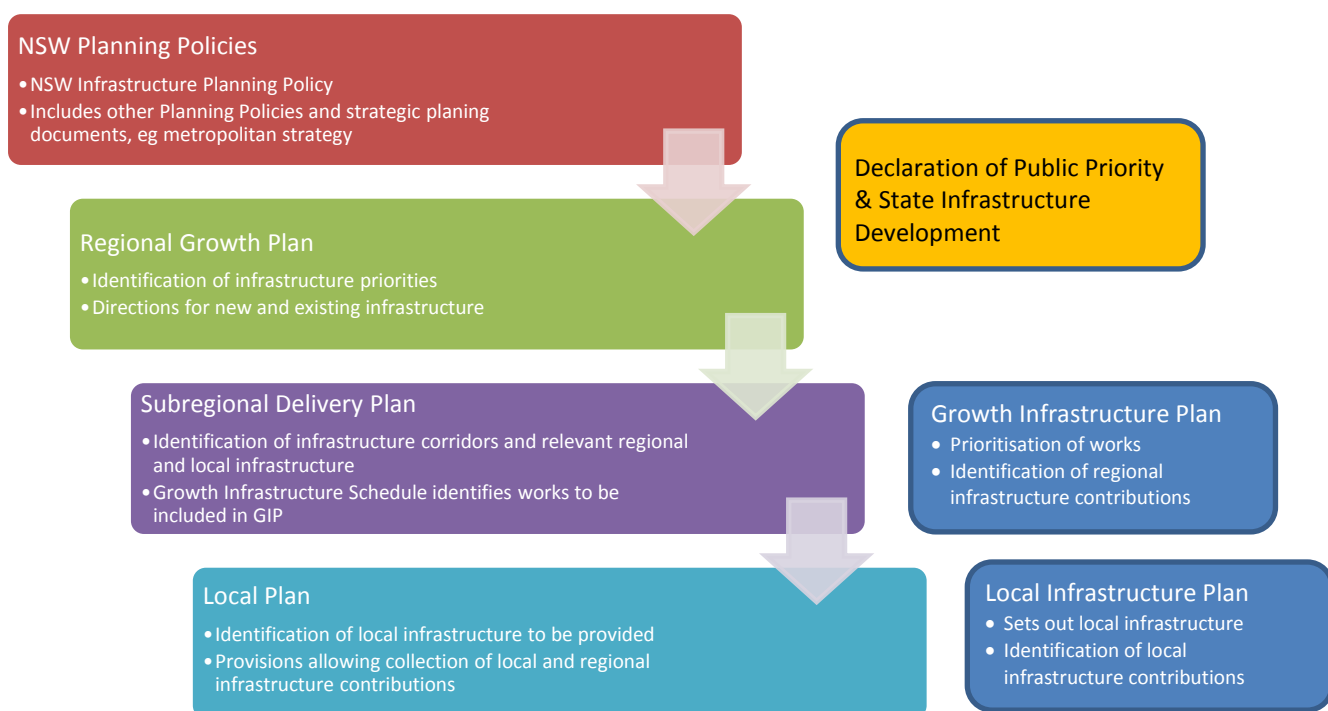
**Principle Two:** Strategic plans are to be integrated with the provision of infrastructure.<sup>4</sup>

The White Paper explains this principle as meaning that:

all strategic plans are to be prepared with an understanding of existing and approved infrastructure priorities and infrastructure plans should be informed by strategic plans.<sup>5</sup>

The hierarchy of strategic plans is considered in detail in the previous Parliamentary Research Service publication, *NSW planning reforms: the Green Paper and other developments*. The relationship between these instruments, the extent to which they feature infrastructure planning, and their interaction with other infrastructure processes and plans is shown below in Figure 1 (overleaf).

Figure 1: Hierarchy of strategic and infrastructure planning



<sup>4</sup> Ibid., cl. 3.3

<sup>5</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 13

A clear hierarchy of strategic plans is established; other infrastructure plans and declarations stand separately.<sup>6</sup> Declarations of Public Priority Infrastructure and State Significant Infrastructure will be informed by State planning policies, with the projects subsequently reflected in regional growth plans. Growth Infrastructure Plans are developed in close coordination with Subregional Delivery Plans, and both will inform each other.

When discussing the infrastructure reforms, the White Paper places the greatest emphasis on Subregional Delivery Plans and Growth Infrastructure Plans as tools for coordinating planning and growth.

Subregional Delivery Plans, which will enact the higher-level policies identified in the NSW Planning Policies and Regional Growth Plans, are seen as an important mechanism by which land use planning and infrastructure planning will inform each other:

Existing and approved transformative infrastructure, including Public Priority Infrastructure projects, will play an important role in determining land use priorities in Subregional Delivery Plans. For example, the approved North West Rail Link will have an impact on development outcomes around designated train stations....

Land use and growth proposals outlined in subregional plans (derived from the consideration of factors such as changing market demand, development feasibility and impact assessment) will inform agency infrastructure growth priorities, which will then be reflected in Growth Infrastructure Plans. For example, an approved urban activation precinct may shape growth infrastructure priorities of Transport for NSW.<sup>7</sup>

Local plans, in turn, will be informed by Subregional Delivery Plans and will contain Local Infrastructure Plans for the funding and provision of infrastructure at a smaller scale.

## **2.1 Stakeholder Comments**

While stakeholders maintained some reservations about aspects of the proposed reforms, in general the submissions recognised the need for change in infrastructure planning and delivery. Supporting the broad direction of the proposed changes, Local Government NSW for example comments that:

One of the major downfalls of regional plans in the past has been the failure of infrastructure planning and delivery to support growth goals and targets. The proposal to integrate the planning and provision of infrastructure with strategic planning for growth would be one of the biggest advances under the new planning system. It is critical for delivering regional and subregional objectives.<sup>8</sup>

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<sup>6</sup> In cl. 1.7 of the Exposure Bill, strategic plans are defined as NSW planning policies, regional growth plans, Subregional Delivery Plans, and local plans. Growth Infrastructure Plans and Local Infrastructure Plans are considered “infrastructure plans”

<sup>7</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 87

<sup>8</sup> LGNSW, [Submission to the Planning White Paper and Exposure Bills](#), June 2013, p. 7

Similarly, the submission of the Housing Industry Association of NSW states that:

HIA acknowledge that infrastructure contributions and the timely provision of infrastructure is a significant part of the proposed reforms and no simple answer exists in relation to reducing the burden on housing delivery whilst ensuring timely infrastructure delivery. It is encouraging that the Paper proposes that infrastructure planning is integrated with strategic land use planning process [*sic*].<sup>9</sup>

The Nature Conservation Council of NSW/Total Environment Centre joint submission and the Environmental Defender's Office submission shared the sentiment that an increased focus on strategic infrastructure provision was welcome, but that infrastructure planning should recognise the importance of the principle of sustainability. This sentiment is represented in their submission's comment, that:

While we support efforts to better improve the link between infrastructure and planning, we recognise that infrastructure projects can have significant environmental and social impacts... It is therefore essential that infrastructure projects be subject to robust and reliable environmental assessment, and that the process for approving infrastructure projects is open and transparent.<sup>10</sup>

### 3 GROWTH INFRASTRUCTURE PLANS

Under the current planning system, the planning and provision of major infrastructure is often handled by the relevant State infrastructure agency. Consequently, the White Paper notes, the provision of infrastructure is guided more by the spending priorities, planning processes and capacity constraints of individual agencies, than by a coherent plan for an area.<sup>11</sup> The White Paper comments that "this has led to uncoordinated infrastructure delivery for greenfield and infill areas and a lack of coordination in the budget process to ensure that funding for infrastructure for an area is available when it is needed."<sup>12</sup> Growth Infrastructure Plans are intended to address this problem by providing "an agreed integrated capital program for priority housing and employment growth areas in the state."<sup>13</sup>

The White Paper posits a shift towards a *spatial* approach to infrastructure planning and provision as a way to provide better coordination between agencies. Spatial infrastructure planning involves assessing the totality of infrastructure needs for a given area in a single process. Growth Infrastructure Plans will function as the key mechanism by which a shift to spatial planning will

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<sup>9</sup> HIA, [Submission by the Housing Industry Association to the White Paper A New Planning System for NSW](#), June 2013, p. 7

<sup>10</sup> NSW NCC & Total Environment Centre, [Charting a new course: Delivering a planning system that protects the environment and empowers local communities](#), p. 35

<sup>11</sup> NSW Government, [A New Planning System for NSW – White Paper](#), July 2012, p. 69

<sup>12</sup> *Ibid.*, p. 157

<sup>13</sup> *Ibid.*, p. 87

be implemented. The White Paper notes that:

The preparation of Growth Infrastructure Plans will reorganise agency infrastructure planning so that agency asset management plans will now consistently cater for growth infrastructure... This important change will strengthen budget decisions for prioritising infrastructure funding.<sup>14</sup>

The White Paper and Bills do not identify exactly what form a Growth Infrastructure Plan will take, or what it will contain. It is likely that more details will be specified under regulations as permitted by Schedule 7 of the Planning Bill. At this stage, the minimum content and requirements for a Growth Infrastructure Plan are set out in cl. 7.20 of the Planning Bill. A plan must:

- identify the regional infrastructure for which a regional infrastructure contribution may be imposed;
- include a contestability assessment for infrastructure to be provided and operated by the private sector; and
- have regard to the principles for infrastructure contributions.

According to the White Paper, Growth Infrastructure Plans will also include:

- subregional performance outcomes;
- 10 year and 5 year spatial infrastructure requirements for growth areas;
- an approved prioritised growth infrastructure delivery schedule with funding allocation for projects within the first five year period; and
- accountability arrangements and performance monitoring requirements.

There appears to be an incongruity of scale here. On one hand the plans will be made at the subregional level and the White Paper identifies a strong link between subregional plans and performance outcomes, with involvement of subregional planning boards in the preparation of Growth Infrastructure Plans. On the other hand, the Bill requires only regional infrastructure to be considered in Growth Infrastructure Plans, while noting that Plans may also identify “priority infrastructure for the region and other infrastructure for the subregion.”

The White Paper identifies four key principles that will underpin the preparation of Growth Infrastructure Plans. Plans are to be:

- Evidence-based, and include market analysis and cost-benefit analysis;
- Prioritised, and aligned to asset management plans of government agencies and utilities;
- Dynamic, being kept up to date to reflect progress made and changes in demand or market conditions; and
- Performance-based, with reference to land use and performance outcomes derived from subregional plans.<sup>15</sup>

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<sup>14</sup> Ibid., p. 157

<sup>15</sup> Ibid., p. 158



With regards to the preparation and making of Growth Infrastructure Plans, clause 7.20 of the Planning Bill specifies that:

1. The Director-General may prepare a draft Growth Infrastructure Plan for any subregion of the State and submit the draft plan to the Minister.  
[...]
4. The Minister may make a Growth Infrastructure Plan in the form in which it was submitted or with such modifications as the Minister considers appropriate. The Minister may decide not to make the draft plan.
5. The making of a Growth Infrastructure Plan requires the concurrence of the Treasurer or (if the cost of the infrastructure concerned is less than \$30 million) the Secretary of the Treasury.
6. In making a growth infrastructure plan, the Minister must have regard to the principles for infrastructure contributions (established by section 7.3).
7. A growth infrastructure plan is required to be published on the NSW planning website.

The White Paper provides more detail, commenting that “Growth Infrastructure Plans will be prepared primarily by the NSW Government, including UrbanGrowth NSW which may prepare these plans in some circumstances.” From the White Paper it appears that local government will have some involvement in the preparation of Growth Infrastructure Plans through subregional planning boards:

Through their participation on Subregional Planning Boards, local councils will now work with the government to develop subregional growth infrastructure priorities... Growth Infrastructure Plans are developed with local council participation due to their representation on Subregional Planning Boards.<sup>16</sup>

However there is no provision made for this in the Exposure Bills, and the standard process of Growth Infrastructure Plan preparation (including the involvement of subregional planning boards) has not yet been made clear.

Growth Infrastructure Plans will be informed by both regional growth plans and Subregional Delivery Plans. Under the new planning system, State planning policies and strategies (such as the *Long Term Transport Master Plan*) will be translated into regional strategies through regional growth plans. Regional growth plans will also broadly identify strategic infrastructure corridors as the location of major infrastructure. Subregional Delivery Plans will be prepared concurrently with Growth Infrastructure Plans and will define the proposed corridor, while Growth Infrastructure Plans themselves will identify the funding and delivery arrangements for the infrastructure. Corridors will then be rezoned to reflect this by local plans. Existing infrastructure corridors will be “reinforced” through Subregional Delivery Plans and local plans.<sup>17</sup>

While the Planning Bill allows the Minister to approve a Growth Infrastructure

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<sup>16</sup> Ibid., p. 157, 166

<sup>17</sup> Ibid., p. 158-159

Plan for any subregion of the State<sup>18</sup>, the White Paper states that greenfield and infill areas that have been identified for housing and employment growth will be subject to Growth Infrastructure Plans. By inference, this may suggest that plans might not be required for areas where significant growth is not predicted.

As an infrastructure plan, Growth Infrastructure Plans will be subject to the Community Participation Charter under clause 2.2 (2)(f) of the Planning Bill. This means that the seven principles of the Community Participation Charter outlined in clause 2.1 (1) are applicable to the preparation of a plan. A Growth Infrastructure Plan will have a minimum exhibition period of 28 days, as specified in Part 1 of Schedule 2.

### 3.1 Stakeholder Responses

A number of stakeholders (including the Independent Pricing and Regulatory Tribunal, Local Government NSW, the Planning Institute of Australia, Urban Taskforce and the Urban Development Institute of Australia) express support for Growth Infrastructure Plans, which are generally seen as an integral part of the Government's strategic infrastructure planning reforms. The Urban Development Institute's submission argues that "planning for infrastructure is an area where NSW has previously failed and the GIPs provide the opportunity to ensure that the necessary infrastructure can be delivered in a timely manner."<sup>19</sup>

However submissions raised a number of concerns in regard to Growth Infrastructure Plans, including:

- The types of infrastructure to be included in a GIP are not specified in the Bills or White Paper, with concerns that the infrastructure that can be funded from levies (and the resulting amount levied on development) will be either too narrow (Local Government NSW) or too generous (Business Chamber of NSW);
- The timeframes for the provision of infrastructure in GIPs may not align with the timeframes in strategic plans (Local Government NSW);
- In practice, strategic plans and infrastructure plans may be developed non-concurrently which could cause confusion in public consultations (Local Government NSW);
- The format of GIPs has not been made clear (Local Government NSW);
- If Growth Infrastructure Plans are made without the necessary funding being committed, infrastructure may not be provided, or "a real potential for cost shifting from State Government to councils" may arise (Local Government NSW);
- It appears that GIPs will focus primarily on new growth areas; GIPs should be prepared for established urban areas in addition to new land release areas, and incorporate social infrastructure (Better Planning Network);

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<sup>18</sup> NSW Government, [Planning Bill 2013 – Exposure Draft](#), April 2013, cl. 7.20 (1)

<sup>19</sup> UDIA, [The Next Act: UDIA Response to the Planning White Paper](#), June 2013, p. 11

- The exhibition period for GIPs is too short, particularly when it may coincide with the exhibition of other plans (Environmental Defender's Office);
- GIPs should place an emphasis on "green infrastructure" and climate change (Environmental Defender's Office); and
- The level of government subsidy to infrastructure identified in GIPs has not yet been specified (Planning Institute of Australia).

For the Environmental Defender's Office, proper and effective community consultation and engagement will be required if Growth Infrastructure Plans are to be successful. The submission observes in this respect:

As part of this process [*infrastructure plan development*], local communities must be provided with clear visual information, evidence supporting the need for proposed projects, and alternative scenarios to consider for the future of their town, city or region. There is a need to clearly explain complex interactions, so the community can develop informed opinions and provide feedback. There must also be better consideration of how existing infrastructure will meet the needs of higher-density development, and commitment of funding to infrastructure (including diverse forms of public transport and 'green infrastructure') before new sites can be developed.<sup>20</sup>

The Business Council of NSW cautions that Growth Infrastructure Plans must strike a balance between infrastructure provision and affordability; it warns that allowing for a relatively wide range of infrastructure to be funded may work against the goal of increasing housing affordability:

A focus of concern is the expectation around the scope of the terms 'essential infrastructure' and 'growth infrastructure' for the purposes of infrastructure planning and delivery. If these terms are taken broadly, where Local Infrastructure Plans and Growth Infrastructure Plans include a large shopping list of infrastructure wants to be funded through infrastructure contributions, it will be difficult to achieve the White Paper's stated outcome of ensuring the financial viability of urban developments while at the same time ensuring a user pay model for infrastructure delivery.<sup>21</sup>

UrbanGrowth NSW perceives "wider benefits" of Growth Infrastructure Plans over and above their stated function of integrating strategic and infrastructure planning:

- GIPs can effectively signal to industry the Government's priorities for funding and investment. This will guide private sector investment in housing supply and employment generation.
- Participation of Local Government in the preparation of the GIPs will provide Local Government with confidence to bring forward funding of local infrastructure to minimize local infrastructure gaps.

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<sup>20</sup> EDO NSW, [Submission on A New Planning System for New South Wales – White Paper](#), June 2013, p. 80

<sup>21</sup> NSW Business Chamber, [Submission: New Planning System for NSW White Paper](#), June 2013, p. 4

- GIPs should address gaps in Local Infrastructure Plans when assessing infrastructure prioritization. GIPs should be suitably flexible to accommodate out-of-sequence development proposals to ensure meritorious proposals are not unreasonably delayed.<sup>22</sup>

#### 4 CONTESTABLE INFRASTRUCTURE

The issue of contestable infrastructure provision was first raised in the Green Paper, not having been explicitly mentioned in the 2012 Independent Review. The stated rationale behind the introduction of infrastructure contestability is that competition that facilitates greater private sector involvement may increase efficiency, cost-effectiveness, and innovation in the design, construction and operation of infrastructure.<sup>23</sup> While some of the existing infrastructure in NSW is already partly provided by the private sector, an objective of the new system will be to identify and encourage additional opportunities for competitive provision at an earlier stage.

The Green Paper prefaces its discussion with the statement that:

Individuals and markets are best placed to deliver diverse choices in all development outcomes including housing and local centres.<sup>24</sup>

This idea has been developed further in the *White Paper*, which states:

Contestable infrastructure provision involves exposing monopoly providers of infrastructure to a credible threat of competition... The era of government as a monopoly provider of infrastructure is now in the past. Experience has demonstrated that increasing competition in infrastructure provision by facilitating private sector involvement can lead to more timely and cost effective design, construction and operation of infrastructure.<sup>25</sup>

“Contestable infrastructure” appears to be referring to the concept of public private partnerships (PPPs); while the White Paper does not use this term, it is mentioned in relation to contestability assessments in the Green Paper.<sup>26</sup> PPPs refer to arrangements under which the private sector partners with the public sector, to design, plan, finance, construct and/or operate projects which would typically be seen as the responsibility of the public sector.<sup>27</sup> While PPPs are an increasingly common means of financing and operating infrastructure in NSW,<sup>28</sup> they remain a contentious and complicated area where a satisfactory outcome

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<sup>22</sup> UrbanGrowth NSW, [A New Planning System for NSW White Paper Submission](#), July 2013, pp. 3-4

<sup>23</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 160

<sup>24</sup> NSW Government, [A New Planning System for NSW – Green Paper](#), July 2012, p. 67

<sup>25</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 161

<sup>26</sup> NSW Government, [A New Planning System for NSW – Green Paper](#), July 2012, p. 67

<sup>27</sup> Commonwealth Parliamentary Library, [Public Private Partnerships: An Introduction](#), September 2002

<sup>28</sup> Public Accounts Committee, [Inquiry into Public Private Partnerships](#), Report No. 16/53 (159), June 2006

often depends on the precise nature and details of the partnership and agreements involved.<sup>29</sup>

The main vehicle for contestable infrastructure will be contestability assessments, which will be included in all Growth Infrastructure Plans. Contestability assessments will consider all stages of infrastructure provision, including design, construction and operation.

Under cl. 2.70 (3) of the Planning Bill:

A Growth Infrastructure Plan is to include a contestability assessment, being an assessment of the opportunities for infrastructure identified in the plan to be provided and operated by the private sector.

The White Paper and Exposure Bills do not provide detailed information about how contestability assessments will be conducted. This is likely to be specified in regulations, as permitted under Schedule 7 of the Planning Bill, which allows for regulations to be made concerning the form of infrastructure plans. The White Paper does provide a high-level description of the process:

Infrastructure NSW will lead the contestability assessments supported by the Department of Planning and Infrastructure, NSW Treasury, the Department of Finance and Services and other agencies as required. These assessments will be based on value for money assessments of conceptual solutions and alternatives to meet subregional infrastructure outcomes... Local councils will undertake contestability assessments on some occasions.

The White Paper identifies a number of considerations to be taken into account when conducting a contestability assessment:

- Value for money;
- Timeliness;
- Innovation;
- Risk allocation; and
- Consumer protection.<sup>30</sup>

It appears from the White Paper that local, regional and Public Priority Infrastructure will be subject to contestability assessments.<sup>31</sup> It comments that “the private sector will be considered as a provider of services to design, deliver and operate regional and local infrastructure solutions for new greenfield developments or urban renewal precincts.” The White Paper also notes that all infrastructure identified in Growth Infrastructure Plans will be subject to a contestability assessment.<sup>32</sup> Public Priority Infrastructure, following the project

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<sup>29</sup> OECD, Public-Private Partnerships: In Pursuit of Risk Sharing and Value for Money, June 2008

<sup>30</sup> NSW Government, A New Planning System for NSW – White Paper, April 2013, p. 161

<sup>31</sup> State Infrastructure Development can also be local or regional infrastructure, and would then be subject to a contestability assessment

<sup>32</sup> *Ibid.*, p. 160; NSW Government, Planning Bill 2013 – Exposure Draft, April 2013, cl. 7.20 (3)

definition phase (discussed in more detail below), will be considered for “opportunities for innovation in design, construction, delivery, financing and operation, consistent with the principles for contestability.”<sup>33</sup>

#### 4.1 Stakeholder Responses

For a reform that may be potentially contentious, there has been little comment on contestable infrastructure and the introduction of contestability assessments. This may reflect the level of detail on the subject provided to date, with much being left to the regulations. None of the submissions considered for this paper provide extensive comment on the proposals.

Submissions that do comment on the contestability reforms are in support of the changes. This includes the submissions of the Independent Pricing and Regulatory Tribunal, the Housing Industry Association and the Property Council. On contestability, the NSW Business Chamber states that:

The Chambers welcome the White Paper’s focus on encouraging contestability for the provision of infrastructure, in line with recommendations made in our discussion paper titled *Diversity and Contestability in the Public Sector Economy*. The NSWBC is in agreement with Premier O’Farrell’s comments around the efficient provision of services:

*“Where there is a better way of delivering a government service or program, which maintains or exceeds appropriate standards, delivers results and defends public value, I believe government is morally and economically obliged to consider it.”<sup>34</sup>*

Similarly, UrbanGrowth NSW supports contestable infrastructure provision on the grounds of its perceived benefits:

Particularly, we support contestable delivery of State funded infrastructure, including roads. The different risk profiles adopted by private sector contractors will allow them to design and construct infrastructure faster and at a lower cost than State agencies.<sup>35</sup>

With regard to the White Paper’s comments that Growth Infrastructure Plans are to be prepared by the Director-General, with councils undertaking contestability assessments “on some occasions,” the City of Sydney noted that:

The section [*of the Bill dealing with GIPs*] should be amended to clarify what circumstances the City would be required to undertake these assessments and how that will be funded or this information should be provided in draft regulations.<sup>36</sup>

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<sup>33</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 174

<sup>34</sup> NSW Business Chamber & Sydney Business Chamber, [Submission: New Planning System for NSW White Paper](#), June 2013, pp. 3-4

<sup>35</sup> UrbanGrowth NSW, [A New Planning System for NSW White Paper Submission](#), July 2013, p. 5

<sup>36</sup> City of Sydney, [NSW Planning System White Paper and Draft Exposure Bills: Submission to](#)



## 5 PUBLIC PRIORITY INFRASTRUCTURE

The White Paper proposes the introduction of a new process for the assessment and approval of infrastructure projects of the highest priority to the government and community. These infrastructure projects will be known as Public Priority Infrastructure (PPI): “Public Priority Infrastructure projects will be those projects agreed by government and identified in high level NSW Government strategies such as the State Infrastructure Strategy and the NSW Long Term Transport Master Plan.”<sup>37</sup> According to the White Paper, the purpose of Public Priority Infrastructure is to create a more streamlined and efficient planning approval process for essential infrastructure.

Provisions under the existing planning system allow for the Minister (or delegated authority) to assess and approve major infrastructure works as State Significant Infrastructure (SSI).<sup>38</sup> These arrangements will be largely carried through to the new system, although State Significant Infrastructure will now be known as State Infrastructure Development.

### 5.1 Infrastructure approvals under the current system

Under the existing system, State Significant Infrastructure is that specified as such in a State environmental planning policy (SEPP), or declared as such by a Ministerial order amending a SEPP. Applications to carry out State Significant Infrastructure works are initially made to the Director General, and include a description of the project. The Director General then issues environmental assessment requirements that must be satisfied; these requirements can specify potential impacts that must be considered during the assessment process. The proponent must prepare an environmental impact statement (EIS) that addresses these requirements.

Following the completion of the EIS the Minister (or a delegated authority) may approve or reject the proposal. Changes to the project design made subsequently require new approval from the Minister.

In some cases SSI applications are only considered in stages, with the Minister granting concept plan approval early on and subsequently assessing different stages of the infrastructure project as designs are finalised (under s 115ZD of the EPA Act). According to the White Paper this delays the approvals process and imposes a burden on the proponent, who must lodge a development application and obtain consent at each stage.<sup>39</sup>

An additional category of State Significant Infrastructure, called critical SSI, exists under the current system. Projects designated critical SSI are exempt

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[the Department of Planning and Infrastructure](#), June 2013, p. 178

<sup>37</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 171

<sup>38</sup> NSW Government, [State Environmental Planning Policy \(State and Regional Development\) 2011](#)

<sup>39</sup> NSW Government, [A New Planning System for NSW – Green Paper](#), July 2012, p. 78

from certain environmental directions, orders and notices<sup>40</sup>, and applications for critical SSI projects can be lodged without the consent of landowners.<sup>41</sup> Third-party objector rights are restricted for critical SSI projects.<sup>42</sup> Critical SSI projects will be removed under the proposed system and thus can, in a sense, be said to be replaced by PPI.

The Green Paper identifies several problems with the current regulatory regime, which it refers to as “cumbersome, and [having] impacted on economic growth and productivity”:

- The existing requirements for assessment and investigation prior to project approval means that “it is often too difficult, costly and time consuming to adjust the project even if better solutions are presented by the private sector”;
- The current system does not fully account for private sector participation in the delivery of infrastructure as there is not up-front certainty at the pre-tendering stage; and
- The up-front approval process severely limits scope for later innovation.<sup>43</sup>

## 5.2 Essential infrastructure approval under the new system

A separate category of Public Priority Infrastructure will be created under the new system, and is reserved for works that are essential to the State’s development. The Planning Bill identifies the kinds of development that can be declared PPI:

(a) the particular development is generally of the kind that is identified in a strategic plan (other than a local plan) or in a Growth Infrastructure Plan as priority infrastructure for the area to which the plan applies, or

(b) a Minister with portfolio responsibility for the carrying out of the particular development applies for the declaration and the Minister administering this Act is of the opinion that the development is essential for the economic, environmental or social well-being of the State.<sup>44</sup>

One of the key changes introduced with Public Priority Infrastructure will be the removal of the need for detailed assessment prior to project approval. In place of the current critical SSI system, which requires significant assessment prior to approval and may be a staged process, the declaration of infrastructure as PPI will allow development to go ahead without requiring approval:

Development for the purposes of Public Priority Infrastructure may be carried out without any planning approval under this Act and despite any provision of or

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<sup>40</sup> [Environmental Planning and Assessment Act](#), s.115ZG (3)

<sup>41</sup> [Environmental Planning and Assessment Regulation 2000](#), cl. 193 (1) (b)

<sup>42</sup> [Environmental Planning and Assessment Act](#), s.115ZK

<sup>43</sup> NSW Government, [A New Planning System for NSW – Green Paper](#), July 2012, pp. 77-78

<sup>44</sup> NSW Government, [Planning Bill 2013 – Exposure Draft](#), April 2013, cl. 5.23 (2)



made under the planning legislation, other than this Division.<sup>45</sup>

Subsequent assessment will focus on avoiding and mitigating environmental and social impacts, rather than satisfying requirements for approval. This will be done in a document known as the project definition report:

- (1) Before the carrying out of development for the purposes of Public Priority Infrastructure:
  - a) the proponent is required to prepare a report on the carrying out of that development (the project definition report), and
  - b) the report is to be publicly exhibited for a period of at least 28 days.
- (2) The project definition report is to set out the following:
  - a) a description of the development (including any staging of the carrying out of the development),
  - b) the measures that the proponent will take to avoid, minimise or mitigate any adverse impacts of the development,
  - c) the monitoring, auditing and reporting that the proponent will undertake in relation to the environmental impacts of the development during the construction and operation stages of the development,
  - d) any other matter prescribed by the regulations.
- (3) Before publicly exhibiting the project definition report, the proponent is to submit a copy of the report to the Director-General and to revise the report to address any matters notified to the proponent by the Director-General and submit a copy of the revised report to the Director-General.
- (4) A copy of the project definition report, as revised by the proponent following public exhibition of the report (including to address any further matters notified to the proponent by the Director-General), is to be published on the NSW planning website.<sup>46</sup>

In addition to these reduced approval and assessment requirements, Public Priority Infrastructure development can be carried out even when it is prohibited by a local plan.<sup>47</sup>

The White Paper sets out a four-step process for Public Priority Infrastructure, as outlined in Figure 2 below. It claims this process – from the commencement of project definition to the end of the project delivery phase – will take two years, in contrast to the four and a half years required under the previous (Part 3A) system.

Once approved by Cabinet and declared by the Minister, Public Priority Infrastructure will be incorporated in regional growth plans and Subregional Delivery Plans. The White Paper envisages that the community participation

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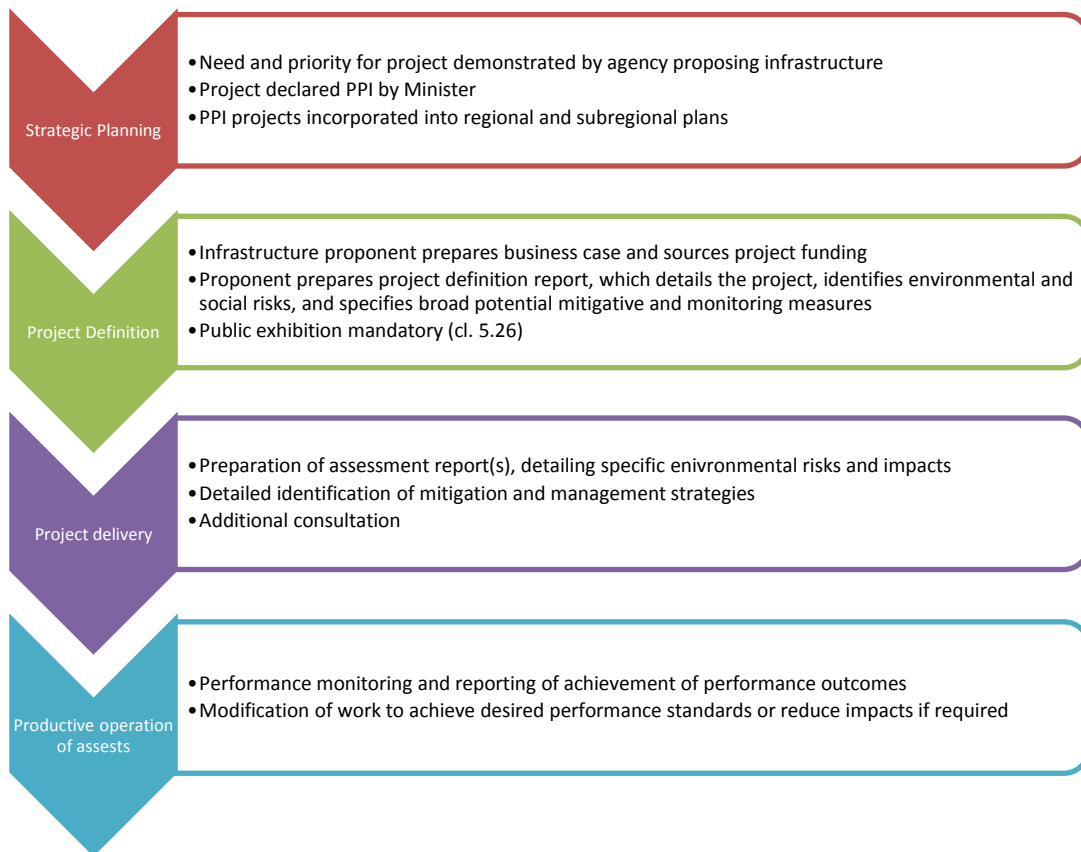
<sup>45</sup> Ibid., cl. 5.25 (1)

<sup>46</sup> Ibid., cl. 5.26

<sup>47</sup> Ibid., cl. 1.19 (1)

involved in the preparation of these strategic plans will inform the design of Public Priority Infrastructure.<sup>48</sup>

**Figure 2: Public Priority Infrastructure Process**



Under cl. 6.2 of the Planning Bill, Public Priority Infrastructure is exempt from the need for concurrences and approvals under a number of other Acts. These exemptions are:

- Concurrence of the Minister administering the *Coastal Protection Act 1979*;
- A permit under *Fisheries Management Act 1994*;
- Approval under the *Heritage Act 1977*;
- An Aboriginal heritage impact permit under the *National Parks and Wildlife Act 1974*;
- Approval to clear native vegetation under the *Native Vegetation Act 2003*;
- Bush fire safety authority approval under *Bush Fires Act 1997*; and
- Approval under *Water Management Act 2000*.

The extent to which the community will be consulted as part of the PPI design

<sup>48</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 173

and development process is unclear. Under the Planning Bill, there is no legislative requirement for the Minister to consult with the community regarding the decision to declare a project PPI. However under cl. 5.26, the project definition report (produced after the declaration of PPI) is to be exhibited for 28 days. It appears that the Community Participation Charter will not apply to the PPI process; the declaration of PPI is absent from a list of functions that come under the Charter.

The White Paper comments that “community participation will be undertaken as a key input into the conceptual design process”, although it does not specify at what stage this will occur. It also identifies “consultation” as taking place within phases two and three of the PPI process (see Figure 2). This will include submissions on the project definition report, and different government agencies.<sup>49</sup>

### **5.2.1 Stakeholder Responses**

#### Consultation requirements

A number of submissions comment on Public Priority Infrastructure. Stakeholders generally recognise the need for a new, more streamlined infrastructure process but have reservations about the degree of consultation proposed as part of the approval and assessment process. Under the draft legislation, there is no requirement for the Minister to consult with stakeholders or the public prior to declaring a PPI project. Some submissions express concern about the lack of public/community consultation, while others recommend that consultation with particular groups or bodies be required.

Local Government NSW’s submission, for example, emphasises the need for the Minister and Department to consult with relevant local government areas at all stages of the PPI process:

LGNSW acknowledges the need to progress the delivery of essential state infrastructure, and that special planning processes may be required to ensure their successful implementation.

However, further clarification is required on how relevant councils will be consulted during the strategic planning, design and construction phases of infrastructure development. While the infrastructure may be designated as a broader public priority, the adjoining local community must not be forgotten. As the representative of these local communities, councils will play a vital role in ensuring that the process is seen to be open, transparent and fair.<sup>50</sup>

The Planning Institute advises that some public consultation should be undertaken for PPI projects, commenting that “The level of consultation expected for a Public Priority Infrastructure development should be comparable

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<sup>49</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p172

<sup>50</sup> LGNSW, [Submission to the Planning White Paper and Exposure Bills](#), June 2013, p. 46

to consultation undertaken for the North West Rail Link (Sydney).”<sup>51</sup>

The Environmental Defender’s Office recommends that project definition reports be placed on exhibition for 45 days (rather than the presently-proposed 28) *prior* to a project being declared PPI. Under the draft legislation, the report is to be exhibited after a project is declared to be public priority.

Some submissions caution that the proposed PPI process will work against the new planning system’s goal of transparency and accountability, or public perceptions thereof. For example, the Law Society’s submission expresses the opinion that:

Subsection 1 [of Section 10.12] excludes legal proceedings in respect of a declaration of Public Priority Infrastructure or any amendment or revocation of such declaration [...]

There appears to be a disconnect between the stated intention to continue the open standing provisions of the current Act as set out in the White Paper and the terms of the draft legislation.<sup>52</sup> [*emphasis original*]

The City of Sydney’s comments regarding PPI are some of the more critical. Noting that the Minister will have the ability to exclude PPI from Part 5 assessments and override local plans without consultation or prior notice, the City of Sydney is of the view that:

This is a significant shift in power to the Minister and undermines the principles of public consultation and involvement (given that the strategic planning processes will be overridden by such a declaration). This section should be omitted or, in the alternative, require the Minister to undertake consultation.<sup>53</sup>

### Assessment requirements

A number of submissions address PPI’s exemption from certain approval requirements, or the environmental assessment standards that will be required in the assessment phase of a PPI project. Local Government NSW questioned what these standards will be, pointing out that assessment methodologies and environmental management measures had not yet been provided.

The Environmental Defender’s Office made several recommendations regarding the assessment process:

*Recommendation 66:* A project definition report for PPI should:

[...]

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<sup>51</sup> Planning Institute of Australia, [A New Planning System for NSW: White Paper Submission](#), June 2013, p. 12

<sup>52</sup> The Law Society of NSW, [Environmental Planning & Development Committee submission on A New Planning System for NSW](#), June 2013, p. 6

<sup>53</sup> City of Sydney, [NSW Planning System White Paper and Draft Exposure Bills: Submission to the Department of Planning and Infrastructure](#), June 2013, pp. 168-169

- require the proponent to avoid, minimise or mitigate any adverse impacts of the development, 'to the extent practicable', including having regard to reasonable alternatives to the proposal, or alternative ways of constructing or operating the infrastructure;
- specifically address *cumulative impacts* in combination with other existing or likely future development, and *climate change impacts* including mitigation and adaptation responses (per clause 5.26).

*Recommendation 67:* PPI should not be exempt from a range of provisions, such as the Act's objects, strategic plans, concurrence requirements and appeals (clause 5.27).<sup>54</sup>

The submission from the NSW Aboriginal Land Council expresses concern regarding the exclusion of infrastructure projects from the Aboriginal heritage permit system, which it views as a minimum (if inadequate) safeguard:

NSWALC has serious concerns regarding how the White Paper and Planning Bill address Aboriginal culture and heritage. Section 6.2 of the Planning Bill states that Aboriginal Heritage Impact Permits are not required for the carrying out of Public Priority Infrastructure, State Infrastructure Development or State Significant Development and accordingly the provisions of or made under any Act that would prohibit an activity without such approval do not apply.

NSWALC is critical of the large number of Aboriginal Heritage Impact Permits that have been issued, with the current Aboriginal Heritage Impact Permit system leading to unacceptable rates of damage and destruction of Aboriginal cultural heritage. The current Aboriginal Heritage Impact Permit system is heavily weighted in favour of development. Nevertheless, it is essential that a permit system is in place for the approval of destruction of Aboriginal cultural heritage. The proposals within the Planning Bill that bypass the need for permits to destroy Aboriginal cultural heritage is alarming.<sup>55</sup>

## 6 INFRASTRUCTURE FUNDING & CONTRIBUTIONS

It is a long-standing principle of the existing planning system that new development makes a contribution towards the cost of infrastructure that will meet the additional demands it generates. This principle will be carried over into the new system.

Currently contributions from developers are collected towards local infrastructure works, and (in certain greenfield areas) regional infrastructure works; the provision of both local and regional infrastructure is also negotiated under voluntary planning agreements (VPAs). Significant changes are proposed for local infrastructure contributions, regional infrastructure contributions, and voluntary planning agreements.

<sup>54</sup> EDO NSW, [Submission on A New Planning System for New South Wales – White Paper](#), June 2013, p. 20

<sup>55</sup> NSW Aboriginal Land Council, [Submission in response to Planning White Paper](#), June 2013, p. 4

## 6.1 Infrastructure funding under the current system

Local infrastructure (including roads, drainage, open space and community facilities) is funded primarily by local councils. Funds for local infrastructure works are either drawn from general expenditure, or funded in whole or in part by a levy upon development under s. 94 of the EP&A Act (commonly known as a Section 94 contribution). Section 94 contributions have been criticised for being overly complex, open to over-collecting by local councils, and insufficiently transparent.<sup>56</sup>

Regional infrastructure works are funded by Special Infrastructure Contributions (SICs), in addition to funding from the State government. SICs apply only in certain growth and land-release areas, rather than on a state-wide basis. Rates are calculated by identifying the total cost of regional infrastructure, and apportioning costs between new development and the State Government. The White Paper comments that Special Infrastructure Contributions are “unfair and unsustainable”, and that they fail “to account for where the majority of growth occurs, and therefore where demands on infrastructure are greatest.”<sup>57</sup>

In addition to monetary contributions, some infrastructure is provided by developers under arrangements with consent authorities currently known as voluntary planning agreements (VPAs). Under these instruments, developers can agree to provide local or regional infrastructure works, land, or monetary contributions.

## 6.2 Infrastructure funding under the new planning system

The White Paper notes that councils, developers and residents have all commented that the current contribution system must be reformed.<sup>58</sup> Under the proposed planning system there will be three forms of infrastructure contributions:

- Local infrastructure contributions (previously section 94 contributions);
- Regional infrastructure contributions; and
- Regional growth funds.

These streams are described in detail in the following sections, and shown in

Figure 3.

Infrastructure contributions can be collected from development requiring consent under Part 4 of the Planning Bill (complying development, code-assessable development, and merit-assessable development identified as requiring consent in a local plan), and from State Infrastructure Development

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<sup>56</sup> NSW Government, [A New Planning System for NSW – Green Paper](#), July 2012, p. 72

<sup>57</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p165

<sup>58</sup> *Ibid.*, p162

that is not carried out by or on behalf of a public authority.<sup>59</sup>

Biodiversity contributions will be dealt with separately from infrastructure contributions, and will be established through Subregional Delivery Plans. Contributions towards affordable housing will be addressed through strategic planning and policies (such as the NSW Housing Policy), rather than through individual development consents.<sup>60</sup>

Figure 3: Infrastructure contributions (reproduced from White Paper)<sup>61</sup>

NEW CONTRIBUTIONS SYSTEM		
<p><b>Local Infrastructure Contributions</b></p> <p>Priorities contained in Local Infrastructure Plans 100% of costs recovered</p>	<p><b>Regional Infrastructure Contributions</b></p> <p>Priorities outlined in Growth Infrastructure Plans Contribution towards regional infrastructure</p>	<p><b>Regional Growth Funds</b></p>
<p><b>Charged on a local basis</b></p>	<p><b>Charged on a subregional basis</b></p>	<p><b>Charged on a regional basis</b></p>
<p><b>Approved infrastructure includes:</b></p> <p>Local roads and traffic management Local open space and embellishment Basic community facilities (land and capital) Capital costs for all drainage</p>	<p><b>Approved infrastructure includes:</b></p> <p>State and regional roads Transport land and works Education land or works Embellishment of regional open space</p>	<p><b>Growth funds acquire land for:</b></p> <p>Regional open space and drainage</p>

The White Paper comments that VPAs “have been criticised because infrastructure needs, costs and contributions vary widely across agreements.” Similarly, the Green Paper remarks that “Voluntary Planning Agreements can be complex and time consuming to execute as they are subject to negotiation between the State, proponent and possibly council.” VPAs will remain in the new planning system but will be referred to as “planning agreements”, and their use will be significantly curtailed.

Many of the specific details regarding infrastructure contributions and planning agreements have not yet been finalised, and will be left to the regulations. The White Paper notes that a “contributions taskforce” consisting of “councils, state agencies and industry will advise the government on arrangements for moving

<sup>59</sup> NSW Government, [Planning Bill 2013 – Exposure Draft](#), April 2013, cl. 7.2

<sup>60</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p168; at present . Contributions towards affordable housing are imposed as a condition of consent if a relevant EPI (typically a LEP) makes provision for this.

<sup>61</sup> Reproduced from NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p164

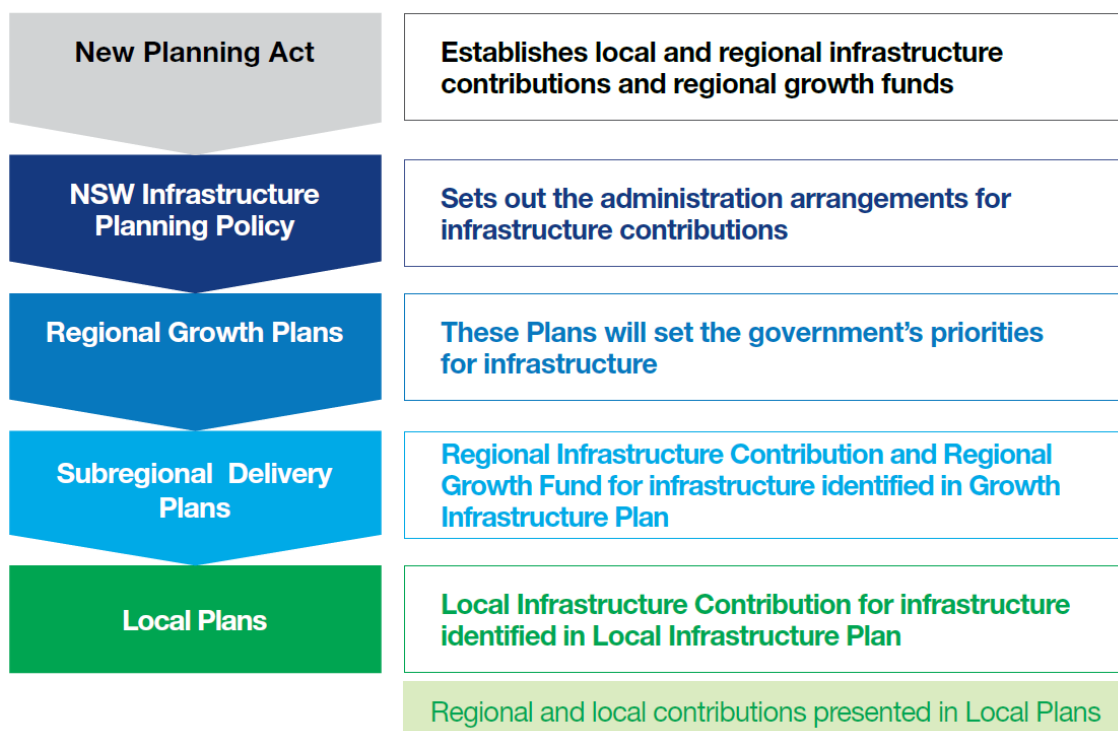


to the new system.”<sup>62</sup>

### 6.2.1 Principles of infrastructure contributions

The White Paper proposes the creation of a NSW Infrastructure Planning Policy, to achieve consistency and stability across plans. This policy will inform the hierarchy of strategic plans and infrastructure plans, as shown in Figure 4.

Figure 4: Relationship between infrastructure contributions and strategic plans (reproduced from White Paper)<sup>63</sup>



According to the White Paper, seven infrastructure contributions principles will be included in the NSW Infrastructure Planning Policy and underpin local and regional plans:

- Simple and predictable;
- Transparency and accountability;
- Beneficiary pays;
- Elimination of avoidable costs;
- Cost reflectivity;
- Affordability; and
- Contestability.<sup>64</sup>

<sup>62</sup> Ibid., p163

<sup>63</sup> Reproduced from NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p162

<sup>64</sup> Ibid., p164



These seven principles are not enshrined in the Planning Bill. Clause 7.3 of the Bill identifies five “principles for infrastructure contributions”, from which the majority of those identified in the White Paper are absent.

- Principle 1:** The local or regional infrastructure that is proposed to be funded by an infrastructure contribution should be able to be provided within a reasonable time.
- Principle 2:** The impact of the proposed infrastructure contribution on the affordability of housing should be considered.
- Principle 3:** The proposed infrastructure contribution should be based on a reasonable apportionment between existing demand and new demand for local or regional infrastructure to be created by the proposed development to which the contribution relates.
- Principle 4:** The proposed infrastructure contribution should be based on a reasonable estimate of the cost of proposed local or regional infrastructure.
- Principle 5:** The estimates of demand for each item of local or regional infrastructure to which the infrastructure contribution relates should be reasonable.<sup>65</sup>

The White Paper principles of “simple and predictable”, “beneficiary pays”, and “contestability” are not reflected in the principles set out in the Bill; a note in the Bill comments that “transparency and accountability” is to be accounted for in the regulations.

### **6.2.2 Regional / Subregional Infrastructure Funding**

The White Paper proposes replacing SICs with two new mechanisms to fund infrastructure provision at the regional/subregional level. Regional infrastructure contributions will fund transport works, schools and upgrade costs to local space.<sup>66</sup> Regional growth funds will primarily fund land acquisition for open space and drainage.

Both regional infrastructure contributions and contributions towards regional growth funds will be collected under the provisions of local plans, and will fund works identified in Growth Infrastructure Plans.

Under clause 7.1 of the Planning Bill, regional infrastructure is defined as follows:

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<sup>65</sup> NSW Government, [Planning Bill 2013 – Exposure Draft](#), April 2013, cl. 7.3

<sup>66</sup> Under s. 94ED of the EP&A Act, SICs can fund the provision, extension or augmentation of “public amenities or public services, affordable housing and transport or other infrastructure relating to land” and associated recurrent costs, plus the conservation or enhancement of the natural environment. Currently SICs fund roads, bus-related infrastructure, open space and conservation, and land acquisition for health and emergency services and open space and conservation.

- (a) regional or State roads,
- (b) land for drainage,
- (c) transport infrastructure,
- (d) regional open space,
- (e) educational establishments.

### Regional Infrastructure Contributions

While the Planning Bill provides that regional infrastructure contributions can be collected towards transport works, schools, and upgrades to local space, a definitive list of the types of infrastructure that will be funded has not yet been released. This list will be prepared by the Contributions Taskforce and likely be included in the regulations or, as under the current system, as guidelines issued by the Minister or DP&I. Contributions will be imposed as a condition of consent, and will be paid into either a regional contributions fund, established under Part 9 Division 7.6 of the Planning Bill.

The White Paper comments that under the new system regional infrastructure contributions “will be calculated and charged on a subregional basis.”<sup>67</sup> Clause 7.15 (1) of the Planning Bill addresses regional, rather than subregional, infrastructure:

a local plan can impose a regional infrastructure contribution on development as a contribution towards the provision of regional infrastructure by the State.

It therefore appears that the need for regional infrastructure will be identified on a subregional basis, and the costs of infrastructure will be distributed across development within this area. It also seems likely then that contribution amounts payable will be fixed across a subregion. The provisions that will permit the collection of contributions will be contained within local plans.

There is a potential conflict here between the “user-pays” principle and the requirement that development rates will be consistent across an entire subregion. Growth areas may not be distributed evenly across high-growth subregions, with some areas of a subregion experiencing no (or even negative) growth. Development occurring in low-growth areas would be unlikely to contribute towards any additional need for regional infrastructure yet may still be required to contribute towards regional infrastructure servicing other parts of the subregion.

Within the Sydney metropolitan area, the subregions to be used will be those found in the draft *Metropolitan Strategy for Sydney to 2031*. The White Paper comments that the basis used for calculating contributions in other parts of the State has not yet been determined.<sup>68</sup>

Neither the White Paper nor Exposure Bills make clear how regional

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<sup>67</sup> Ibid., p165

<sup>68</sup> Ibid., p165

contributions will be calculated. It is not clear what proportion of the cost of infrastructure will be funded under regional infrastructure contributions, but it seems that the costs will not be entirely recovered:

The government believes it is appropriate to recover some of the cost of providing infrastructure to support population growth in major centres.<sup>69</sup>

At present, the State government contributes 50% of the costs of regional infrastructure in growth centres levied for under SICs.<sup>70</sup>

### Regional Growth Funds

The second new regional infrastructure funding mechanism will be regional growth fund charges (as they are referred to in the White Paper; the Exposure Bills refer to these as “planning growth funds”). Documentation released to date is not entirely clear as to the nature of these funds: the White Paper implies that “regional growth funds” will be established and calculated as a separate contributions system, while the Exposure Bills specify only that regional infrastructure contributions intended for certain kinds of work be paid into the funds and expended in certain ways.

Regional growth fund charges will primarily be implemented to meet the high costs associated with land acquisition for open space and drainage, which often exceed the cap placed on infrastructure contributions under the current system.

Under the existing system, local councils generally pay for some drainage and the expansion or provision of regional open space. Funding for these facilities is often collected from new development within a single LGA under the provisions of s. 94 of the EP&A Act. Given the wider catchment area that such facilities serve (often larger than the LGA), the equity of these arrangements may be questioned.

A regional growth fund will be established for each development area under Schedule 1 of the Planning Administration Bill.<sup>71</sup> In addition to contributions paid towards the fund by development, these funds will hold the proceeds of the sale or lease by the Planning Ministerial Corporation of any land situated within the development area.<sup>72</sup>

Regional growth funds will hold monies collected as regional infrastructure contributions intended for land for drainage or land for open space.<sup>73</sup>

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<sup>69</sup> Ibid., p165

<sup>70</sup> NSW Department of Planning and Infrastructure, [Special Infrastructure Contribution](http://www.gcc.nsw.gov.au/sic-69.html), <http://www.gcc.nsw.gov.au/sic-69.html>

<sup>71</sup> Development areas are declared as such by the Minister under cl. 1.8 of [the Planning Administration Bill 2013 – Exposure Draft](#)

<sup>72</sup> NSW Government, [Planning Administration Bill 2013 – Exposure Draft](#), April 2013, Schedule 1, cl. 1.6

<sup>73</sup> NSW Government, [Planning Bill 2013 – Exposure Draft](#), April 2013, cl. 7.17 (b)

Documents released to date (including the White Paper and Exposure Bills) are not clear regarding how these contributions will be levied. The White Paper notes that “these contributions will be calculated and charged on a regional basis,”<sup>74</sup> although the provisions imposing regional contributions will be contained in local plans. It also states that all new development within a region (including infill) will be required to make a “modest contribution” to the fund.<sup>75</sup>

### **6.2.3 Local Infrastructure Contributions**

The current developer contributions system has been criticised by developers (who feel that its complexity and costs are stifling development) and councils (for being overly burdensome and insufficient). The Green Paper comments that:

The approaches to development contributions in the past have been complex, inequitable, and inefficient. Successive reviews and reforms have not substantially improved the structure and operation of the levy framework.<sup>76</sup>

It also cites IPART’s submission to the independent planning review:

The large number of policy changes may have reduced investment certainty. Further, the rationale for the current allocation of costs between these parties is not clearly articulated. The system is fragmented, resulting in inequities in the allocation of the costs of development depending on the location and the ultimate owner of the infrastructure.<sup>77</sup>

The 2012 Independent Review concluded that “there is clearly widespread dissatisfaction with the present system and its ability to deliver community infrastructure in a timely and equitably funded manner.”<sup>78</sup>

The new planning system proposes replacing the existing contributions system (based on s. 94 of the EP&A) with “local infrastructure contributions”, collected under Local Infrastructure Plans. Clause 7.4 of the Planning Bill allows a consent authority to:

impose a local infrastructure contribution on development to fund the provision by a council of local infrastructure in the area in which development is proposed to be carried out.

This will be done by means of a condition of development consent for the development concerned.

Local infrastructure contributions will be collected towards the cost of “local

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<sup>74</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p166

<sup>75</sup> Ibid., p166

<sup>76</sup> NSW Government, [A New Planning System for NSW – Green Paper](#), July 2012, p72

<sup>77</sup> NSW Government, [A New Planning System for NSW – Green Paper](#), July 2012, p72

<sup>78</sup> NSW Planning System Review, [The Way Ahead for Planning in NSW?: Issues Paper](#), December 2011, p. 85

infrastructure” as defined in clause 7.1 of the Planning Bill:

- (a) local roads,
- (b) local drainage works,
- (c) open space,
- (d) community facilities.<sup>79</sup>

Local infrastructure contributions can be levied on development that a Local Infrastructure Plan identifies as subject to a local infrastructure contribution. Such contributions are only payable by those developments requiring consent under Part 4 of the Bill, or by State Infrastructure Development that is not carried out by or on behalf of a public authority.<sup>80</sup>

Local infrastructure contributions must be paid to the local council, even in instances where the council is not the consent authority. In lieu of a monetary contribution, a council can accept land dedication or the carrying out of works-in-kind as partial or full payment.<sup>81</sup>

Neither the White Paper nor Exposure Bills are clear as to how local infrastructure contributions will be calculated. As is currently the case, contributions may be collected directly or indirectly (through a fixed-rate levy, as with current s. 94A). Under the current system, direct contributions are calculated by identifying additional infrastructure that will be needed by the estimated future population, and apportioning the cost of this infrastructure over its estimated users. The fundamental mechanics of this process appear unlikely to be changed under the proposed system.

As is currently the case, a direct contribution may only be imposed when an authority is able to show a direct link between the additional demand that a development will create, and the infrastructure that is being levied for – that is, the need for the infrastructure must be shown to result in whole or in part from the development in question:

- (1) A direct contribution for the provision, extension or augmentation of local infrastructure within an area can only be imposed if the consent authority is satisfied that the development concerned will or is likely to require the provision of or increase the demand for that local infrastructure.
- (2) A direct contribution for recoupment of the cost of providing existing local infrastructure within the area can only be imposed if:
  - (a) the consent authority is satisfied that the development concerned will, if carried out, benefit from the provision of the existing local infrastructure, and

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<sup>79</sup> Under the current system, a consent authority can require a “reasonable dedication or contribution for the provision, extension or augmentation of the public amenities and public services concerned” under s. 94 of the EP&A Act. This includes contributions towards roads, bus infrastructure, local parks, drainage, community facilities, and recreation facilities.

<sup>80</sup> NSW Government, [Planning Bill 2013 – Exposure Draft](#), April 2013, cl. 7.2

<sup>81</sup> NSW Government, [Planning Bill 2013 – Exposure Draft](#), April 2013, cl. 7.8

- (b) the existing local infrastructure was (at any time, whether before or after the commencement of this Act) provided within the area by a council in preparation for or to facilitate the carrying out of development in the area.<sup>82</sup>

In practice, under the current system, direct contributions are collected by identifying a work required to meet the needs of the additional population generated by development, and apportioning the cost of this work over all development that contributes to the need.

Under a direct contributions regime, the cost of infrastructure and associated works will be based upon a standardised and benchmarked rate, such as a fixed cost per square metre for road construction or fixed construction costs for a community centre. This would differ from the current system, under which infrastructure costs are generally determined by local councils.

Benchmarked rates will be set by the Independent Pricing and Regulatory Tribunal, and councils will be able to apply to charge more than this rate where their costs are higher. Contributions rates will also be uncapped, removing one of the elements of the existing system that local government has previously identified as hindering the efficient provision of infrastructure.

In contrast to direct contributions, indirect contributions are collected as a fixed-rate levy (up to 1% under the present system) upon the cost of each development within an area, which is paid to the local council. There is currently no requirement for a council to show a nexus between infrastructure need and a development in question in order to collect indirect contributions.

### Governance arrangements

Existing concerns about the development contributions system often focus upon the inefficiency and lack of transparency and accountability in the way that local government collects and spends funds.

The White Paper proposes measures that will address these criticisms:

- Local councils will have to submit a compliance certificate to the Minister as part of the process of making Local Plans. These will certify compliance with the contributions framework and principles;
- Local councils will need to prepare annual reports on the collection, management, and disbursement of funds, and on infrastructure delivery, as part of the integrated planning and reporting framework. This is likely to be significantly more detailed than the current, often limited, information provided in financial statements;
- Councils will be annually audited;
- Contributions collected must be spent within three years, unless the Minister grants an exemption; and

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<sup>82</sup> NSW Government, [Planning Bill 2013 – Exposure Draft](#), April 2013, cl. 7.7

- If funds are held for longer than three years, the Minister will require that the funds must be spent and can direct how they are to be expended.<sup>83</sup>

Under Schedule 7 of the Planning Bill, the regulations are able to make provisions regarding the “collection and publication by public authorities of information concerning the provision of infrastructure and the determination, collection, application and use of infrastructure or other contributions.”

#### **6.2.4 Details yet to be finalised**

There are a number of areas relating to both local and regional infrastructure contributions where details regarding the new arrangements have not been finalised. The White Paper notes that outstanding issues will be progressed in consultation with key industry stakeholders and local councils.

Perhaps most importantly, it has not yet been determined what kinds of development will be liable to pay contributions towards infrastructure provision. This has been a point of contention under the current system. Historically, in order for councils to charge a local infrastructure contribution, it has been necessary to show that the development in question will lead to additional demand for infrastructure. This requirement has limited contributions to residential and employment-generating developments.

Other issues yet to be finalised are:

- What will be considered “essential infrastructure” for the purposes of collecting contributions, and the standards to which it can reasonably be provided (such as the amount of open space per capita, or internal fit-out of a community centre);
- The relevant method of charging local and regional contributions (for example, percentage of construction value, or dollars per square metre of development);
- The charging mechanism for local infill contributions and regional contributions;
- Benchmarking for greenfield local infrastructure costs;
- Transitional arrangements; and
- The precise form and content of local infrastructure contributions plans and Local Infrastructure Plans (left to regulations under Schedule 7).<sup>84</sup>

#### **6.2.5 Stakeholder Responses**

The proposed changes to local and regional infrastructure funding arrangements and developer contributions are one of the more contentious areas of infrastructure reform. Most submissions address the subject, with a number offering lengthy commentary. This reflects the significant financial

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<sup>83</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p169-170

<sup>84</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p167



interests of both developers and local government involved in the issue, and comes despite the relative lack of detail provided to date.

Many of the issues addressed in submissions are relevant to both local and regional infrastructure contributions. This paper considers these broader issues first, before specifically addressing local and regional infrastructure contributions.

### Detail and resourcing

Many submissions point out that a number of key details of the proposed new system have not yet been announced. These include the list of approved infrastructure, the method by which contributions will be calculated, and the infrastructure contributions that will be payable by development. A number of submissions note that this makes it difficult to offer properly considered comment on the reforms. The Independent Pricing and Regulatory Tribunal, for example, points out that:

Many details of the new contributions system are yet to be specified. This makes it difficult to analyse the potential impacts, including the financial impact on the NSW Government. Minimising uncertainty for councils, developers and the community and will help *[sic]* stakeholders in making future revenue, expenditure and investment plans.<sup>85</sup>

The City of Sydney points out that there has been no detail provided as to what constitutes the various categories of “local infrastructure”, while the Urban Taskforce requests more detail on “matters to do with quantum of levy, who will pay and level of government subsidy to demonstrate whether the system proposed is a fair and reasonable system”. The NSW Business Chamber also expresses “concern over the lack of detail around the quantum for infrastructure charges”, and seeks clarification as to the scope of the term “essential infrastructure”.

UrbanGrowth NSW emphasises the importance of these details in determining the success or otherwise of the infrastructure reforms:

Critical to the success of these reforms is the fine tuning; in terms of scope, levels of contributions, timing of collection, and expenditure efficiency. When fine tuning infrastructure issues, the Department of Planning and Infrastructure must consider: impacts on market confidence, equity and reasonableness to create a scheme that facilitates economic activity rather than impedes it. UrbanGrowth NSW can assist in the development of infrastructure plans and funding mechanisms. We can bring project experience and offer insight into infrastructure delivery challenges.<sup>86</sup>

In requesting additional detail regarding the scope of infrastructure, the

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<sup>85</sup> IPART, [NSW Planning System Review: IPART Submission on White Paper](#), June 2013, p. 2

<sup>86</sup> UrbanGrowth NSW, [A New Planning System for NSW White Paper Submission](#), July 2013, p.



Planning Institute of Australia identifies a number of specific issues that should be clarified:

The scope of some of the identified infrastructure items is not entirely clear in the Bill. While there are definitions provided in the Bill for the terms local infrastructure and regional infrastructure, the items described under each term are not defined. For example, in local infrastructure, the term “community facilities” is not defined. Do community facilities include only community centres, or also child care centres, youth centres, senior citizen centres, etc.? It is noted that the term “basic community facilities” is used in the White Paper, but this term has not found its way into the Planning Bill.

Similarly transport infrastructure and educational establishments under regional infrastructure are not defined. Does transport infrastructure include heavy rail, light rail, buses, ferries, etc?

If educational establishments are to be included then why not health establishments? Health and education can be argued to be equally important to a community. We accept that there may be valid reasons for such differentiation, however this has not been adequately explained and therefore appears anomalous.<sup>87</sup>

The Planning Institute of Australia also points out the need for additional resourcing of local and State government to allow them to prepare, audit and review plans. The Institute’s submission comments that:

A significant amount of work will be required to complete all the necessary studies to ascertain all contributions so that the planning system can operate in the way intended. Therefore the allocation of sufficient resources to enable this work to be carried out in a timely and robust manner will be a prerequisite to implementation.<sup>88</sup>

The submission from the Urban Taskforce also foresees that councils may have difficulties in ensuring compliance with the new infrastructure policies. Their submission notes that:

Local councils must be directed to review all existing local environmental plans, development control plans and infrastructure contributions plans for consistency with state planning priorities. Local Council must be given a reasonable time to prepare new local plans [*which include infrastructure plans*] and development guides, however, if not prepared in the time allocated by the Government, the Government must impose a standard plan upon the local council.<sup>89</sup>

The City of Sydney, on the other hand, sees the additional requirements for departmental review as unnecessary:

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<sup>87</sup> Planning Institute of Australia, [A New Planning System for NSW: White Paper Submission](#), June 2013, p. 29

<sup>88</sup> Planning Institute of Australia, [A New Planning System for NSW: White Paper Submission](#), June 2013, p. 29

<sup>89</sup> Urban Taskforce, [Delivering a Better Planning System for NSW: White Paper](#), June 2013, p. 24

the White Paper proposes a significantly increased role for the Department including advising the Minister on whether to make or amend a council's draft Local Infrastructure Plan. This increased role for the department is unjustified and will require significant additional Departmental resources and add another bureaucratic step to the process and delay plan-making.<sup>90</sup>

### Infrastructure Contribution Principles

Several submissions raised concerns about the infrastructure principles outlined in the White Paper and Planning Bill. Both the City of Sydney and Planning Institute of Australia identified the disparity between the seven principles contained in the White Paper, and the five principles in clause 7.3 of the Planning Bill. The Planning Institute pointed out that any confusion must be avoided in such a contentious area of the Bill as infrastructure contributions, and called for these principles to be clarified and simplified in the Act.

The City of Sydney, in addition to commenting on the disparity between the Bill and the White Paper, recommends alterations and additions to the Bill's principles as follows:

Amend Principle 4 in section 7.3 of the draft Planning Bill by removing the words 'a reasonable estimate of the cost' and inserting instead the words the 'efficient cost'.

Insert the following additional principle in section 7.3 of the draft Planning Bill: 'Local and regional infrastructure contributions requirements should be clear, simple and predictable'.

Insert the following additional principle in section 7.3 of the draft Planning Bill: 'Contributions plans and planning agreements shall actively facilitate the efficiencies that can be achieved through delivery of local and regional infrastructure as works-in-kind by developers of land'.<sup>91</sup>

The Urban Taskforce supports the principles outlined in the White Paper, while not commenting on those expressed in the Bill, and noted that "A system that is underpinned by principles such as *[those in the White Paper]* will support the funding of infrastructure in a fair and transparent manner."

### Infrastructure that may be funded by contributions from development

Neither the White Paper nor the Exposure Bills specify in detail the types of infrastructure that can be funded from developer contributions, nor the levels of provision (for example open space per person, or number of community centres) that will be considered reasonable. Several submissions point out that these details will be critical in determining the success (or otherwise) of the reforms. Some stakeholders (often developers or industry groups, such as the

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<sup>90</sup> City of Sydney, [NSW Planning System White Paper and Draft Exposure Bills: Submission to the Department of Planning and Infrastructure](#), June 2013, p. 133

<sup>91</sup> City of Sydney, [NSW Planning System White Paper and Draft Exposure Bills: Submission to the Department of Planning and Infrastructure](#), June 2013, p. 118

Housing Industry Association, the Property Council, and the NSW Business Chamber) argue in favour of a relatively restrictive approach, while others (the Environmental Defender's Office and City of Sydney) are of the view that the range of infrastructure that can be funded should be at least as expansive, if not more so, than under the current regime.

The NSW Business Chamber's submission is representative of those that argue in favour of a more restrictive approach to the scope of infrastructure contributions:

There is concern over the lack of detail around the quantum for infrastructure charges, where charges will be determined after various infrastructure plans have been developed. A focus of this concern is the expectation around the scope of the terms 'essential infrastructure' and 'growth infrastructure' for the purposes of infrastructure planning and delivery. If these terms are taken broadly... it will be difficult to achieve the White Paper's stated outcome of ensuring the financial viability of urban developments while at the same time ensuring a user pays model for infrastructure delivery.<sup>92</sup>

The Property Council's submission raises similar concerns, that infrastructure contribution rates will increase under the new system. It comments that any price increase is "most likely to be seen through the introduction of new categories of infrastructure to be included in the regional levies."<sup>93</sup>

On the other hand, several stakeholders emphasise the importance of providing adequate and appropriate infrastructure. The Environmental Defender's Office recommends that "green infrastructure" be included in Growth Infrastructure Plans (which will form the basis of regional contributions), and comments more broadly that:

Strategic planning needs to properly value green infrastructure and integrate it into broader infrastructure planning and funding. This includes the State Infrastructure Strategy, Regional Growth Plans, Growth Infrastructure Plans and Local Plans.

"Green infrastructure" is defined in the submission as:

the parks, gardens, waterways, trees, cycleways and biodiversity corridors that make our communities more liveable, valuable, healthy, connected and climate change-ready. There is growing evidence that 'urban green spaces have positive effects on people's health, stimulate a city's economy, raise community spirit and further social integration.'<sup>94</sup>

While the City of Sydney does not argue in favour of an expanded definition and

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<sup>92</sup> NSW Business Chamber, [Submission: New Planning System for NSW White Paper](#), June 2013, p. 4

<sup>93</sup> Property Council of Australia, [Delivering on the Promise: Submission to the NSW Government's White Paper – A New Planning System for NSW](#), June 2013, p. 53

<sup>94</sup> EDO NSW, [Submission on A New Planning System for New South Wales – White Paper](#), June 2013, p. 83

provision of infrastructure, it does comment that “reducing the scope of leviable local infrastructure would reduce the City’s capacity to provide facilities and reduce service levels for the community.”<sup>95</sup> The same submission includes the following recommendation: “do not reduce the scope of local infrastructure that can be funded using infrastructure contributions and ensure that it includes but is not limited to public domain, child care centres, libraries, aquatic centres and community centres.”<sup>96</sup>

#### Development that will be liable to pay infrastructure contributions

The kinds of development that are subject to infrastructure contribution levies has historically been an area of contention. It is surprising then that relatively few submissions commented on this issue, with only the Housing Industry Association, Planning Institute of Australia and Urban Taskforce discussing it directly. Again, this may reflect the level of detail released to date.

The Housing Industry Association’s submission comments that:

For local contributions, the Paper appears to be silent on the sharing of contributions across all land uses – residential, commercial, and industrial... HIA believes that local contributions must be appropriate shared [*sic*] across all land uses in new development areas, as they all benefit from the infrastructure provided.<sup>97</sup>

The Association also supports the exemption of dwelling alterations or expansions from infrastructure levies.

The Urban Taskforce’s submission expresses support for the White Paper’s proposal, that infrastructure levies should be spread across the broadest base of beneficiaries.

In contrast, the Planning Institute of Australia recommends levying only development that is likely to contribute towards the need for infrastructure. This may mean exempting commercial or industrial development from contributing towards certain categories of infrastructure:

It is proposed to broaden the base for collection of levies by allowing contributions towards the acquisition of land for regional drainage and regional open space to be applied to all development including industrial, retail and commercial development. While it can be argued that industrial, commercial and retail development may contribute to the demand for regional drainage given that they can generate additional stormwater runoff, it is difficult to see how these types of development generate demand for additional open space.

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<sup>95</sup> City of Sydney, [NSW Planning System White Paper and Draft Exposure Bills: Submission to the Department of Planning and Infrastructure](#), June 2013, p. 121

<sup>96</sup> *Ibid.*, p. 129

<sup>97</sup> HIA, [Submission by the Housing Industry Association to the White Paper A New Planning System for NSW](#), June 2013, p. 8

The proposed regional growth plan therefore appears to be driven more by a pragmatic mechanism to spread the costs of this expensive infrastructure to reduce the burden on developers rather than any obvious planning rationale.<sup>98</sup>

### Cost apportionment and calculation

Several submissions raise questions relating to the way that infrastructure contributions will be calculated. The Urban Taskforce, the Property Council, the Housing Industry Association and the Business Chamber of NSW all express the view that the cost of infrastructure should be met by the entire community which is likely to use the infrastructure, rather than simply by new development that is generating the need for the infrastructure. The Urban Taskforce, for example, argues that:

The [*existing*] expectation that a small group of developers be required to make significant contributions to essential infrastructure that will clearly be to the benefit of the broader community, is highly inappropriate... Thankfully Government recognises that this situation cannot continue and an alternative has been offered in the White Paper. The White Paper speaks of the need for infrastructure levies to be competitive with comparable markets in other jurisdictions and that the levy should be spread across the broadest base of beneficiaries... spreading the cost should not simply mean spreading the cost over a broader base of developers as the developer is not the only beneficiary. The entire community benefits from improved infrastructure and hence the entire community should share a proportion of the cost.<sup>99</sup>

The Business Chamber of NSW expresses similar sentiments, noting that it has concerns regarding:

the over-reliance on new developments to fund infrastructure delivery. The delivery of new infrastructure obviously benefits not only those in new properties but also those in existing properties... Without a more equitable distribution of the costs for new infrastructure, the financial viability of urban developments will be jeopardised.<sup>100</sup>

UrbanGrowth NSW cautioned against the infrastructure reforms becoming merely a cosmetic change, and argues that the reforms present a real opportunity to rethink principles of infrastructure funding and costs:

Care should be taken to avoid Subregional Plans and Local Plans merely replacing the existing SIC and S.94 Plans without any real reduction in the overall amount of contributions. Where subregional plans cover only growth areas, the contributions will be naturally high because the level of existing infrastructure in these subregions is low. The reforms provide an opportunity to

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<sup>98</sup> Planning Institute of Australia, [A New Planning System for NSW: White Paper Submission](#), June 2013, p. 31

<sup>99</sup> Urban Taskforce, [Delivering a Better Planning System for NSW: White Paper](#), June 2013, p. 34

<sup>100</sup> NSW Business Chamber, [Submission: New Planning System for NSW White Paper](#), June 2013, p. 4

adjust infrastructure contributions to recognize the wider public benefit across the whole metropolitan area. For example; education, water services, electrical supply are a basic right for all Australians. Also, biodiversity protection and riparian management is a common obligation for all Australians by virtue of our National commitments to biodiversity protection. Amortizing these infrastructure contributions via a flat rate across all metropolitan subregional plans will promote lower cost housing in greenfield areas.<sup>101</sup>

A second issue relates to retrospective charging for infrastructure. At present, councils are able to collect contributions towards the cost of infrastructure that has already been provided, if they are able to demonstrate a link between the infrastructure and the need generated by residents of development. This retrospective charging is not formalised anywhere, but is based on the established principle of identifying a causal nexus between infrastructure works and a development. The Planning Bill formalises retrospective charging by outlining the conditions under which it can occur in s. 7.7 (2). Submissions raise concerns about the drafting of this section. One example is that of the NSW Property Council:

The link between growth and investment in infrastructure means that local contributions can be applied to charge development for growth itself. The flexibility in legislation means that local contributions can recover costs for infrastructure in close proximity to development and also infrastructure already in existence – leading to the double recovery of costs.<sup>102</sup>

Similarly, the Planning Institute of Australia comments that:

Whilst it is appropriate for Councils to be able to recoup costs associated with infrastructure previously provided, there should be some time limit placed on this to avoid infrastructure that may have been provided decades ago (and which may have been fully funded at the time through grants or other means) are not to be 're-funded' through retrospective contributions. [*sic*]<sup>103</sup>

The Housing Industry Association opposed this measure, commenting that "contributions, both direct and indirect, should be limited to prospective infrastructure only."<sup>104</sup>

### Comparative costs

The lack of detail released to date about precisely how contributions will be calculated, and the types of infrastructure that they will fund, did not prevent several stakeholders from estimating the financial impact of the changes.

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<sup>101</sup> UrbanGrowth NSW, [A New Planning System for NSW White Paper Submission](#), July 2013, p. 4

<sup>102</sup> Property Council of Australia, [Delivering on the Promise: Submission to the NSW Government's White Paper – A New Planning System for NSW](#), June 2013, p.54

<sup>103</sup> Planning Institute of Australia, [A New Planning System for NSW: White Paper Submission](#), June 2013, p. 29

<sup>104</sup> HIA, [Submission by the Housing Industry Association to the White Paper A New Planning System for NSW](#), June 2013, p. 12



In a detailed submission, the Urban Development Institute of Australia reported modelling it had conducted to estimate the infrastructure charges that would be applied to the construction of a new dwelling in both a greenfield and infill area, under the current and proposed contributions framework. This modelling estimated savings of approximately \$40,000 on a greenfield dwelling, and an increase of approximately \$3,250 on a dwelling in an infill area. It is important to note that this modelling was based on a number of assumptions, given the scarcity of detail available at this stage.

Several other submissions make less definite predictions about the amount of contributions that will be required under the new system. The Independent Pricing and Regulatory Tribunal commented that “developers in some areas (eg, metropolitan infill) are likely to pay more than they are required to do under the existing system while others (eg, in greenfield areas) are expected to pay less. Similarly, the impact on councils will not be uniform across the state.”<sup>105</sup>

The Property Council, while identifying some elements of the reforms that will “marginally curb the pricing of infrastructure”, believes that the “cumulative effective [*sic*] of the new system is likely to lead to higher infrastructure taxes than what currently exists”.<sup>106</sup>

### Benchmarking and the role of the Independent Pricing and Regulatory Tribunal

There was relatively little stakeholder comment on expanding the Independent Pricing and Regulatory Tribunal’s role to include infrastructure benchmarking and vetting, despite this being a relatively major reform. The Tribunal commented extensively on its proposed role, with additional commentary from the City of Sydney, the Housing Industry Association, and the Property Council.

The Tribunal identifies three areas where its role will be expanded, according to the proposals set out in the White Paper. It will:

- benchmark the cost of local infrastructure on the essential infrastructure list
- have an expanded role in reviewing contribution plans proposed by the state and local councils
- have an expanded role in setting Regional Infrastructure Contributions and Regional Growth Fund contributions.<sup>107</sup>

With regards to the first of these functions, the Tribunal comments that:

The benchmarking of local infrastructure costs will not be a simple task.

Considerations include:

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<sup>105</sup> IPART, [NSW Planning System Review: IPART Submission on White Paper](#), June 2013, p. 3

<sup>106</sup> Property Council of Australia, [Delivering on the Promise: Submission to the NSW Government’s White Paper – A New Planning System for NSW](#), June 2013, p. 53

<sup>107</sup> IPART, [NSW Planning System Review: IPART Submission on White Paper](#), June 2013, p. 16

- the extent to which councils will be required to meet infrastructure standards set by outside agencies
- whether benchmark costs can be reasonably established for all infrastructure items or whether it is more useful to identify costing methods that are likely to lead to the efficient delivery and cost of the infrastructure (eg, by competitive tendering)
- the extent to which costs may vary across different regions or development settings.

[...]

We note that at this stage benchmarks will only apply to the cost of infrastructure works (ie, capital costs) and not the cost of land. The cost of land is a significant component of existing local infrastructure contributions, especially in greenfield areas. There is also a large degree of variability in land values, depending on the location of the land. IPART expects to provide guidance on appropriate ways to estimate the cost of land as part of the benchmarking project.<sup>108</sup>

The Property Council and Housing Industry Association submissions both express support for the benchmarking of infrastructure costs.

While the Tribunal agrees that it is well-placed to review regional infrastructure plans, it disagrees with the White Paper's proposal that it review all local infrastructure contributions plans proposed by councils. Given the time and resources required for a review, the Tribunal instead feels that it would be more appropriate to review plans on an exceptional basis as it does at present, rather than on a routine basis. Its submission identifies cases where it may be appropriate that plans are referred for review:

- there is a material discrepancy between the cost of infrastructure in a plan and the relevant benchmark cost, and/or
- there is a need for independent advice on a substantive issue not agreed by relevant stakeholders (eg, the council, the NSW Government or developers).<sup>109</sup>

On the Tribunal's proposed role, the City of Sydney notes that:

the White Paper states that the Minister will make plans 'following advice from IPART'. While the City welcomes IPART's involvement in the contributions system, it needs to be a targeted and relevant involvement that does not multiply red tape.<sup>110</sup>

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<sup>108</sup> IPART, [NSW Planning System Review: IPART Submission on White Paper](#), June 2013, p. 16

<sup>109</sup> Ibid., p. 3

<sup>110</sup> City of Sydney, [NSW Planning System White Paper and Draft Exposure Bills: Submission to the Department of Planning and Infrastructure](#), June 2013, p. 133



### Contributions Taskforce

The Housing Industry Association, the Property Council, and the Planning Institute of Australia all support an ongoing role for a contributions taskforce that would set and review guidelines for the collection and accounting of infrastructure contributions. The Property Council recommends that the Taskforce be extended to “an independent standing advisory committee”, and comments that “it should be considered essential to have the Property Council as participants.”<sup>111</sup>

### Regional catchment areas

The demarcation of regions, and the relationship between regional and subregional infrastructure, was one of the aspects of regional infrastructure contributions most frequently addressed in submissions.

The Independent Pricing and Regulatory Tribunal points out that there is a lack of clarity between the different types of contributions (regional infrastructure contributions, and the regional growth fund), and inconsistencies between the names and functions of contribution mechanisms:

The new system of infrastructure contributions comprises 3 levels of funding:

**Local infrastructure contributions** for local roads, local open space, community facilities and drainage works.

**Regional infrastructure contributions** for state and regional roads, transport land and works, education land or works and embellishment of regional open space. The contributions will vary by subregion.

**Regional Growth Fund** is a new category of levy imposed on a regional basis (eg, Sydney-wide and in other high growth areas) to recover the cost of land for regional open space and all land for drainage.

The term ‘regional’ is not used consistently. ‘Regional infrastructure contributions’ will be levied on a subregional basis and the ‘Regional Growth Fund’ will fund land for both local and regional infrastructure. Alternative titles could be:

- ‘subregional infrastructure contributions’, rather than ‘regional infrastructure contributions’, to align with the base across which these are levied
- ‘Planning Growth Fund contributions’, rather than ‘Regional Growth Fund’, to reflect the broad nature of this fund.

[...]

it is unclear to us whether regional infrastructure contributions also include

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<sup>111</sup> Property Council of Australia, [Delivering on the Promise: Submission to the NSW Government's White Paper – A New Planning System for NSW](#), June 2013, p. 12

contributions to the Regional Growth Fund.<sup>112</sup>

Some stakeholders questioned the equity of collecting infrastructure contributions on a regional basis, where funds may be contributed towards facilities that will not be used by the majority of those paying for them. The City of Sydney thought that a regional contribution arrangement would be particularly inequitable for its constituents:

it is proposed that the costs of all new drainage land and regional open space in the Sydney region be met by all development in the Sydney region. This effectively means that all City of Sydney developers (and therefore home buyers) will be paying for facilities in the outer Sydney release areas. There should not be extra impost on inner area developers for these facilities... There is no benefit for inner areas in contributing towards water management in the Hawkesbury-Nepean catchment. This proposal is ill-conceived, unfair and inequitable.<sup>113</sup>

Local Government NSW points out that, by a certain reading of the White Paper, there may not be regional contributions schemes for low-growth areas of the State:

An area where local government is seeking clarity is the question of how regional contributions will operate outside high growth areas where there will be no Subregional Delivery Plans or subregional planning boards. We can anticipate that [*the proposed*] approach will provide high-growth areas with a high level of funding for necessary infrastructure, but it should not be forgotten that areas with low population growth also require access to funds for the provision of regional infrastructure.<sup>114</sup>

### Government subsidy for regional contributions

Both the Planning Institute and the Urban Taskforce submissions highlight the fact that the level of Government subsidy of regional infrastructure has not yet been specified, and infrastructure contributions only fund 50% of the cost at present. The Planning Institute comments that:

there is no information on the level of subsidy the Government will carry in GIPs, as although the Special Infrastructure Contributions have been in place for some years, developers have never been levied more than 50% of the cost of this infrastructure. If there is a significant delay in clarifying at least base contributions for every development area of the State, the Government may lose the goodwill of developers who are willing to make a new and evolving system work. The current uncertainties in levies are a matter requiring early resolution.<sup>115</sup>

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<sup>112</sup> IPART, [NSW Planning System Review: IPART Submission on White Paper](#), June 2013, pp. 7, 11

<sup>113</sup> City of Sydney, [NSW Planning System White Paper and Draft Exposure Bills: Submission to the Department of Planning and Infrastructure](#), June 2013, p. 118

<sup>114</sup> LGNSW, [Submission to the Planning White Paper and Exposure Bills](#), June 2013, p. 44

<sup>115</sup> Planning Institute of Australia, [A New Planning System for NSW: White Paper Submission](#), June 2013, p. 30

### Timeframe on local contributions

Part of the proposed reforms to infrastructure contributions will be the requirement for local governments to spend funds collected within three years. This proposal was generally supported by developers and industry groups (in particular Urban Taskforce and the Housing Industry Association), while other stakeholders took a more circumspect approach (such as the Independent Pricing and Regulatory Tribunal, UrbanGrowth NSW, Local Government NSW and City of Sydney).

The Housing Industry Association's position is that:

the maximum three year restriction on councils holding local infrastructure contributions including annual reporting responsibilities is supported. The Paper is unclear whether the three year time frame applies from the date of an individual payment, or for specific allocations within a contribution plan. This will need to be carefully managed by the Department to ensure that councils do not become faced with a constant process of updating contribution plans every three years to ensure they do not overcommit to infrastructure delivery in any given three year period.<sup>116</sup>

In contrast, other stakeholders cautioned that the proposed restrictions are unworkable in light of the timeframes involved in collecting funding for infrastructure. Both the Independent Pricing and Regulatory Tribunal and the Planning Institute recommend a minimum five year limit on holding contributions instead of the three years that is proposed. The City of Sydney suggests that, in lieu of a firm time limit, local councils submit a sustainable contributions strategy to the Department detailing how contributions will be responsibly held and spent.

Local Government NSW highlights some of the problems that a three-year limit would introduce:

LGNSW opposes the proposal in the *White Paper* and section 7.9(5) of the *Planning Bill* to impose a three year limit on councils holding contributions prior to expenditure. This has practical limitations and is considered unrealistic, particularly for staged development. In regional townships, the progress of even a relatively small subdivision could plausibly take more than ten years to reach completion, and a council may not be in a position to finalise any new works/infrastructure until most of these funds have been collected. The alternative would be for councils in these circumstances to secure funds up front to provide significant infrastructure and later recoup the cost through developer contributions, but this would have adverse cash flow implications for councils.<sup>117</sup>

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<sup>116</sup> HIA, [Submission by the Housing Industry Association to the White Paper A New Planning System for NSW](#), June 2013, p. 8

<sup>117</sup> LGNSW, [Submission to the Planning White Paper and Exposure Bills](#), June 2013, p. 8

Similarly, UrbanGrowth NSW comments that:

We have concerns about the three year rule for expenditure given the cyclical nature of development where release areas can be slow at the start or economic cycles can cause development to stall. The three year rule as a mechanism might create a perverse outcome by promoting expenditure on minor or less significant infrastructure and delay delivery of the more significant, high cost infrastructure. Governance should be aimed at improving Local Government's capacity to invest in facilitating infrastructure.<sup>118</sup>

### Indirect local contributions

The Planning Bill allows for the levying of both direct and indirect infrastructure contributions, as is the case under the current laws. On the other hand, the City of Sydney recommends that indirect contributions become the default means of calculating contributions for all infill areas, for two reasons:

- accurately calculating a nexus-based charge for all development sites in a single contributions scheme is time consuming, costly, and in the City's experience still results in appeals no matter how assiduously the task is approached
- most development applications (by value) are for building works, meaning that a fixed rate levy on capital investment value is more suitable than a nexus-based charge on subdivision. By contrast, the practice in release areas has been for subdivision rather than building works to be levied.

For the City of Sydney, this has not happened to date because of deficiencies in the indirect contributions system:

Councils would rather spend contributions on much needed infrastructure rather than on costly section 94 appeals, however they are currently forced to levy through the section 94 (direct contributions) system because a one per cent levy [*the current maximum rate*] under section 94A is not sufficient to meet infrastructure upgrade cost required in many areas...

Neither the White Paper nor the draft Planning Bill includes any information on the maximum contribution rate for indirect contributions – presumably this will be included in forthcoming regulations. It is certain that the City will need to impose levies higher than one per cent of capital investment value in its significant brownfield redevelopment areas. In 2012, the City sought the advice of the Department as to how it could go about securing Ministerial approval for a higher levy in certain locations; however, the Department was unable to provide the City with adequate information about the process and requirements for such an application. In another recent example, it is understood the time taken for a higher levy to be approved at a Sydney metropolitan council was more than 18 months.<sup>119</sup>

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<sup>118</sup> UrbanGrowth NSW, [A New Planning System for NSW White Paper Submission](#), July 2013, p. 5

<sup>119</sup> City of Sydney, [NSW Planning System White Paper and Draft Exposure Bills: Submission to the Department of Planning and Infrastructure](#), June 2013, pp. 119-120

The Independent Pricing and Regulatory Tribunal's submission proposes measures that would help address these deficiencies. The Tribunal comments that:

Contributions made by developers under section 94A [*indirect contributions*] have attracted less criticism than contributions under section 94 [*direct contributions*].... To minimise the overall cost burden, we consider that the existing arrangements for the caps on indirect contributions should be retained. The NSW Government should publish guidelines on the process councils must follow and the criteria for levying indirect contributions greater than the cap amount.<sup>120</sup>

### 6.3 Planning Agreements

Voluntary planning agreements (VPAs) are a mechanism that exist under the current planning system, and are commonly used for the provision of local or regional infrastructure. Under a VPA, a developer can agree to provide a financial contribution, land dedication or works that are made necessary by a development. Examples of works provided can include open space provision and embellishment, works to roads and footpaths, and the provision of lighting, landscaping and drainage works.

In practice, this can mean that works largely unrelated to a development are requested by a council in exchange for consent or “bargained for” in exchange for more favourable planning controls (such as increased floor space ratio or height limits. IPART's submission to the 2012 Independent Review commented on VPAs, pointing out that:

The [*infrastructure*] caps do not apply to Voluntary Planning Agreements or situations where developers undertake works-in-kind in lieu of providing cash contributions. This creates a situation where the arrangements between councils and developers are not transparent and may create incentives for councils to pressure developers for these types of contributions to avoid the caps.<sup>121</sup>

The Green Paper recognised that voluntary planning agreements need to be “phased out or significantly modernised and simplified.” It declared that clear minimum planning agreement benchmarks needs to be established that:

- Define infrastructure performance outcomes, rather than lists of assets;
- Define negotiation timeframes; and
- Facilitate more in-kind contributions to improve cost effectiveness as well as the liveability of new communities.<sup>122</sup>

This position has evolved under the White Paper, which sees planning

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<sup>120</sup> IPART, [NSW Planning System Review: IPART Submission on White Paper](#), June 2013, p. 10

<sup>121</sup> IPART, [Submission to NSW Planning System Review](#), February 2012, p. 16

<sup>122</sup> NSW Government, [A New Planning System for NSW – Green Paper](#), July 2012, p. 68

agreements in the future being used in “exceptional circumstances”.<sup>123</sup> It sets out a clear set of “safeguards” that will apply to planning agreements:

- All planning agreements must be consistent with the contribution principles;
- Infrastructure covered by a planning agreement is to be based on the proposed cost arrangements for infill and greenfield developments in the standard contributions system;
- Documents and processes for planning agreements will be standardised;
- Planning agreements can only be entered into in areas that have an existing Local Infrastructure Plan or Growth Infrastructure Plan, or where state wide or regional infrastructure benchmarks prepared by the Department of Planning and Infrastructure apply; and
- Affordable housing contributions will be strictly limited to where they are strictly authorised by and consistent with a regional growth plan or Subregional Delivery Plan.<sup>124</sup>

Perhaps the biggest change to planning agreements is the requirement that works provided must generally be in accordance with an existing infrastructure plan, or else obtain a Ministerial Planning Order:

A planning agreement is a voluntary agreement between one or more public authorities and a person (the developer) under which the developer is required to dedicate land free of cost, pay money, or to carry out public or other works, or any combination of them, to be used for or applied towards the following:

- a) the provision of infrastructure that is identified in a Local Infrastructure Plan or Growth Infrastructure Plan,
- b) the provision of infrastructure that is identified in a Ministerial planning order where there is no Local Infrastructure Plan applying to the land concerned or where there is no Growth Infrastructure Plan applying to the land concerned,
- c) the provision of affordable housing that is identified in a strategic plan,
- d) the conservation or enhancement of the natural environment of the State.<sup>125</sup>

The White Paper comments that “planning agreements will generally be used only for State Significant Development and under exceptional circumstances such as through density bonus schemes.”<sup>126</sup> This is likely to be controlled through determinations by the Minister, allowable under cl. 7.37 of the Planning Bill:

The Minister may determine:

- (a) the procedures to be followed in negotiating a planning agreement,
- or

<sup>123</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p161

<sup>124</sup> *Ibid.*, p170

<sup>125</sup> NSW Government, [Planning Bill 2013 – Exposure Draft](#), cl7.28 (1)

<sup>126</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p170



- (b) the publication of those procedures, or
- (c) other standard requirements with respect to planning agreements.

### **6.3.1 Stakeholder Responses**

Submissions were made both opposing and supporting the proposed changes to planning agreements. All submissions considered were in support of planning agreements remaining in some form, but disagreed regarding the specific restrictions that should be placed upon them.

Several stakeholders disagreed entirely with the proposed changes. The Urban Taskforce, for example, comments that “Currently there is generally no limitation on how VPAs are used and this provides flexibility to the planning authority and the proponent to negotiate quantum and where the funds will be spent. We support the continuation of flexibility in the use of VPAs.”<sup>127</sup> Similarly, the City of Sydney’s submission states that:

The proposed confinement of agreements to ‘works-in-kind’ in a contributions plan will significantly reduce flexibility, innovation and mutually beneficial outcomes for councils, communities and developers...

In many cases, appropriate local infrastructure requirements cannot be identified at the ‘front end’ strategic planning/infrastructure planning stage, and can only be readily identified at the ‘back end’ rezoning or development application stage. This is often the case where the owner of a large strategic site seeks a rezoning that could not feasibly be envisaged at the strategic planning stage. It is also the case that new demand from previously unidentified urban renewal sites will not be captured in the projected demand (and schedule of works) of any existing infrastructure plan...

The legislation should not add limitations to the scope of Voluntary Planning Agreements. The proposal is excessively rigid and will prevent good planning outcomes. If it is considered that innovation flowing from flexibility is currently being abused, the Minister could establish some type of ombudsman empowered to handle and act on complaints regarding the conduct of the voluntary Planning Agreements system.<sup>128</sup>

Local Government NSW, the Minerals Council, and UrbanGrowth NSW all support the retention of planning agreements but also favour the proposal to place limitations on their use. Local Government NSW seeks additional clarification on what these controls will be, claiming that the current uncertainty is a “cause of enormous frustration to councils and communities”.<sup>129</sup>

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<sup>127</sup> Urban Taskforce, [Delivering a Better Planning System for NSW: White Paper](#), June 2013, p. 34

<sup>128</sup> City of Sydney, [NSW Planning System White Paper and Draft Exposure Bills: Submission to the Department of Planning and Infrastructure](#), June 2013, p. 123

<sup>129</sup> LGNSW, [Submission to the Planning White Paper and Exposure Bills](#), June 2013, p. 46

The Minerals Council addresses planning agreements at length in its submission. It comments that:

In recent years an expectation has arisen, from both DP&I and local councils, that mining proponents will enter into voluntary planning agreements. There is no guidance on how this process should be undertaken and what impacts are appropriately compensated by mining proponents.

It is not appropriate for all social and economic infrastructure requirements in a region to be identified and apportioned between proponents of different classes of development.

[...]

Confusion also exists about the extent to which mining projects should provide compensation to councils in relation to impacts that result from additional people moving to an area in order to work on the project. The impacts on local infrastructure of additional residents should largely be already compensated for through infrastructure contributions levied on developers of residential property.

There is little attention paid to the net benefits a project generally brings to a region and additional payments already required of mining projects made such as higher rates.

The submission provides a number of recommendations regarding planning agreements:

The Government must:

- Provide robust guidance on infrastructure contributions of mining projects in the Guidelines for the Negotiations of VPAs
- Put in place a clear process with timeframes for the negotiation of VPAs
- Amend the Planning Bill to provide that for SSD projects the decision maker may make appropriate conditions for infrastructure contributions to be made by the project.



## 7 CONCLUSION

The reform programme set out in the White Paper and two Exposure Bills is an ambitious one, and has the potential to bring about the “root-and-branch” change that is its goal. The reforms proposed to infrastructure planning, approvals and funding are a significant aspect of the overall programme, and may encourage urban development and growth through more co-ordinated, timely and efficient infrastructure provision.

With the detail of many reforms still to be finalised, it is difficult to accurately predict their outcome. Critical information is yet to be released, for example, in the areas of contestability assessments, local and regional infrastructure contributions, and the integration of infrastructure and strategic plans. Much of this additional detail will be provided in regulations, while some may evolve as standard practice as the new system takes shape. As experience under the current planning system has shown, in particularly contentious areas such as infrastructure contributions it is often the detail of the legislation and regulations which determine their success.

While the need for an overhaul of strategic infrastructure planning is generally recognised by stakeholders, several tensions underlie the proposed reforms. The new planning system will need to balance a number of competing priorities: community consultation with efficiency and expedience; affordability for homeowners and businesses with an adequate provision of infrastructure; and public benefits for the State or region against local interests and character. Finding the right balance may prove difficult but will be essential if the system is to fulfil its purpose of promoting economic growth and development in NSW for the benefit of the entire community, while protecting the environment and enhancing people’s way of life.

## APPENDIX 1: SUMMARY OF THE WHITE PAPER AND EXPOSURE BILLS

### Background

The *Environmental Planning & Assessment Act 1979* (EP&A Act) has undergone many reforms (see the Research Service e-brief [NSW Planning Framework: History of Reforms](#)). Consequently, it is widely held to have become too complex, too focussed on development assessment at the expense of strategic planning, and un conducive to effective community participation. During the 2011 NSW election campaign, the NSW Coalition stated that it would reform the planning legislation and "return local planning powers to local communities".

In June 2011, the O'Farrell Government enacted the first step in reforming the planning system: the repeal of Part 3A of the EP&A Act. In July 2011, the Government announced an independent review of the planning system, to be chaired by two former Members of Parliament – Tim Moore and Ron Dyer. This review progressed through three stages: listening and scoping; an issues paper; and the final Review Report, [The Way Ahead for Planning in NSW](#).

In July 2012, the NSW Minister for Planning and Infrastructure released the Government's initial response to the review, [A New Planning System for NSW - Green Paper](#). The Green Paper also considered several other reports, including: [A Review of International Best Practice in Planning Law](#) commissioned by the Department of Planning and Infrastructure; and the 2009 NSW Legislative Council Standing Committee on State Development report on the [New South Wales Planning Framework](#). The Green Paper sets out the Government's reform agenda in broad terms, key to which is placing community participation at the centre of the new planning system in concert with increased emphasis on strategic planning. Following receipt of over 1,500 submissions, in December 2012 the NSW Government published a [Green Paper Feedback Summary](#).

On 21 November 2012, the [Environmental Planning and Assessment Amendment Act 2012](#) was assented to. While generally consistent with the direction set out in the Green Paper, these statutory amendments were pre-emptive of the reform process. The Bill made amendments to the purpose, status and content of Development Control Plans, the regulation of residential development on bush fire prone land, and the assessment of accredited certifiers.

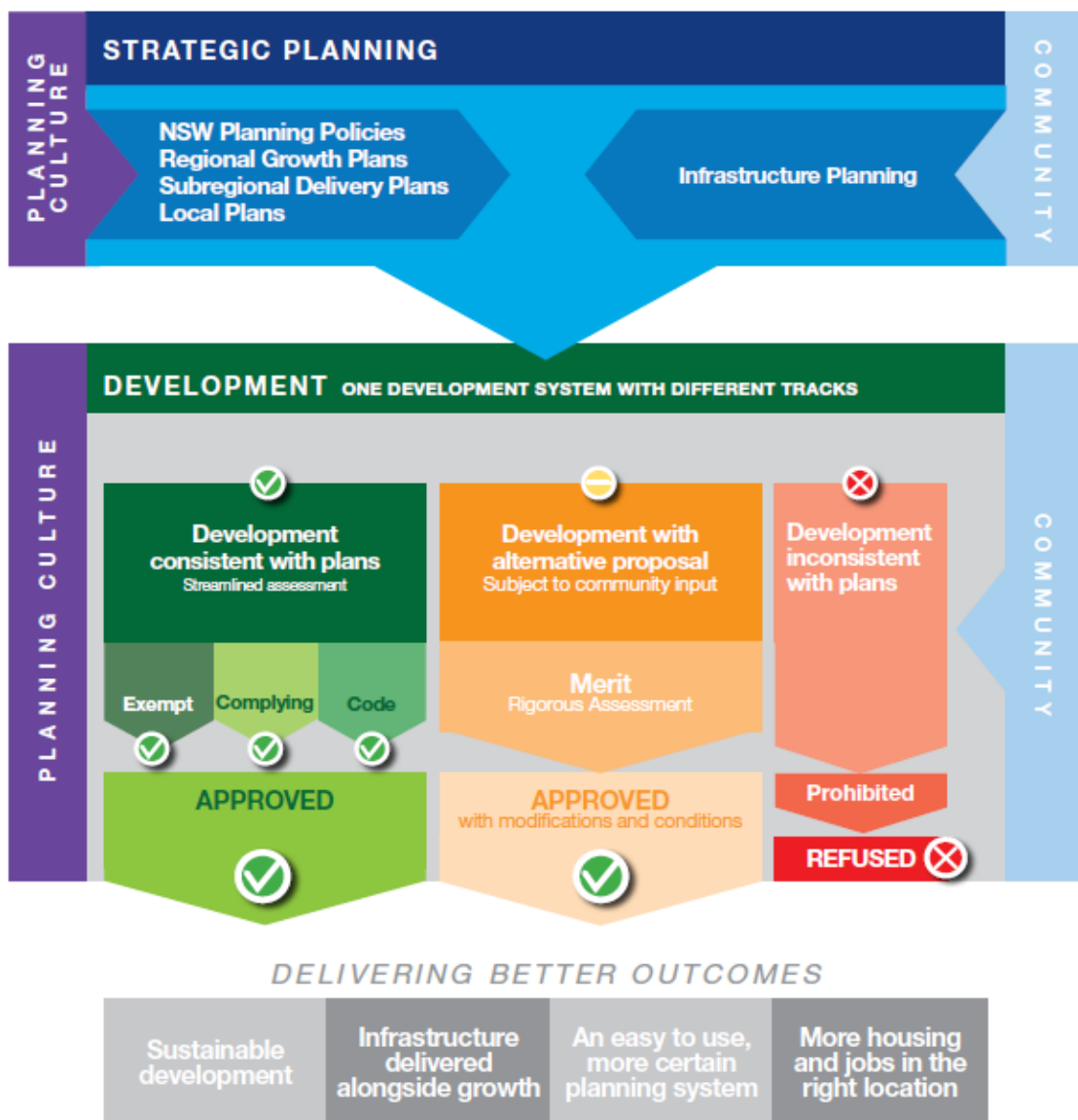
### The White Paper

On 16 April 2013, the NSW Government released the [White Paper – A New Planning System for NSW](#) and two Exposure Bills – the [Planning Bill 2013](#) and the [Planning Administration Bill 2013](#), together with [summaries](#) of the Bills. The White Paper sets out the Government's vision for the planning system, to be enacted through the Bills and other statutory instruments. According to the White Paper, the proposed planning system will be "simpler, strategic, more

certain, focussed on improving outcomes, and places people and their choices at the heart of planning decisions.”<sup>130</sup> The main purpose of the system is as follows:

... to promote economic growth and development in NSW for the benefit of the entire community, while protecting the environment and enhancing people’s way of life. To do this, the planning system has to facilitate development that is sustainable. Sustainable development requires the integration of economic, environmental and social considerations in decision making, having regard for present and future needs.<sup>131</sup>

**Figure: The new planning system at a glance**<sup>132</sup>



<sup>130</sup> NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.5

<sup>131</sup> Ibid., p.5

<sup>132</sup> Ibid., p.18

The five fundamental reforms proposed in the Green Paper are carried through to the White Paper, in addition to proposed changes to building regulation and certification added in response to feedback and submissions. These five reforms (see Figure 1), and the proposed changes to building regulation and certification, are as follows:

#### **Delivery culture:**

- Establishment of a culture change action group to design and oversee the implementation of a range of culture change actions across the industry
- Promotion of a culture focussed on cooperation and community participation, the delivery of positive and pragmatic outcomes and a commitment to ongoing education and innovation
- Regular and mandatory performance reporting for strategic planning at all levels to support transition to greater transparency and accountability

#### **Community participation:**

- A statutory Community Participation Charter
- Planning authorities required to prepare a Community Participation Plan
- High level of participation in particular for Regional Growth Plans and Subregional Delivery Plans
- ePlanning to move paper-based development application processes and traditional methods of consultation online

#### **Strategic planning:**

- A shift to upfront evidence based strategic planning
- A hierarchy of plans, through which a clear line of sight operates as set out in the legislation:
  - NSW Planning Policies – present the Government's planning policy framework relating to land use and development for a range of sectors
  - Regional Growth Plans – provide a high level vision and objectives and policies for each region of the State
  - Subregional Delivery Plans – provide the delivery framework for Regional Growth Plans in appropriate locations with a focus on integrating infrastructure and providing a framework for rezoning areas of significance
  - Local Plans – principal legal documents that deliver the strategic vision for a local government area through zoning, development guides and infrastructure
- Integration of infrastructure with land use planning
- Whole of government requirements in strategic plans to improve planning outcomes and reduce the number of development applications that require multi-agency concurrence, referral or other planning related approvals.
- Establishment of a 'one stop shop' for all remaining concurrences and approvals

**Development assessment:**

- Development assessment streamed into five tracks: exempt, complying, code, merit and prohibited
- 80% of all developments to be complying development or code assessment development within the next five years
- Expanded range of residential, commercial, retail and industrial developments will be complying or code assessment
- Expanded low cost appeal rights to provide greater access to existing appeal rights for applicants
- Promotion of independent expert decision making through the Planning Assessment Commission, Regional Planning Panels and Independent Hearing and Assessment Panels
- New merit assessment processes will mean faster assessment where applications are consistent with performance outcomes
- Improved assessment of State Significant Development
- Strategic Compatibility Certificates will be an interim measure, issued prior to completion of a Subregional Delivery Plan or Local Plan, or implementation of the Subregional Delivery Plan program, for development consistent with an agreed strategy that will deliver metropolitan or regional strategic outcomes

**Infrastructure:**

- Growth Infrastructure Plans to integrate land use planning and infrastructure provision and involve the private sector earlier in the planning process through contestability assessments
- Local and regional infrastructure contributions will be simplified and made more consistent
- Particular infrastructure (e.g. major projects identified in the Long Term Transport Master Plan) will be declared to be Public Priority Infrastructure and the private sector will be able to contribute earlier in the design and planning process

**Building regulation and certification:**

- An expanded accreditation system for building professionals including building designers, a range of engineers, fire protection designers and installers, energy efficiency designers and access consultants
- Mandatory certification of specified building aspects including the design, installation and commissioning of critical building systems and elements
- Improved documentation through all stages of the building life cycle to make it easier to manage safety risks, including introduction of a building manual
- Enhanced decision support and peer review for certifiers making decisions about complex buildings
- Strengthened controls on certifiers through stronger disciplinary guidelines, increased auditing and increased reporting requirements

Resourcing the proposed planning reforms was identified as a key issue by respondents following the release of the Green Paper. According to the White Paper, the NSW Government, in consultation with local government and stakeholders, is currently working through:

... various models for funding the transformative changes proposed in the White Paper. This will include the reallocation of resources across government to deliver strategic integrated outcomes, and a review and readjusting of fees and charges applying cost recovery principles.<sup>133</sup>

The White Paper includes information on transitional arrangements:

Planning and assessment processes that began before the new legislation commences will be able to be completed without interruption and under existing requirements. This means that changes to the planning system will not be retrospective and will only apply in the future.

Existing regional and subregional strategies will not be discarded and relevant aspects will transition into the new plans. Furthermore, recent initiatives like the Strategic Regional Land Use Plans and state significant development will be given full effect in the new planning system.

The Department of Planning and Infrastructure will work with key stakeholders while the White Paper is released for public comment to develop detailed transitional provisions. It will provide more detail on transitional arrangements when the new planning legislation is introduced into Parliament.<sup>134</sup>

### **The Exposure Bills**

The NSW Government proposes to replace the *Environmental Planning & Assessment Act 1979* with two statutes: the [Planning Bill 2013](#) and the [Planning Administration Bill 2013](#). The Planning Bill is structured as follows:

- Part 1: Principles and definitions;
- Part 2: Community participation;
- Part 3: Strategic planning;
- Part 4: Development (other than infrastructure) assessment and consent;
- Part 5: Infrastructure and environmental impact assessment;
- Part 6: Concurrences, consultation and other legislative approvals;
- Part 7: Infrastructure and other contributions;
- Part 8: Building and subdivision;
- Part 9: Reviews and appeals; and
- Part 10: Civil and criminal enforcement provisions.

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<sup>133</sup> Ibid., p.20

<sup>134</sup> Ibid., p.20

The Object of the Planning Bill is set out in Clause 1.3:

(1) The object of this Act is to promote the following:

- (a) economic growth and environmental and social well-being through sustainable development,
- (b) opportunities for early and on-going community participation in strategic planning and decision-making,
- (c) the co-ordination, planning, delivery and integration of infrastructure and services in strategic planning and growth management,
- (d) the timely delivery of business, employment and housing opportunities (including for housing choice and affordable housing),
- (e) the protection of the environment, including:
  - (i) the conservation of threatened species, populations and ecological communities, and their habitats, and
  - (ii) the conservation and sustainable use of built and cultural heritage.
- (f) the effective management of agricultural and water resources,
- (g) health, safety and amenity in the planning, design, construction and performance of individual buildings and the built environment,
- (h) efficient and timely development assessment proportionate to the likely impacts of proposed development,
- (i) the sharing of responsibility for planning and growth management between all levels of government.

(2) Sustainable development is achieved by the integration of economic, environmental and social considerations, having regard to present and future needs, in decision-making about planning and development.

The Bill provides for regulations to be made on a large number of matters, including:

- the form and content of community participation plans, Local Plans, Environmental Impact Statements, local infrastructure plans and Growth Infrastructure Plans;
- modification of development consents under Part 4;
- applications for strategic compatibility certificates and the determination of those applications;
- the types of development to be assessed under Part 5; and
- the calculation of direct and indirect local infrastructure contributions and regional infrastructure contributions.

The Planning Administration Bill makes provision for planning administration, administrative bodies, and orders, investigations and environmental audits. The administrative bodies that may be established under the Bill include:

- the Planning Ministerial Corporation;
- the Planning Assessment Commission;
- Regional Planning Panels;
- Subregional Planning Boards; and
- Council independent hearing and assessment panels.

The Planning Ministerial Corporation, which will be managed by the Director-General, will have functions including:

- acquisition of land in accordance with the [Land Acquisition \(Just Terms Compensation\) Act 1991](#); and
- dealing with land vested in the corporation.

The Planning Assessment Commission will have functions including:

- reviewing or advising on planning and development matters, Local Plans and the administration of the legislation;
- holding public hearings into any matter the subject of review or advice, where requested by the Minister; and
- the functions of a Regional Planning Panel, Subregional Planning Board or council appointed independent hearing and assessment panel in certain circumstances.

Regional Planning Panels will have functions including:

- advising on planning and development matters and Local Plans; and
- specified consent authority functions of a council for regionally significant development, in particular, the determination of applications.

Subregional Planning Boards will have functions including:

- preparation of Subregional Delivery Plans; and
- under delegation from the Minister, giving directions to a council as to how local infrastructure contributions may be used (cl 7.9 of the Planning Bill).

The Planning Administration Bill 2013 makes provisions for the constitution of independent hearing and assessment panels. It also sets out some requirements for how panels are to conduct development assessments and the reporting responsibilities councils have with regard to the operation of panels.