



briefing paper



NSW Parliamentary Research Service

NSW planning reforms: sustainable development

Briefing Paper No 7/2013

by Daniel Montoya

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ISSN 1325-5142

ISBN 978-0-7313-1904-6

August 2013

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NSW planning reforms: sustainable development

by

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SUMMARY

This paper examines how 'sustainable development' is conceptualised and proposed to be applied in the NSW planning system set out in a White Paper and two Exposure Bills – the Planning Bill and the Planning Administration Bill. An appendix to the paper contains a summary of the proposed system. Comparison is made with 'sustainable development' in the current planning system. Commentary from selected stakeholders provides some analysis of the proposed system; these comments are too complex and extensive to be encapsulated in this summary. While a broad cross-section of stakeholders was selected, this paper does not purport to represent all stakeholder positions on the White Paper and Exposure Bills.

Definitions and legislative objects

Under the current planning act – the *Environmental Planning & Assessment Act 1979* (EP&A Act) – sustainable development is defined as 'ecologically sustainable development' (ESD). A uniquely Australian term, ESD contains five principles, including intergenerational equity, the integration of economic, social and environmental factors, and the precautionary principle. Since its adoption in 1992 by all Australian governments, ESD has been incorporated into a large number of Commonwealth, State and Territory statutes and policies. **[3.0]**

ESD is one of ten objects of the EP&A Act. The Act does not assign priority to any of its objects over another. This is problematic because, as the Act contains objects that may conflict, it leaves decision makers without a means of resolving these potential conflicts. In addition, use of ESD as an object equal to the other objects is inconsistent with the internal logic of ESD. In other NSW legislation, where ESD features as an overarching object, ESD operates as a means of resolving conflict between competing objects. **[3.1]**

Whereas a 2011 Independent Review of the planning system commissioned by the O'Farrell Government recommended retention of ESD as currently defined, the White Paper and Exposure Bills adopt a new definition of sustainable development as follows:

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.

Further, where the Independent Review recommended making ESD the overarching object of new planning legislation, the Planning Bill includes sustainable development as one object among nine of equal weight. The new definition of sustainable development is narrower than ESD, omitting three of the five ESD principles: the precautionary principle; conservation of biological diversity and ecological integrity; and improved valuation, pricing and incentive mechanisms, such as the polluter pays principle. ESD also includes a more substantial definition of the intergenerational equity principle. **[3.3]**

Planning instruments

Two types of planning instruments can be made under the EP&A Act: State Environmental Planning Policies and Local Environmental Plans. The Act provides that both may be made for the purpose of achieving any of the objects of the Act. Examples can be found where ESD is an object or aim of both types of planning instruments. **[4.1]**

The new system will feature a hierarchy of four strategic plans: NSW Planning Policies; Regional Growth Plans; Subregional Delivery Plans; and Local Plans. While the White Paper proposes to include sustainable development in strategic planning, many of its proposals are not given effect in the Planning Bill. Rather, several provisions indirectly provide for sustainable development to be taken into account. Proposed by the Bill are ten strategic planning principles to guide the preparation of strategic plans. Two of these principles make reference to having regard to economic, environmental and social considerations but do not make express reference to the 'integration' of these considerations. In provisions that set out requirements for periodic review of strategic plans, the Bill requires the responsible body (e.g. a local council) to ensure the plan continues to achieve the objects of the Act. **[4.2]**

Decision making

A significant body of case law has developed with regards to the interpretation and application of ESD under the EP&A Act. It appears that, according to this environmental jurisprudence, if an administrator does not take ESD into consideration when making *any* development assessment decision under the Act, it will become strong evidence of failure to consider the public interest, thereby potentially rendering the decision void. **[5.1]**

The definition of sustainable development in the objects of the Planning Bill includes specific reference to it being achieved through decision-making about planning and development. In light of recent environmental jurisprudence, it would seem that sustainable development will therefore be a mandatory consideration in *every development assessment decision* made by an administrator under the Bill, irrespective of its application in the body of the Bill. Of the different development assessment tracks established in the Bill, only the sections relating to merit assessment provide means by which sustainable development *may* be taken into account. No explicit requirement is made for sustainable development to be taken into account for complying development, code assessable development, development that requires environmental impact assessment, State Infrastructure Development or public priority infrastructure. **[5.2]**

The EP&A Act provides for ESD to be taken into account when the concurrence of a person is required for development that is likely to significantly affect threatened species. The Planning Bill, on the other hand, does not require sustainable development to be taken into account when concurrence is required in relation to threatened species. **[5.1 & 5.2]**

...

Environmental impact assessment

Under the EP&A Act, Environmental Impact Statements and Species Impact Statements must have regard to ESD principles. There is very little detail in the Planning Bill regarding what must be considered when conducting environmental impact assessment, these matters in general having been left for the regulations. No specific provision of the Bill requires Environmental Impact Statements or Species Impact Statements to take sustainable development into account. **[6.1 & 6.2]**

1. INTRODUCTION

Planning, in theory and practice, is complex. Contemporary debates shape the NSW planning system, including on topics such as the relationship between the public and the private spheres and the relative value of economic, social and environmental considerations. Planning is a process by which decisions about land use and the built environment are made to guide future action. It is multi-sectoral, being relevant to industry, infrastructure, transport, housing and the environment. It is also multi-scalar in scope, the matters it deals with ranging from the house next door to State significant projects like Barangaroo. Legislation, other statutory instruments and government policies establish the framework by which strategic planning, development assessment, compliance and enforcement and community participation operate in the planning system

Following an election commitment to overhaul the NSW planning system, established under the *Environmental Planning & Assessment Act 1979*, in July 2011 the NSW Coalition commenced the reform process with the announcement of an independent review, to be chaired by two former Members of Parliament – Tim Moore and Ron Dyer. The reform process reached the White Paper stage in April 2013, at which time two Exposure Bills were also released – the Planning Bill 2013 and the Planning Administration Bill 2013. A report setting out stakeholder feedback on the White Paper and Bills will be released by the Government prior to introduction of the Bills in Parliament.

This paper compares the conceptualisation and application of ‘sustainable development’ in the current and proposed planning systems. Commentary on the Government proposals is provided by reference to the views of a number of selected stakeholders. Where relevant, this paper places discussion of sustainable development in the context of the broader objectives of the planning system, including its environmental protection functions.

Sustainable development is a concept that emerged in the 1980s in response to growing realisation of the need to ‘balance economic and social progress’ with ‘environmental protection and stewardship’. It includes principles such as intergenerational equity, the precautionary principle and the integration of economic, social and environmental factors. In 1992, all Australian governments adopted a uniquely Australian formulation: ecologically sustainable development (ESD). ESD has since been incorporated into a large number of Commonwealth, State and Territory statutes and policies. The Planning Bill 2013 replaces ESD with a new definition of sustainable development:

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.

This paper is the first of four papers the Research Service intends to publish on the NSW planning reforms. The other three will consider building regulation and certification, infrastructure and decision-making. The upshot is that a number of important features of the proposed planning system are not covered in-depth in these papers, including community participation, strategic planning, heritage

and the planning system's delivery culture.¹

This paper begins with a brief overview of the proposed planning system. The seventeen stakeholders selected to provide a broad cross-section of stakeholder responses to the White Paper and Exposure Bills are then identified. The remainder of the paper considers the definition and application of 'sustainable development' in different aspects of the current and proposed planning systems, together with stakeholder commentary. Several appendices are attached to this paper, one of which summarises the proposed system.

1.1 General issues in the debate

Several issues with the proposed reforms merit brief commentary. Attention has been drawn by several parties to drafting and related issues in respect to the Planning Bill 2013. A formal complaint by the Better Planning Network to the Department of Planning & Infrastructure claimed that statements by department officials at public forums that the new laws would not reduce judicial review rights were wrong. In response, the Director-General stated that "the department acknowledges that the current drafting of [the clause] has gone further than the government intended".² The Planning Institute of Australia considered that the Bill was "not as simple, easy to understand and navigate as it could and should be".³ Issues identified by the Institute include the following:

Whilst we accept that 'legalese' is part and parcel of any legislation, the drafting of the Planning Bill cannot be said to be entirely simple to navigate or comprehend (not 'plain English' form).

... the proposed assessment system is more complicated in its structure than we would wish to see. If complex legal drafting is added to an already complex structure, the ideal of introducing a streamlined system free from disputation around statutory interpretation may not be achieved.

The Bill appears to rely on numerous (12) Schedules to reduce the complexity in the substantive parts of the Bill. Given that the Schedules are integral to the understanding and interpretation of the relevant legislative provisions, it is not clear whether they reduce complexity or simply add to 'navigational' difficulties.⁴

The Institute concluded that:

... we consider that [the Bill] requires some fundamental revisions for it to be 'user friendly', less susceptible to legal interpretive challenges and more easily adaptable where future amendments are necessary.⁵

¹ The 2012 Research Service paper, [NSW planning reforms: the Green Paper and other developments](#), deals with some of these issues.

² SMH, [Top official admits errors over draft planning laws](#), 13 August 2013

³ Planning Institute of Australia, [A New Planning System for NSW: White Paper](#), Submission by Planning Institute of Australia (NSW Division), June 2013, p.2

⁴ Ibid., p.6

⁵ Ibid., p.6

Attention has also been drawn to discrepancies between the White Paper and the Planning Bill 2013. As reported in the Sydney Morning Herald:

“The aspirations in the white paper appear to be contradicted by the actual draft bill,” says Dr Nicole Gurrán, an associate professor at the University of Sydney’s urban and regional planning program.⁶

In the context of discussing merit appeal and decision review rights, the Law Society of NSW identified several discrepancies:

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.

This disconnect is also apparent in such fundamental areas as community participation, strategic plans and State significant development approvals where significant rights of review have been removed by provisions of the Planning Bill.⁷

Another issue with the proposed planning system is the potential for corruption. The Independent Commission Against Corruption identified several key concerns with the proposed system, much of which may only be addressed as more detail is forthcoming, in the form of regulations, development assessment codes and strategic plans. These concerns include:

- Making the integrity of the system ‘dependent upon clear definitions, tight processes, the skill set of decision-makers and the role of experts’;
- Adoption of a performance based assessment regime, which may introduce a high level of discretion into the system if performance outcomes are ill-defined;
- In some cases, largely unfettered discretion conferred on decision-makers in the draft legislation, most notably involving Ministerial decision-making;
- The suggestion that approval by an expert may in itself constitute an acceptable solution to a performance outcome – referral to experts should be used as part of the decision-making process rather than a standalone solution;
- Some aspects of the proposed system are not clear or simple. The development assessment framework is particularly complex; and
- The limited availability of third party appeal rights under the proposed system means that an important disincentive for corrupt decision-making is absent.⁸

⁶ SMH, [Power to the people .. that’s the plan](#), 13-14 July 2013

⁷ The Law Society of NSW, [Environment Planning and Development Committee submission on A New Planning System for New South Wales – White Paper](#), 28 June 2013, p.6

⁸ Independent Commission Against Corruption, [Submission Regarding a New Planning System for NSW \(White Paper and Accompanying Bills\)](#), June 2013

2. BACKGROUND

2.1 The White Paper and Exposure Bills

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](#).⁹ The White Paper sets out the Government's vision for the planning system, to be enacted through the Bills and other statutory instruments. It contains six areas of reform:

- (1) Delivery culture – a new planning culture to set a sound framework for the successful implementation and operation of the new planning system;
- (2) Community participation – increased community participation in the preparation of plans and a statutory Community Participation Charter;
- (3) Strategic planning – increased focus on strategic planning through a hierarchy of evidence based strategic plans: NSW Planning Policies; Regional Growth Plans; Subregional Delivery Plans; and Local Plans;
- (4) Development assessment – a performance based system with five assessment tracks in which emphasis will be placed on code complying development and the use of independent expert decision making;
- (5) Infrastructure – integration of infrastructure planning and provision with the planning process through measures including Growth Infrastructure Plans. The system will also feature increased private sector involvement and simplified infrastructure contributions; and
- (6) Building regulation and certification – reforms to provide a more robust, consistent and transparent building regulation and certification system in order to increase confidence in the quality and safety of buildings.¹⁰

This paper focuses on how the proposed reforms deal with the matter of sustainable development. Sustainable development is a key component of the current planning system's environmental protection role. It features as an object of the *Environmental Planning & Assessment Act 1979* (EP&A Act) and a matter of relevance for planning instruments and development assessment. The Planning Bill deals with sustainable development in a similar manner, the key change being adoption of a new statutory definition of sustainable development.

2.2 Stakeholder comments

The four briefing papers the Research Service intends to publish on the proposed planning reforms canvas stakeholder responses to the way in which the White Paper and Exposure Bills deal with the issues relevant to each paper. They do not purport to be representative of all stakeholder positions. Rather, each paper sets out responses from 17 submissions that were selected on 16

⁹ See Appendix 1 for a summary of the proposed system.

¹⁰ NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.7ff

July 2013 using the following criteria (see Box 1):

- A significant subset of the proposed 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.

BOX 1: SELECTED STAKEHOLDERS

Community:

- Better Planning Network
- NSW Aboriginal Land Council

Environment:

- Environmental Defender's Office NSW
- Nature Conservation Council of NSW & the Total Environment Centre

Governmental:

- Independent Commission Against Corruption
- UrbanGrowth NSW

Heritage:

- Heritage Council of NSW

Industry:

- Housing Industry Association
- NSW Business Chamber & Sydney Business Chamber
- NSW Minerals Council

Legal:

- The Law Society of NSW

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

In respect to the current briefing paper, of the 17 stakeholders identified in Box 1, three made no comment on sustainable development or the objects of the Act more broadly: the NSW Aboriginal Land Council; Independent Commission Against Corruption (ICAC); and UrbanGrowth NSW. For that reason, these stakeholders are not mentioned further in this paper.

Each of the following chapters deal with key aspects of the statutory operation of sustainable development, setting out the current situation and proposed reforms before considering stakeholder comments. These key aspects are as follows:

- (1) The definition of sustainable development and its place in the objects;
- (2) Planning instruments;
- (3) Decision making; and
- (4) Environmental impact assessment.

3. DEFINITIONS AND LEGISLATIVE OBJECTS

Sustainable development is a concept that emerged in the 1980s in response to growing realisation of the need to ‘balance economic and social progress’ with ‘environmental protection and stewardship’.¹¹ The most famous definition of sustainable development comes from the World Commission on Environment and Development (popularly known as the Brundtland Commission) in its 1987 report *Our Common Future*:

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.¹²

In 1992, the Rio Declaration was signed at the United Nations Conference on Environment and Development. It contained 27 principles for sustainable development, including intergenerational equity, the precautionary principle and the polluter pays principle.¹³

In December 1992, all Australian governments adopted the [National Strategy for Ecologically Sustainable Development](#). It defined ecologically sustainable development as:

using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.¹⁴

The Strategy set out a number of objectives and principles, five of which were adopted in the NSW statutory definition of ecologically sustainable development (ESD):

- (1) Intergenerational equity;
- (2) Protection of biodiversity and maintenance of essential ecological processes;
- (3) Integration of economic, social and environmental factors;
- (4) The precautionary principle; and
- (5) Adoption of policy instruments such as improved valuation, pricing and incentive mechanisms.

The precautionary principle is defined as follows in the Strategy:

where there are threats of serious or irreversible environmental damage, lack of

¹¹ T Edwards, [Sustainable Development](#), NSW Parliamentary Library Research Service, Briefing Paper 04/09, April 2009

¹² World Commission on Environment and Development, [Our Common Future](#), 1987

¹³ Report of the United Nations Conference on Environment and Development, [Rio Declaration on Environment and Development](#), June 1992

¹⁴ Council of Australian Governments, [National Strategy for Ecologically Sustainable Development](#), 1992

full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.¹⁵

ESD principles have since been incorporated into a large number of Commonwealth, State and Territory statutes and policies.

Since its inception, the concept of sustainable development has been subject to criticism, primarily with regard to the potential for ambiguous interpretation and application.¹⁶ These criticisms influenced the debate in Australia that occurred in 1992 after the Rio Summit. As Harding notes, ESD:

... is a peculiarly Australian term and arose in the early stages of a government initiated discussion of sustainable development in Australia in 1990. It seems that the environmental groups, concerned that the sustainable development discussion process would be hijacked by business and industry and interpreted as just *economically* sustainable development, successfully fought for the inclusion of the *ecologically* in the "official" terminology.¹⁷

The Planning Bill 2013 replaces ESD with a new definition of sustainable development (cl 1.3(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.

3.1 The current planning system

Environmental protection has always been a key 'object' of the [Environmental Planning & Assessment Act 1979](#) (EP&A Act). These objects are set out under section 5 of the legislation. Specifically, s5(a)(i), (vi) and (vii) relate to environmental protection.¹⁸ The first objects reads:

the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.

As amended in 1995, s5(a)(vi) now provides for:

the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats.¹⁹

¹⁵ Ibid.

¹⁶ T Edwards, [Sustainable Development](#), NSW Parliamentary Library Research Service, Briefing Paper 04/09, April 2009

¹⁷ R Harding, *Ecologically sustainable development: origins, implementation and challenges*, *Desalination*, 2006. Vol 187, pp229-239, as quoted in T Edwards, [Sustainable Development](#), NSW Parliamentary Library Research Service, Briefing Paper 04/09, April 2009, p.6

¹⁸ See section 3.3.2 of this paper for a full list of the EP&A Act objects, as set out in comparison with the objects of the Planning Bill 2013.

¹⁹ The amendment was introduced by the *Threatened Species Conservation Act 1995*, as first

Section 5(a)(vii), which refers to “ecologically sustainable development”, was inserted as a new object of the Act in 1997. At the same time, the [Protection of the Environment Administration Act 1991](#) (POEA Act) was amended to define how ecologically sustainable development is to be achieved (s6(2)), a definition adopted in the EP&A Act itself (s4(1)). Section 6(2) of the POEA Act reads:

... ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:

(a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by:

(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and

(ii) an assessment of the risk-weighted consequences of various options,

(b) inter-generational equity—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,

(c) conservation of biological diversity and ecological integrity—namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,

(d) improved valuation, pricing and incentive mechanisms—namely, that environmental factors should be included in the valuation of assets and services, such as:

(i) polluter pays—that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,

(ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,

(iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best

placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.

The EP&A Act does not assign weight or priority to any of its objects over another. This is problematic for two reasons. As it can be argued that the Act contains objects that may conflict, it leaves decision makers without a means of resolving these potential conflicts.²⁰ More critically, in making ESD equal to all other objects, a principle by which potential conflicts could be resolved, the Act uses ESD in a way inconsistent with its internal logic. This may result in decisions being made under the Act that are inconsistent with the principles of ESD, so long as they comply with another object of the Act. On this last point, Dwyer and Taylor contend that:

... ESD is the factor that balances economic, social and environmental considerations; ESD is *not* a factor to be balanced against other factors. If the object of ESD is to be balanced against the numerous other social and economic objects of an environmental statute in making decisions, it is evident that these other objects may receive double weighting in the decision-making process. Indeed, an administrator will often be able to justify his or her decision to approve a development that is likely, in reality, to have an adverse environmental impact on the basis that the development is consistent with the other objects of the statute ...²¹

3.2 Definitions and objects in related legislation

3.2.1 NSW legislation

The point to make is that, unlike certain other statutes, the EP&A Act does not present a hierarchy of objects. Selected alternative approaches, drawn from legislation dealing with environmental issues, are discussed below (see Appendix 2 for the objects in full).

Three related statutes make all of their objects subject to ESD: the *National Parks and Wildlife Act 1974*, *Native Vegetation Act 2003* and *Plantations and Reafforestation Act 1999*.

Four related statutes have an objects clause that opens with a preliminary statement, including reference to either a specific principle of ESD or ESD in general, to which a number of equally weighted objects are subject: the *Coastal Protection Act 1979*, *Fisheries Management Act 1994*, *Mining Act 1992* and *Water Management Act 2000*. The Mining Act's preliminary statement is as follows:

... to encourage and facilitate the discovery and development of mineral

²⁰ For example, Dwyer and Taylor (2013) argue that it is not farfetched to envisage a situation where the environmental protection object (s 5(a)(vi)) is in conflict with the object to encourage provision and maintenance of affordable housing (s 5(a)(viii)).

²¹ G Dwyer and M Taylor, [Moving from consideration to application: The uptake of principles of ecologically sustainable development in environmental decision-making in New South Wales](#), *Environmental and Planning Law Journal*, May 2013, Vol 30(3), p.200

resources in New South Wales, having regard to the need to encourage ecologically sustainable development, and in particular ...

The *Marine Parks Act 1997* makes its third object subject to the first two. It also includes reference to ESD in the third object.

3.2.2 State and Territory planning legislation

Various approaches are found to the prioritisation (or otherwise) of the objects of planning legislation in other Australian jurisdictions. Of the seven other Australian States and Territories, five have structured the objects of their planning legislation to give prominence to one or more objects over others (see Appendix 3): Northern Territory; South Australia; Tasmania; Victoria; and Queensland.²²

The Northern Territory and South Australia provide a brief generic object statement focussed on orderly planning and development. This is followed by a number of equally weighted provisions by which the object is to be achieved, including sustainable development.

Tasmania and Victoria make the facilitation of development subject to several preceding objects.²³ In Tasmania's case, the facilitation of 'economic development' (s1(d) of Schedule 1) is subject to three preceding objectives, including the sustainable development of natural and physical resources (s1(a)). Sustainable development is defined along similar lines to ESD.

Victoria makes the object of facilitating development (s4(1)(f)) subject to five preceding objects, including the fair, orderly, economic and sustainable use and development of land (s4(1)(a)). Taken together, the objects are all subject to a purpose clause in section 1, which aims to establish a framework for planning the use, development and protection of land in Victoria in the present and long-term interests of all Victorians.

Queensland's *Sustainable Planning Act 2009* includes a purpose clause which aims to achieve ecological sustainability (s3). Ecological sustainability is defined as a balance that integrates environmental protection, economic development and maintenance of the cultural, economic, physical and social wellbeing of people and communities (s8). Section 5 of the Act sets out provisions by which the Act's purpose is to be advanced, including objects similar in nature to those of the EP&A Act and two ESD principles – the precautionary principle and the intergenerational equity principle.

²² The ACT has one object, which is to provide a planning and land system that contributes to the orderly and sustainable development of the Territory. Western Australia has two equally weighted objects, the second of which is to promote the sustainable use and development of land.

²³ Both jurisdictions also have a number of subsidiary objects relating to the planning processes established under the Act.

3.3 Proposed planning reforms

The definition and application of sustainable development in the proposed planning system has evolved since the release of the 2012 Independent Planning System Review's final report. This section briefly covers the recommendations of the Independent Review before setting out how sustainable development is defined in the White Paper and Planning Bill 2013.²⁴

3.3.1 The Independent Planning Review

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. In the [final report](#) released in May 2012, the authors made two recommendations regarding the place of sustainable development in any new planning legislation. An argument was made for an overarching object as follows:

The object of the proposed Sustainable Planning Act is to be as follows:

The object of this Act is to provide an ecologically, economically and socially sustainable framework for land use planning and for development proposal assessment and determination together with the necessary ancillary legislative provisions to support this framework.

*The Act is structured to set out the elements necessary for this broad object and to provide more detailed objects relevant to the planning processes.*²⁵

The authors argued that this overarching object should be accompanied by complementary “separate (but thematically consistent objects) for strategic planning and for local land-use planning.”²⁶ No precedent or reasons were given for why an overarching object was recommended.

The Independent Review also investigated the question of defining sustainable development. It concluded that the term should be defined in any new planning legislation in a manner consistent with other NSW legislation, namely as ecologically sustainable development following the definition in the POEA Act.²⁷

3.3.2 The White Paper

The main purpose of the proposed planning system, as articulated in the White Paper, includes environmental protection as follows:

²⁴ See the following Research Service publication for a discussion of sustainable development in the Green Paper: D Montoya, N Wales & G Griffith, [NSW planning reforms: the Green Paper and other developments](#), Briefing Paper 07/2012, November 2012

²⁵ T Moore and R Dyer, [The Way Ahead for Planning in NSW: Recommendations of the NSW Planning System Review](#), Vol 1 – Major Issues, May 2012, p.37

²⁶ Ibid., p.37. Moore and Dyer also recommended incorporating some process objects in any new planning legislation.

²⁷ T Moore and R Dyer, [The Way Ahead for Planning in NSW: Recommendations of the NSW Planning System Review](#), Vol 2 – Other Issues, May 2012, p.80

... 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.²⁸

The White Paper envisages this purpose being implemented in a manner consistent with 'sustainable development', rather than 'ecologically sustainable development'. It states:

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 to present and future needs.²⁹

As expanded on later in the White Paper, sustainable development is:

... effectively a process that facilitates good development, and thereby economic growth and productivity, while protecting and managing the environment and advancing social outcomes.

Sustainable development is therefore about giving weight to the following three interdependent key pillars:

Environment: Protecting threatened species and habitats, using natural resources wisely and minimising, mitigating or addressing environmental impacts.

Economic: Promoting the development of the economy and the wellbeing of all communities by facilitating housing, business and employment and other forms of activity and improving productivity.

Social: Facilitating housing that meets the needs of the whole community, creating a high quality built environment that promotes the health of all communities and ensuring accessibility to services and employment opportunities.

Sustainable development is a key tool for advancing environment goals and objectives. In locations where high conservation values have been identified (for example, where there are threatened species populations and ecological communities), the application of sustainable development will mean that environmental protection will have a higher priority than all other objectives and goals.

Also, in areas where the facilitation of environmental, social and economic goals concurrently is a priority for the community, sustainable development principles will set the framework for advancing social and economic objectives in a way that mitigates or minimises any adverse environmental impacts or risks. In making these assessments, decision makers and the community will need to consider not only the benefit of people now but also the impacts on

²⁸ NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.5

²⁹ Ibid., p.12

future generations.³⁰

For comparative purposes, Table 1 sets out the objects of the [Planning Bill 2013](#) and their equivalents in the EP&A Act. The Table also includes objects unique to either the Bill or the Act. Section 4(1) of the EP&A Act defines ESD according to the definition contained in section 6(2) of the *Protection of the Environment Administration Act 1991*. This definition is included in the Table for comparison with the definition of sustainable development in the Planning Bill.

Table 1: Comparison of legislative objects

Planning Bill 2013	Environmental Planning and Assessment Act 1979
CI 1.3(1)(a) [to promote] economic growth and environmental and social well-being through sustainable development	s5(a)(vii) [to encourage] ecologically sustainable development
CI 1.3(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.	<p><i>Protection of the Environment Administration Act 1991</i></p> <p>s6(2) ... ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:</p> <p>(a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.</p> <p>In the application of the precautionary principle, public and private decisions should be guided by:</p> <ul style="list-style-type: none"> (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and (ii) an assessment of the risk-weighted consequences of various options, <p>(b) inter-generational equity—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,</p>

³⁰ Ibid., p.16

Planning Bill 2013	Environmental Planning and Assessment Act 1979
	<p>(c) conservation of biological diversity and ecological integrity—namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,</p> <p>(d) improved valuation, pricing and incentive mechanisms—namely, that environmental factors should be included in the valuation of assets and services, such as:</p> <ul style="list-style-type: none"> (i) polluter pays—that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement, (ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste, (iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.
CI 1.3(1)(b) [to promote] opportunities for early and on-going community participation in strategic planning and decision-making	s5(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment
CI 1.3(1)(c) [to promote] the co-ordination, planning, delivery and integration of infrastructure and services in strategic planning and growth management	n/a
CI 1.3(1)(d) [to promote] the timely delivery of business, employment and housing opportunities (including for housing choice and affordable house)	s5(a)(viii) [to encourage] the provision and maintenance of affordable housing
<p>CI 1.3(1)(e) [to promote] the protection of the environment, including:</p> <p>(i) the conservation of threatened species, populations and ecological communities, and their</p>	s5(a)(vi) [to encourage] the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats

Planning Bill 2013	Environmental Planning and Assessment Act 1979
habitats, and (ii) the conservation and sustainable use of built and cultural heritage	
CI 1.3(1)(f) [to promote] the effective management of agricultural and water resources	s5(a)(i) [to encourage] the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment
CI 1.3(1)(g) [to promote] health, safety and amenity in the planning, design, construction and performance of individual buildings and the built environment	n/a
CI 1.3(1)(h) [to promote] efficient and timely development assessment proportionate to the likely impacts of proposed development	n/a
CI 1.3(1)(i) [to promote] the sharing of responsibility for planning and growth management between all levels of government	s5(b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State
n/a	s5(a)(ii) [to encourage] the promotion and co-ordination of the orderly and economic use and development of land
n/a	s5(a)(iii) [to encourage] the protection, provision and co-ordination of communication and utility services
n/a	s5(a)(iv) [to encourage] the provision of land for public purposes
n/a	s5(a)(v) [to encourage] the provision and co-ordination of community services and facilities

The Planning Bill has nine objects, the first of which is to achieve economic growth and environmental and social well-being through sustainable development (see row 1 of Table 1). The key change from the Act is the replacement of ESD with a new definition of 'sustainable development'. This new definition does not include three of the five ESD principles:

- the precautionary principle;
- conservation of biological diversity and ecological integrity; or
- improved valuation, pricing and incentive mechanisms, such as the

polluter pays principle.

The EP&A Act also includes a more substantial definition of the intergenerational equity principle, specifying that the present generation “should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations.”

Like the EP&A Act, the Planning Bill 2013 includes a number of objects of equal importance, rather than assigning weight or priority to any of its objects over another. With no hierarchy or prioritisation of objects, sustainable development is on an equal footing with the rest.

3.4 Stakeholder comments

3.4.1 Objects of the Planning Bill and purpose of the planning system

Debate over the definition of sustainable development in the Bill is part of the wider debate about the Bill’s philosophy and purpose. Central to that debate is the relative weight given to economic, social and environmental issues, as may be inferred from the objects and provisions of the Bill, as well as from the White Paper.

An Act’s objects are a “statement of intention as to how an Act is to operate.”³¹ As noted by several stakeholders, they play an important role in guiding legal interpretation of a statute’s other provisions. The City of Sydney argued, with respect to the place of sustainable development in the objects, that:

The phrasing structure is essential for the State and local authorities to defend decisions against poor and ill-considered development. This is especially important in the context of ‘light touch’ legislation (guiding legislation low on regulation which quickly reverts to core objectives when challenged).³²

It further noted that:

Given the prospect of reduced urban design and environmental amenity outcomes through less prescription in future Local Plan development controls (controls which economists refer to as ‘micro-regulations’), the phrasing of the Objects in the Act will become fundamental in assessing and defending non-compliant code assessments, merit assessments, PAC hearings, court appeals and planning panel reviews.³³

³¹ D C Pearce & R S Geddes, *Statutory Interpretation in Australia*, 7th Ed., 2011, LexisNexis Butterworths, at [4.49]

³² City of Sydney, [NSW Planning System White Paper and Draft Exposure Bills: Submission to the Department of Planning and Infrastructure](#), 28 June 2013, p.17. The City of Sydney’s comment regarding ‘guiding legislation’ is an allusion to the statement in the Green Paper that “the new legislation will be an ‘enabling’ Act which will establish the broad framework for the planning system. The Act will not include detailed prescriptive controls, instead these details will be covered by guidance and good practice advisory notes.” NSW Government, [A New Planning System for NSW – Green Paper](#), July 2012, p.3

³³ City of Sydney, *op. cit.*, p.22

Broad support of the Bill's objects was expressed by several stakeholders. The Housing Industry Association considered the new objects to be:

... a strong starting point for reforming the planning system, and it is particularly important to see recognition that housing delivery must be timely, infrastructure must be coordinated and that development assessment should be efficient and timely proportionate with the likely impacts of proposed developments.³⁴

Over half of the stakeholders who commented on the objects of the Bill suggested adding and/or amending objects (this is in addition to the significant number of comments on the Bill's definition of sustainable development – see discussion below). Suggestions for amendment of several objects were as follows:

Object (b): [to promote] opportunities for early and on-going community participation in strategic planning and decision-making

- Amend object (b) to 'ensure guaranteed and meaningful public involvement and participation in environmental planning and assessment decisions' (Nature Conservation Council of NSW & the Total Environment Centre, emphasis in original);³⁵

Object (e): [to promote] 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*

- Amend the environmental protection object (cl 1.3(1)(e)(ii)) to include specific reference to 'the protection and conservation of native animals and plants', as is the case in the EP&A Act (Environmental Defender's Office NSW);³⁶
- Amend object (e)(i) to refer more specifically to 'the protection of biodiversity and ecological integrity, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats' (Nature Conservation Council of NSW & the Total Environment Centre, emphasis in original);³⁷
- Replace object (e)(ii) with a new separate object – 'the identification, protection and management of the cultural, including Aboriginal, heritage

³⁴ Housing Industry Association, [Submission by the Housing Industry Association to the White Paper – A New Planning System for NSW](#), 28 June 2013, p.1

³⁵ Nature Conservation Council of NSW & the Total Environment Centre, [Charting a New Course: Delivering a Planning System that Protects the Environment and Empowers Local Communities](#), Submission on the White Paper – A New Planning System for NSW, June 2013, p.15

³⁶ Environmental Defenders' Office NSW, [Submission on A New Planning System for New South Wales – White Paper](#), June 2013, p.27

³⁷ Nature Conservation Council of NSW & the Total Environment Centre, op. cit., p.15

of NSW' (Heritage Council of NSW);³⁸

- Replace object (e)(ii) with a new separate object – 'The identification, protection and management of the natural and cultural (Aboriginal, built, landscape, moveable, maritime and archaeological) heritage of NSW' (Planning Institute of Australia);³⁹

Object (f): [to promote] the effective management of agricultural and water resources

- Amend object (f) by requiring the 'proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages' (Nature Conservation Council of NSW & the Total Environment Centre, emphasis in original);⁴⁰
- Amend 'the object of the Bill' to 'include express reference to promotion of the proper management, development and conservation of the State's mineral resources for the purpose of promoting the social and economic welfare of the community and a better environment' (NSW Minerals Council);⁴¹ and

Object (h): [to promote] efficient and timely development assessment proportionate to the likely impacts of proposed development

- Amend object (h) to insert the underlined words - efficient and timely development assessment and approval process proportionate to the likely impacts of proposed development (NSW Minerals Council).⁴²

The City of Sydney recommended expansion of the objects of the Bill to reflect appropriate community participation throughout the planning process.⁴³

Suggestions for additional objects were as follows:

- Reinstate the object of 'provision of land for public purposes' (Environmental Defender's Office NSW);⁴⁴
- Add an object aimed at 'promoting resilience to climate change for communities, wildlife and the environment, addressing risks and opportunities via mitigation and adaptation' (Nature Conservation Council

³⁸ Heritage Council of NSW, [Heritage Council of NSW – Submission to the White Paper and Draft Planning Bills 2013](#), 27 June 2013, p.6

³⁹ Planning Institute of Australia, op. cit., p.7

⁴⁰ Nature Conservation Council of NSW & the Total Environment Centre, op. cit., p.15. This is essentially a replacement of the Bill's object by object 5(a)(i) of the EP&A Act.

⁴¹ NSW Minerals Council, [NSW Planning System Review: White Paper and Draft Legislation Submission](#), June 2013, p.11

⁴² Ibid., p.26

⁴³ City of Sydney, op. cit., p.61

⁴⁴ Environmental Defenders' Office NSW, op. cit., p.27

of NSW & the Total Environment Centre);⁴⁵

- Add an object to 'promote well designed, high quality places and buildings' (Planning Institute of Australia);⁴⁶
- Add an object on 'open and transparent decision making and appropriate opportunities for reviewing and appealing decisions' (Planning Institute of Australia);⁴⁷ and
- Add an object to promote 'facilitation of investment that meets the long-term needs of the community' (Property Council of Australia).⁴⁸

While some of the suggestions for amended and additional objects primarily reflect a stakeholder's particular concerns, others are reflective of broader discussion of the relative weight given to economic, environmental and social matters in the White Paper and the Bill. The consensus of opinion amongst the stakeholders was that the White Paper and Bill prioritise economic growth and development. As observed by the Urban Taskforce Australia:

[the] White Paper clearly recognises that the planning system must encourage economic growth and that the development industry contributes to the economic prosperity of the state of NSW. The Act includes clear objectives to provide for the needs of growth.⁴⁹

Strong opinions were expressed for and against the economic emphasis in the proposed planning system. For example, the NSW Business Chamber & Sydney Business Chamber stated that they:

... have been vocal in advocating for a planning system that promotes economic growth and prosperity, and are pleased with the White Paper's firm focus on growth and development.⁵⁰

The Urban Development Institute of Australia made a similar argument when commenting on strategic planning:

Strategic plans have historically failed to consider whether requirements, controls and zonings are economically viable. State and Local Government should always consider whether development makes an acceptable financial return given the proposed planning constraints.

Economic and commercial viability is one of the key impediments to

⁴⁵ Nature Conservation Council of NSW & the Total Environment Centre, op. cit., p.15

⁴⁶ Planning Institute of Australia, op. cit., p.7

⁴⁷ Ibid., p.7

⁴⁸ 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.4

⁴⁹ Urban Taskforce Australia, [Delivering a Better Planning System for NSW: White Paper](#), Submission to the NSW Government on the NSW Planning System Review – White Paper, 28 June 2013, p.14

⁵⁰ NSW Business Chamber & Sydney Business Chamber, [Submission: New Planning System for NSW White Paper](#), 27 June 2013, p.1

development and needs to be thoroughly accommodated within the new planning system.⁵¹

For some stakeholders, support for the proposed planning system's economic focus is reflective of a particular understanding of the *purpose* of the planning system. According to the Property Council of Australia, the planning act is:

... the primary land-use and economic growth legislation for NSW.⁵²

As a result:

... the planning system is one of the few substantial micro-economic levers available to a state government.⁵³

Of the stakeholders who opposed the emphasis on economic growth, the Nature Conservation Council NSW & Total Environment Centre expressed their opinion in the strongest terms:

In our view, the White Paper and Exposure Planning Bills are seriously flawed. Unamended, they will comprehensively fail to provide an adequate framework for a new planning system for NSW that ensures meaningful community participation, protection of the environment, heritage and community well-being, and avoidance of corruption risks. Rather, there is an overemphasis on economic growth, and facilitation of development, at all costs.⁵⁴

Their opinion reflects a sentiment noted by several stakeholders; namely, that the emphasis on economic growth has a corollary – a decreased emphasis on social issues and a weakening of environmental protection. Weakened environmental protections identified by stakeholders include:

- Removal of the term 'ecologically sustainable development' and some of its associated principles;
- Lack of environment-focused strategic planning principles;
- Removal of the requirement for all State Significant Development to have an Environmental Impact Statement;
- Absence of cumulative impact considerations or ESD principles in the decision criteria for development assessment;
- Transfer of arms-length agency concurrence duties to the Planning Director-General;
- No provisions for environmental impacts to be taken into account for complying or code assessable development;

⁵¹ Urban Development Institute of Australia, [The Next Act: UDIA NSW Response to the Planning White Paper](#), June 2013, p.8

⁵² Property Council of Australia, op. cit., p.26

⁵³ Ibid., p.1

⁵⁴ Nature Conservation Council of NSW & the Total Environment Centre, op. cit., p.4

- Reduction in the number of environmental protection zones;
- No mandatory requirement for inclusion of environmental targets in Regional Growth Plans or Subregional Delivery Plans; and
- Provisions that restrict third party merit appeal proceedings and judicial review proceedings.⁵⁵

3.4.2 Defining sustainable development

No stakeholders supported the proposed definition of sustainable development outright. While qualified and, to some degree, ambiguous support was offered by the Planning Institute of Australia and Property Council of Australia, they both argued that it lacked clarity. In particular, the Planning Institute of Australia suggested that the terms ‘environmental wellbeing’ and ‘social wellbeing’ should be defined in the Act’s Dictionary, with the Property Council of Australia observing that the “objectives of the new Act do not clearly reinforce key sustainability principles.”⁵⁶ The other stakeholders who discussed the definition of sustainable development recommended retention of ESD.

The question of how sustainable development is defined is important. For the City of Sydney, the definition is:

... paramount to what the system will evaluate, approve or reject and how decisions and choices will be made by the Minister, the Department, the Planning Assessment Commission (PAC), Regional Planning Panels, Subregional Delivery Boards, councils and the court.⁵⁷

The White Paper does not explain why the Government has proposed to replace ESD with a new definition of sustainable development. According to the Environmental Defenders’ Office NSW, “one of the NSW Government’s informal reasons for moving away from ESD is that it unduly emphasises environmental factors.”⁵⁸ On this point, it may be argued that this represents a misunderstanding of ESD (see section 3.1 of this paper). As expanded upon by the Nature Conservation Council of NSW & the Total Environment Centre:

It is important to recognise that ecologically sustainable development does not seek to raise environmental matters above other matters. Ecologically sustainable development seeks to integrate environmental, economic and social considerations in decision making.

Properly applied, ESD recognises that ecological integrity and environmental sustainability are fundamental to social and economic wellbeing, particularly

⁵⁵ These were identified in the submissions of the Environmental Defender’s Office NSW, Nature Conservation Council of NSW & the Total Environment Centre, and City of Sydney.

⁵⁶ Property Council of Australia, op. cit., p.27

⁵⁷ City of Sydney, op. cit., p.16. Note that, while the City of Sydney submission is referring to ‘sustainable growth’ at this point in its submission, it appears to use the term interchangeably with ‘sustainable development’.

⁵⁸ Environmental Defenders’ Office NSW, op. cit., p.27

when considering the needs of both present and future generations. Despite the challenges presented by the concept of ESD, experts have recognised that ‘there is no other credible candidate for an integrative policy framework’.⁵⁹

The new definition of sustainable development was variously described as “far weaker than the one contained in our current planning legislation”⁶⁰, “a major step backwards for the environment and communities”⁶¹ and “watered-down.”⁶² The EDO argued that:

The proposed change is not simply a change of terminology (‘ESD’ to sustainable development), but is the deliberate removal of fundamental principles so that they will no longer apply to decision making.⁶³

The Law Society of NSW noted that the new definition:

... is not a minor change and reflects the prioritisation of growth and economic considerations rather than a focus on ecologically sustainable development.⁶⁴

Correspondingly, Local Government NSW expressed concern that the new definition may:

... limit their ability to protect important natural assets which underpin future economic and social viability.⁶⁵

Key to their argument was that councils are concerned about the removal of three of the five principles of ESD, namely the precautionary principle, the conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms, such as the polluter pays principle. Criticism of the removal of principles that have long been ‘enshrined in Australian law’ was a key plank in the argument for retention of ESD. On this point, the Environmental Defenders’ Office NSW also noted:

The Planning Bill objects only refer to two relevant principles (and even then only in vague terms). These are the ‘integration’ of economic, social, environmental factors, and consideration of ‘present and future needs’.⁶⁶

Other reasons given for retaining ESD include:

- The Independent Planning Review recommended retention of ESD;⁶⁷

⁵⁹ Nature Conservation Council of NSW & the Total Environment Centre, op. cit., p.12

⁶⁰ Better Planning Network, [Submission on the White Paper: A New Planning System for NSW and Associated Planning Bills](#), 27 June 2013, p.2

⁶¹ Nature Conservation Council of NSW & the Total Environment Centre, op. cit., p.11

⁶² Environmental Defenders’ Office NSW, op. cit., p.27

⁶³ Ibid., p.27

⁶⁴ The Law Society of NSW, op. cit., p.9

⁶⁵ Local Government NSW, [Submission to the Planning White Paper and Exposure Bills](#), June 2013, p.14

⁶⁶ Environmental Defenders’ Office NSW, op. cit., p.26

⁶⁷ Better Planning Network, op. cit.; Nature Conservation Council of NSW & the Total

- ESD is standard terminology in over 60 NSW statutes, as well as the statutes of other States and the Commonwealth;⁶⁸
- ESD features in several intergovernmental agreements – the *Intergovernmental Agreement on the Environment* and the *National Strategy for Ecologically Sustainable Development*;⁶⁹
- A body of case law has developed around the interpretation and application of ESD principles;⁷⁰ and
- For clarity and to meet community expectations.⁷¹

Most of the stakeholders who recommended retention of ESD also argued, some more specifically than others, for some form of hierarchy amongst the objects of the Bill. The Property Council of Australia recommended that all of the objects be ‘linked’ to the “definition of ‘sustainable development’”⁷²; the City of Sydney recommended that ESD be ‘elevated’ above the outcome of ‘economic growth’ in the Bill’s objects.⁷³ Other stakeholders followed the lead of the Independent Planning Review in arguing that ESD should be the overarching object of the Bill, for which two reasons were given. The first is that equally weighted objects, a feature of the current system, leaves wide discretion for decision makers, the concern being that the failings of the present scheme will be replicated in the new, with economic outcomes trumping environmental considerations.⁷⁴ The second is that clearly defined objects would be consistent with a 2012 ICAC recommendation from its report on [anti-corruption safeguards and the NSW planning system](#):

‘that the NSW Government ensures that the new planning legislation clearly articulates its objectives and provides guidance on the priority (if any) to be given to competing objective’.⁷⁵

Environment Centre, op. cit.; City of Sydney, op. cit.

⁶⁸ Better Planning Network, op. cit.; Environmental Defenders’ Office NSW, op. cit.; Nature Conservation Council of NSW & the Total Environment Centre, op. cit.; Local Government NSW, op. cit.

⁶⁹ Environmental Defenders’ Office NSW, op. cit., p.26

⁷⁰ Better Planning Network, op. cit.; Nature Conservation Council of NSW & the Total Environment Centre, op. cit.; Local Government NSW, op. cit.

⁷¹ Urban Taskforce Australia, op. cit.

⁷² Property Council of Australia, op. cit., p.27

⁷³ City of Sydney, op. cit., p.17

⁷⁴ Better Planning Network, op. cit.; Nature Conservation Council of NSW & the Total Environment Centre, op. cit.; Environmental Defenders’ Office NSW, op. cit.

⁷⁵ Nature Conservation Council of NSW & the Total Environment Centre, op. cit., p.14

4. PLANNING INSTRUMENTS

4.1 The current planning system

Two types of environmental planning instruments (EPIs) may be made under the EP&A Act: State Environmental Planning Policies (SEPPs) and Local Environmental Plans (LEPs).⁷⁶ Section 24(1) of the Act provides that:

... an environmental planning instrument may be made in accordance with this Part for the purposes of achieving any of the objects of this Act.

EPIs may therefore be made to achieve ESD. Some EPIs include ESD within their objects or aims. For example, the aim of the [State Environmental Planning Policy \(Kosciuszko National Park – Alpine Resorts\) 2007](#) is to:

... protect and enhance the natural environment of the alpine resorts, in the context of Kosciuszko National Park, by ensuring that development in those resorts is managed in a way that has regard to the principles of ecologically sustainable development (including the conservation and restoration of ecological processes, natural systems and biodiversity) (cl 2(1)).

Similarly, the [Armidale Dumaresq Local Environmental Plan 2012](#) contains an aim to:

... ensure that development has regard to the principles of ecologically sustainable development and to areas subject to environmental hazards and development constraints (cl 1.2(2)(e)).

Section 73 of the EP&A Act provides that:

The Director-General shall keep State environmental planning policies and councils shall keep their local environmental plans and development control plans under regular and periodic review for the purpose of ensuring that the objects of this Act are, having regard to such changing circumstances as may be relevant, achieved to the maximum extent possible.

4.2 Proposed planning reforms

The new system will feature a hierarchy of four strategic plans:

- 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

⁷⁶ A third type of instrument used to be made under the Act: Regional Environmental Plans. From 1 July 2009, the option of making a Regional Environmental Plan was removed from the legislation and the existing Plans were designated as deemed SEPPs. Department of Planning & Infrastructure, [Regional environmental plans \[deemed SEPPs\]](#), no date [online – accessed 21 August 2013]

Growth Plans in appropriate locations with a focus on integrating infrastructure and providing a framework for rezoning areas of significance; and

- Local Plans – principal legal documents that deliver the strategic vision for a local government area through zoning, development guides and infrastructure.⁷⁷

While the White Paper proposes to include sustainable development in strategic planning, many of its proposals are not given effect in the relevant part of the Bill (Part 3); sustainable development is mentioned twice in the Bill, but not once in Part 3.⁷⁸

A key change proposed in the White Paper to strategic planning is:

a shift to upfront evidence based strategic planning, with a focus on achieving sustainable development outcomes.⁷⁹

The White Paper sets out ten strategic planning principles to guide the preparation of strategic plans. Principle 1 reads as follows in the White Paper:

Strategic plans should promote the state's economy and productivity through facilitating the delivery of housing, retail, commercial and industrial development and other forms of economic activity, by way of sustainable development — strategic planning should integrate economic, environmental and social considerations in decision making to enable development that is sustainable.⁸⁰

However, Principle 1 as included in clause 3.3 of the Bill does not contain reference to sustainable development. The Bill sets out the ten principles as follows:

Principle 1: Strategic plans should promote the State's economy and productivity through facilitating housing, retail, commercial and industrial development and other forms of economic activity, having regard to environmental and social considerations.

Principle 2: Strategic plans are to be integrated with the provision of infrastructure.

Principle 3: Strategic plans are to guide all decisions made by planning authorities and allow for streamlined development assessment.

Principle 4: Strategic planning is to provide opportunities for early community participation.

Principle 5: Planning authorities and State agencies are to co-operate

⁷⁷ NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.7

⁷⁸ Both are found in the Object clause (cl 1.3).

⁷⁹ NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.60

⁸⁰ *Ibid.*, p.63

constructively in the preparation and implementation of strategic plans.

Principle 6: Strategic plans should reflect agreed planning outcomes in setting the planning vision for an area.

Principle 7: Strategic plans are to be standardised, easy to use and available online.

Principle 8: There should be monitoring and reporting of strategic planning outcomes.

Principle 9: Strategic plans are to be based on evidence, set realistically deliverable targets and take account of economic, environmental and social considerations.

Principle 10: Local plans should facilitate development that is consistent with agreed strategic planning outcomes and should not contain overly complex or onerous controls that may adversely impact on the financial viability of proposed development.

Together with Principle 9, Principle 1 makes reference to a principle of sustainable development as defined in the Bill, namely “the integration of economic, environmental and social considerations”. However, neither Principle 1 nor 9 expressly require the *integration* of economic, environmental and social considerations. It could also be argued that Principle 1 gives more weight to economic considerations than environmental or social considerations.

The White Paper makes specific reference to sustainable development in regard to the development and content of Regional Growth Plans and Subregional Delivery Plans. On page 78 it states:

Consistent with the principles of the Strategic Planning Framework, the vision and planning direction in Regional Growth Plans will be grounded in detailed supporting evidence. This is a fundamental shift in approach which should ensure that plans will enable sustainable development outcomes in New South Wales.⁸¹

With regard to Subregional Delivery Plans, the White Paper states that they will implement the following transformative change:

evidence based policy making to achieve sustainable development, including the preparation of sectoral strategies that focus on assessing the costs and benefits of different land use and development options.⁸²

Strategic Impact Assessment is proposed as a methodology by which Regional Growth Plans and Subregional Delivery Plans will consider the impacts associated with different planning options over the life of the plan, including the cumulative impacts of those options. Effectively:

⁸¹ Ibid., p.78

⁸² Ibid., p.80

... it represents a systematic process for evaluating the economic, social and environmental consequences of proposed policy options for significant land use planning decisions to achieve sustainable development.⁸³

Despite such stated aims in the White Paper, the Planning Bill includes no reference to sectoral strategies, Strategic Impact Assessment, requirements to take cumulative impacts into account or establishing sustainable development as a desired outcome of Regional Growth Plans or Subregional Delivery Plans.

Three provisions of the Bill require strategic plans to achieve the objects of the Act. With regard to NSW Planning Policies, Regional Growth Plans and Subregional Delivery Plans, clause 3.9(4) states:

The relevant planning authority is to keep strategic plans under regular and periodic review to ensure they continue to achieve the objects of this Act having regard to changing circumstances.

A more extensive provision is made in clause 3.15(1) in relation to Local Plans:

The Minister is to make arrangements for the relevant planning authority to keep local plans under regular and periodic review for the purpose of ensuring that the objects of this Act are, having regard to such changing circumstances as may be relevant, achieved to the maximum extent possible.

Also in relation to Local Plans, clause 3.17 makes provision for a plan's planning control provisions to be made for the purposes of achieving any of the objects of the Act, including in particular such topics as:

- (a) protecting, improving or utilising, to the best advantage, the environment, and
- (h) protecting native animals and plants, including threatened species, populations and ecological communities, and their habitats.

4.3 Stakeholder comments

4.3.1 Strategic planning principles

The Housing Industry Association and Planning Institute of Australia expressed support for the ten strategic planning principles as contained in clause 3.3 of the Bill, although the Planning Institute of Australia's support was qualified as follows:

The principles are valuable and are generally supported but may benefit from clarification and testing, i.e. Principle 10 which refers to overly onerous controls.⁸⁴

Many stakeholders took issue with some aspect of the principles. There was a

⁸³ Ibid., p.88

⁸⁴ Planning Institute of Australia, op. cit., p.14

general feeling that, overall, the strategic planning principles emphasised economic growth over environmental and social considerations. Several stakeholders called for ESD to feature in the principles; for example, the Heritage Council of NSW contended that:

Provisions and considerations relating to ecologically sustainable development, the protection of the environment, the protection, conservation and management of cultural heritage and Aboriginal objects, places and features must be readily evident throughout the Planning Bill 2013 particularly in the heads of consideration for development assessment and strategic plans [emphasis in original].⁸⁵

The Environmental Defenders' Office NSW made two related recommendations:

Recommendation 12: Balance economic, social and environmental values (through amending Principle 1 and deleting Principle 10 under clause 3.3).

Recommendation 13: There should be additional Strategic Planning Principles to achieve environmental and NRM [natural resource management] outcomes, and the sustainability of natural and built environments. In particular, strategic plans should:

- aim to *achieve ecologically sustainable development* when making, amending and implementing plans – including by applying relevant ESD principles in decision making;
- aim to *maintain or improve environmental outcomes* in the area – including through the integration of national and state NRM targets, and regional Catchment Action Plan (or equivalent) targets;
- take into account, and mitigate, the *cumulative impacts* of past, present and likely future development in the area – including by establishing the carrying capacity of the landscape (with respect to environmental qualities, waste etc);
- take into account the likely *scientific impacts of climate change* on the area – including identifying and planning for an effective hierarchy of mitigation and adaptation responses in urban, rural and coastal areas;
- provide for *urban sustainability* (open space, 'green infrastructure', public transport), *building efficiency* (water, energy, materials) and *social inclusion* (walkability, design, affordable housing) that can be tailored to local needs [emphasis in original].⁸⁶

The Planning Institute of Australia recommended incorporation of an additional

⁸⁵ Heritage Council of NSW, op. cit., p.6

⁸⁶ Environmental Defenders' Office NSW, op. cit., p.11

principle related to the ‘human dimension of planning’:

Liveability, environmental issues and economic activity need not be mutually exclusive. The challenge for planners is to reconcile these competing needs to create good places for people to live, work and play.

A Principle such as this may alleviate some of the concerns in the community that there is weakness of the language around environmental and social considerations. It may in turn instil confidence in the new planning system acknowledging that increased density, development and growth can and should be sustainable and with good planning, cities, towns and regions can be rich places to live, work and play.⁸⁷

Principles 1, 3 and 10 were identified by some stakeholders as unduly emphasising economic growth. Principle 1 reads as follows:

Principle 1: Strategic plans should promote the State’s economy and productivity through facilitating housing, retail, commercial and industrial development and other forms of economic activity, having regard to environmental and social considerations.

According to the Better Planning Network:

The result of this Principle will be that environmental and social considerations are bypassed and will always be subordinate to development. This Principle could be re-written as follows: ‘*Strategic plans should identify and protect areas of high biodiversity significance and natural areas, areas of heritage significance or neighbourhood character and identify remaining areas for housing, retail, commercial and industrial development and other forms of economic activity*’ [emphasis in original].⁸⁸

The Environmental Defenders’ Office NSW said of Principle 1:

[it] aims to promote a wide range of economic activity while ‘having regard to’ environmental and social considerations. This is a weak legal test that is very easy for decision-makers to discharge, and in practice, disregard. The principle is vague and imbalanced, even in comparison to the weak references and new definition of sustainable development under the Bill’s draft objects.⁸⁹

The City of Sydney made similar observations concerning Principle 1. It also explained that:

Principle 1 establishes a relatively narrow, economic focus for strategic planning which inaccurately represents the multi-faceted role of the discipline and is far removed from the international best practice that the new system purports to achieve.⁹⁰

⁸⁷ Planning Institute of Australia, op. cit., p.14

⁸⁸ Better Planning Network, op. cit., p.6

⁸⁹ Environmental Defenders’ Office NSW, op. cit., p.34

⁹⁰ City of Sydney, op. cit., p.69

The City of Sydney therefore recommended that:

Principle 1 should be revised so that the State's economy and productivity is considered alongside a wider range of outcomes, including:

- meeting housing needs
- a low carbon economy
- supporting economic development and meeting business and employment needs
- supporting infrastructure and services required to meet the needs of new development
- healthy, vibrant and strong communities
- conserving our built and natural heritage
- social and cultural infrastructure
- adaptation for climate change and natural hazards
- quality design
- liveable communities.⁹¹

Principle 3 reads as follows:

Principle 3: Strategic plans are to guide all decisions made by planning authorities and allow for streamlined development assessment.

The Better Planning Network argued for the inclusion of ESD:

This principle should read: *'Strategic plans are to guide all decisions made by planning authorities to allow for development assessment based on the principles of Ecologically Sustainable Development'* [emphasis in original].⁹²

Principle 10 was the most criticised of the proposed strategic planning principles. It reads as follows:

Principle 10: Local plans should facilitate development that is consistent with agreed strategic planning outcomes and should not contain overly complex or onerous controls that may adversely impact on the financial viability of proposed development.

The Environmental Defenders' Office NSW recommended abolishing the principle. Local Government NSW had similar concerns, although it recommended altering the principle rather than abolishing it:

... while we generally support these principles, we consider that the prescriptive approach in Principle 10, which specifically stipulates that local plans "*should not contain overly complex or onerous controls that may adversely impact on the financial ability of proposed development*") is inappropriate and has the potential to be used in reviews or court challenges to undermine *sustainable* outcomes from strategic planning processes. We recommend that Principle 10 be amended to read as follows:

⁹¹ Ibid., p.69

⁹² Better Planning Network, op. cit., p.6

Principle 10: “Local plans should facilitate development that is consistent with agreed strategic planning outcomes” [emphasis in original].⁹³

Criticisms levelled against Principle 10 by the City of Sydney were more extensive:

The City objects to this simplistic principle. It sets up an expectation that the role of land use plans is to *facilitate* development, rather than *manage, regulate and plan* for development. There are numerous situations where complex or strict controls are required to protect places of heritage or environmental significance or to avoid adverse effects from polluting or inappropriate land uses. In the opinion of the local council and community, these may outweigh financial viability concerns.

Project viability factors, such as lease termination costs, environmental contamination clean-up costs, excessive land purchase prices, equipment depreciation, market corrections and the like, should not be planning considerations in assessing viability.

The City is not aware of any other free market industry sector that appears to have its viability (and therefore profit margins) effectively protected by a statutory principle. While the City of Sydney supports the need for plans to consider benchmark viability as a key consideration in the process, it should not be expressly the function of Local Plans to promote the economic viability of all development projects given their varying contingent factors. By their very nature, planning controls in urban environments often adversely affect the financial viability of new development that may otherwise occur without controls, and in doing so, controls protect the amenity and therefore viability of existing investments. There is a real potential for Principle 10 to corrupt the process and open the door for legal challenge to the validity of local plans and decisions by all decision-making levels [emphasis in original].⁹⁴

It therefore recommended that the principle be removed or revised to read:

‘Local Plans should facilitate development that is consistent with agreed strategic planning outcomes’.⁹⁵

4.3.2 Strategic plans

Few stakeholders commented on the application of sustainable development in strategic planning. This may be because of the limited detail contained in the Bill. With regards to the content of NSW Planning Policies, the Bill stipulates only that:

A draft NSW planning policy is to contain principles and policies in relation to strategic planning for the State, including:

- (a) planning for infrastructure, and

⁹³ Local Government NSW, op. cit., p.22

⁹⁴ City of Sydney, op. cit., p.70

⁹⁵ Ibid., p.70

- (b) development assessment, and
- (c) other planning related matters (cl 3.4(2)).

In response to this, the Environmental Defenders' Office NSW argued that:

... consistent with ESD principles, NSW Planning Policies must adequately protect the environment and foster social outcomes (in addition to the White Paper's economic focus). Otherwise, subsequent strategic plans will be 'locked in' to growth-driven and ultimately unsustainable policies, rather than a balanced and integrated approach ... Two further categories should be included [in clause 3.4(2)]. One should require the integration of NRM [natural resource management] and environmental outcomes into planning. In addition, a NSW Planning Policy on *Sustainability* should require minimum standards for energy and water efficiency (updating BASIX), climate change mitigation and adaptation, other building design standards, and measures to encourage clean industry ...⁹⁶

The Environmental Defenders' Office NSW also made a recommendation relating to the application of an overarching ESD object through the NSW Planning Policies:

... the White Paper and Bill do not clarify how competing objectives or conflicts between NSW Planning Policies will be prioritised; or how consistency of lower-level plans will be measured and certified. Historically, SEPPs to promote development such as mining have had a stronger (sometimes overriding) effect compared with other state and local plans, policies and provisions that protect the environment. NSW Planning Policies must not entrench this approach. An overarching object to achieve ESD would provide some assistance to decision makers in applying and prioritising competing objectives, for the benefit of the people of NSW ...⁹⁷

With regard to the NSW Planning Policy on Energy and Resources, as proposed in the White Paper,⁹⁸ the NSW Minerals Council asserted that the Policy should:

Recognise the Object of the Mining Act 1992, to "encourage and facilitate the discovery and development of mineral resources in New South Wales, having regard to the need to encourage ecologically sustainable development..."⁹⁹

Several stakeholders specifically recommended that ESD should feature as an objective of Regional Growth Plans, Subregional Delivery Plans and/or Local Plans.¹⁰⁰ The Environmental Defenders' Office NSW also made several recommendations pertaining to the role of Subregional Delivery Boards – the

⁹⁶ Environmental Defenders' Office NSW, op. cit., p.38

⁹⁷ Ibid., p.39

⁹⁸ NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.69

⁹⁹ NSW Minerals Council, op. cit., p.18

¹⁰⁰ Better Planning Network, op. cit.; Environmental Defenders' Office NSW, op. cit.; City of Sydney, op. cit.

Boards which will have responsibility to develop Subregional Delivery Plans under clause 3.6 of the Planning Bill – including a requirement that:

Boards and their members ... exercise their powers and functions in order to achieve the overarching object of ESD.¹⁰¹

¹⁰¹ Environmental Defenders' Office NSW, op. cit., p.43

5. DECISION MAKING

5.1 The current planning system

Based on recent case law regarding decision-making under the EP&A Act, Dwyer and Taylor set out a number of propositions that appear to be settled concerning the place of ESD as a relevant consideration:

The statutory requirement to consider the public interest in determining whether to approve a development application under Pt 4 of the EPA Act obliges the administrator to have regard to principles of ESD in making a decision (provided that issues relevant to those principles arise in the context of making that decision);

Subject to Div 4.1 of the EPA Act, the statutory requirement to consider the public interest in determining whether to approve a development application for State Significant Development (SSD) under the EPA Act obliges the administrator to have regard to principles of ESD in making a decision (provided that issues relevant to those principles arise in the context of making that decision);

While Pt 3A of the EPA Act has been repealed, it still applies to some projects under the transitional arrangements. In this respect, administrators are obliged to consider ESD principles when determining whether to approve or reject a development application under Pt 3A (provided that issues relevant to those principles arise in the context of making that decision). However, it is apparent that conflicting authority continues to surround the issue of whether an administrator is obliged to consider ESD principles in determining whether to approve a concept plan (EPA Act, s 75O) or modification of a project approval (EPA Act, s 75W) under Pt 3A of the EPA Act;

The concept of ESD operates at a high level of generality and provides “significant scope for judgment and evaluation”. Subject to the legal principles relating to relevant considerations discussed above, a *global* consideration of ESD principles that engages with the substance of those principles will be sufficient. There is, *prima facie*, no need for administrators to take *specific* ESD principles into account in making decisions. This is a rebuttable presumption; if an applicant can demonstrate that the relevant environmental statute evinces an intention that an administrator is bound to consider a particular aspect or principle of ESD “in a particular manner and to a particular extent”, the administrator will be obliged to do so;

An ESD policy made at the local government level may be a relevant consideration to be taken into account by local council administrators when making environmental planning decisions; and

At the very least, ESD is not an irrelevant consideration for the purpose of environmental decision-making in New South Wales.¹⁰²

¹⁰² G Dwyer and M Taylor, [Moving from consideration to application: The uptake of principles of ecologically sustainable development in environmental decision-making in New South Wales](#), *Environmental and Planning Law Journal*, May 2013, Vol 30(3), p.202

Further, Lyster et al argue that the Minister must have regard to the public interest when making a decision concerning State significant infrastructure under Part 5.1 of the Act, despite no specific provision stating as much in section 115ZB.¹⁰³ This is based on the finding in *Minister for Planning v Walker* that:

... it is a condition of validity that the Minister consider the public interest. Although that requirement is not explicitly stated in the *EPA Act*, it is so central to the task of a Minister fulfilling functions under a statute like the *EPA Act* that, in my opinion, it goes without saying.¹⁰⁴

In summary, recent environmental jurisprudence suggests that if an administrator does not take ESD into consideration when making any development assessment decision under the Act, it is likely to constitute failure to consider the public interest, thereby potentially rendering the decision void.¹⁰⁵ However, the degree to which a decision maker must *apply* ESD principles is limited. While it appears mandatory for consent authorities to take ESD *into consideration* when making a determination on a development application, the administrator is not legally obliged to take any action with respect to *the application of* ESD principles.¹⁰⁶ This is an important distinction as consideration of ESD by an administrator does not necessarily result in the achievement of ESD as a substantive outcome.

Provision is also made for ESD to be taken into account when the concurrence of a person is required for development that may take place on land that is, or is a part of, critical habitat, or development that is likely to significantly affect a threatened species, population or ecological community or its habitat. In such cases, the Director-General of the Department of Environment, Climate Change and Water (now Office of Environment and Heritage) or the Minister administering the *Threatened Species Conservation Act 1995* must take the principles of ESD into consideration in deciding whether or not concurrence should be given (ss 79B(5), 112D, 112E).

5.2 Proposed planning reforms

Like the EP&A Act, the Bill does not expressly deal with the question of when sustainable development must be taken into consideration in decision-making. However, following the commentary on recent environmental jurisprudence set out in the previous section of this paper, it would seem that the inclusion of sustainable development in the objects of the Planning Bill will make consideration of sustainable development mandatory in *all* decision-making

¹⁰³ Lyster et al., *Environmental & Planning Law in New South Wales*, 3rd Ed., 2012. Sydney: The Federation Press, p.131

¹⁰⁴ [Minister for Planning v Walker](#) [2008] NSWCA 224 at [39]

¹⁰⁵ [Minister for Planning v Walker](#) [2008] NSWCA 224; [Kennedy v NSW Minister for Planning](#) [2010] NSWLEC 240 at [77]

¹⁰⁶ G Dwyer and M Taylor, [Moving from consideration to application: The uptake of principles of ecologically sustainable development in environmental decision-making in New South Wales](#), *Environmental and Planning Law Journal*, May 2013, Vol 30(3), p.203

under the Bill. If anything, this approach to statutory interpretation may be more apparent on the face of the Bill than under the EP&A Act. This is because, unlike the Act, the Bill's definition of sustainable development makes specific reference to decision-making (cl 1.3(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 also does not address the current limitation of the EP&A Act with regard to the degree to which a decision maker must *apply* sustainable development when making a decision. Sustainable development is not required to be a substantive outcome of a decision made under the proposed system.

With regard to the specifics of the Bill, six development assessment tracks are proposed:

- Complying development;
- Code assessable development;
- Merit assessable development;
- Development that requires environmental impact assessment;
- State infrastructure development; and
- Public priority infrastructure.¹⁰⁷

Of the Bill's provisions dealing with each development assessment track, only the sections relating to merit assessment provide means by which sustainable development may be taken into account.

Merit assessment is dealt with in clause 4.19. Development that is subject to merit assessment includes development that:

- is State Significant Development;
- is regionally significant development;
- requires an Environmental Impact Statement (EIS), as identified in a Local Plan;
- requires a concurrence because the development is likely to significantly affect threatened species, populations and ecological communities, and their habitats;

¹⁰⁷ These six categories are derived from the author's reading of the Bill. This is because the Bill lacks clarity on the matter: according to clause 1.13 of the Bill, there are nine categories of development. 'Code assessable development' is not included in this list. Further, category (f) – development requiring development consent under Part 4 – includes, but is not limited to, categories (b), (c) and (d). Note also that 'public priority infrastructure' is technically not a development assessment track, as assessment and approval is required prior to Ministerial declaration of infrastructure as 'public priority infrastructure'.

- requires specific approvals or authorisations under other Acts (such as approvals under the *Heritage Act 1977*) and is subject to one stop referral;
- relies on a strategic compatibility certificate; or
- is permissible but is not of a class identified for code assessment or does not meet all of the standards in a class.

Clauses 4.19(2) and 4.19(3) set out the matters that must be taken into consideration by the relevant consent authority when determining an application for development consent. Note that this is the only part of the Bill where a development assessment track contains a public interest test. Clause 4.19(2) relates to all merit assessable development other than State or regionally significant development and clause 4.19(3) relates to merit assessable State and regionally significant development. Both clauses contain the following subclauses concerning the matters a consent authority must take into consideration:

(c) the likely impacts of the development, including:

(i) any environmental impacts on the natural or built environment, and

(ii) any economic or social impacts in the locality,

(d) the public interest (in particular whether any public benefit outweighs any adverse impact of the development) (cl 4.19(3)).

No specific mention of sustainable development is made in these subclauses. Rather, like the EP&A Act, sustainable development will be taken into account as part of the public interest test. However, unlike section 79C of the EP&A Act, clauses 4.19(2)(d) and 4.19(3)(d) of the Bill qualify the public interest test by reference to 'whether any public benefit outweighs any adverse impact of the development'.

When the Minister is the consent authority under Part 4 of the Bill or the determining authority under Division 5.1 of Part 5, the Minister must consult the Minister administering the *Threatened Species Conservation Act 1995* for any recommendations on the matter (cl 6.5). Where the Minister is not the consent authority under Part 4 or the determining authority under Division 5.1 of Part 5, the relevant authority must consult with either the Minister or the Department head of the Department to which administration of the *Threatened Species Conservation Act 1995* is assigned (cl 6.6). In this case, the consent authority or determining authority must not grant development consent without concurrence from either the Minister or the Department head. In contrast to sections 79B, 112D and 112E of the EP&A Act, the Minister or Department head is not required to take sustainable development into consideration when deciding whether to grant concurrence (cl 6.6(5)).

5.3 Stakeholder comments

This overview of stakeholder views is largely, if not wholly, critical in tone and content, reflecting the nature of the views expressed in the relevant submissions.

A significant focus of the planning reforms is to speed up development assessment.¹⁰⁸ In response, Local Government NSW warns that:

... sound planning principles should not be sacrificed for the sake of expedience. Shortening average development assessment times for example, must not come at the expense of consistent, transparent and appropriate assessment.

Importantly, a robust assessment process is essential in achieving best practice sustainable development outcomes, in areas undergoing change. Requiring development standards that result in good design is critical in achieving compatible infill development when land is being up-zoned for higher density development. It is essential that the benefits of the current system are not compromised for expedience. It is considered to be counter-productive to save two weeks on a DA assessment process that results in the approval of plans for a development that has a life span of over 50 years.¹⁰⁹

Some stakeholders recommended making ESD a mandatory consideration in decision making under the Act. For example, the Better Planning Network argued that:

There must be a legal requirement in the Planning Bill to consider the cumulative impacts of development and Ecologically Sustainable Development principles as part of the development assessment process [emphasis in original].¹¹⁰

Recommendations were also made with regard to ESD and particular development assessment tracks. The Environmental Defenders' Office NSW recommended that a number of objective rules and standards for code development and content should be developed, including:

- Achieving ESD – All codes must be consistent with an overarching aim of achieving ESD and decision makers should be required to apply ESD principles (among other criteria) when making codes.¹¹¹

The Office also recommended the introduction of additional criteria for decision makers exercising merit assessment functions under clause 4.19 including:

¹⁰⁸ Of seven principles for the new development system, the fourth principle is 'encouraging predictable and speedy assessments'; NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.119

¹⁰⁹ Local Government NSW, op. cit., p.38

¹¹⁰ Better Planning Network, op. cit., p.10

¹¹¹ Environmental Defenders' Office NSW, op. cit., p.15

- the suitability of the site for the development (and appropriate alternative options);
- the cumulative impacts of past, present and likely future developments in the area;
- climate change impacts – in particular:
 - the development’s likely contributions to climate change;
 - the likely impacts of climate change on the development;
 - the need for relevant conditions to address both mitigation and adaptation.
- the public interest, specifically including relevant principles of ESD that should apply.¹¹²

Several stakeholders commented on the introduction of a qualification to the public interest test for decision-making. Clauses 4.19(2)(d) and (3)(d) of the Planning Bill read:

the public interest (in particular whether any public benefit outweighs any adverse impact of the development).

The Property Council of Australia considered that these clauses are ambiguous, when read in the broader context of the merit assessment criteria included in clauses 4.19(2) and (3). In the Council’s opinion:

The ambiguity of the proposed criteria in the draft legislation could result in unnecessary litigation, whereas the current Act’s requirements (Section 79c) are well understood.

If criteria for public interest assessment is to be developed, we recommend the criteria and underlying definitions are carefully devised and assessed in concert with industry for a balanced approach.¹¹³

The other stakeholders who commented on the amendment were more critical. According to the Law Society of NSW:

In the absence of a focus on ecologically sustainable development in the objects, this is likely to have the consequence that intergenerational equity, the precautionary principle and other environmental benefits will be outweighed by perceived public benefit in economic and social terms.¹¹⁴

The Nature Conservation Council of NSW & the Total Environment Centre did not consider it appropriate to modify the public interest criterion because:

¹¹² Ibid., p.16

¹¹³ Property Council of Australia, op. cit., p.41

¹¹⁴ The Law Society of NSW, op. cit., p.9

- a body of case law as to what constitutes the ‘public interest’ already exists,
- this provision skews the definition of ‘public interest’ in favour of harmful development, by asking the decision maker to place an emphasis on whether a claimed public benefit is sufficient to warrant adverse impacts on the environment or local community,
- it could be said that the ‘public interest’ is dynamic and that what constitutes the public interest may change over time. Any attempt to define public interest could limit its future application, and
- certain elements that have been interpreted as being part of the public interest (such as consideration of ecological sustainable development and the impacts of climate change) should be addressed substantively and specifically by the planning system in other ways.¹¹⁵

Proposed White Paper reforms include simplifying the concurrence and referral process.¹¹⁶ In response, the Nature Conservation Council of NSW & the Total Environment Centre argued that:

More fundamental to the planning system’s effectiveness is its ability to produce sustainable outcomes. Fast approvals that deliver poor quality, high risk or unsustainable development are not in the public interest.¹¹⁷

With regard to concurrences for threatened species, the Environmental Defenders’ Office NSW made several recommendations, including:

- In relation to the matters which the Department head or Minister must consider in determining whether to give a concurrence (clause 6.6(5)):
 - That the Department head or Minister must also consider:
 - the principles of *ecologically sustainable development* (as required now under s 79B of the EP&A Act), including the precautionary principle and the conservation of biodiversity and ecological integrity as a fundamental consideration;
 - *submissions received on the development application* (as required now under s 79B the EP&A Act, not only submissions received on a *species impact assessment* (clause 6.6(5)(a));
 - *species’ conservation statements* in addition to recovery plans and threat abatement plans.

¹¹⁵ Nature Conservation Council of NSW & the Total Environment Centre, op. cit., p.33

¹¹⁶ Key principle 6 for the new development assessment system; NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.120

¹¹⁷ Nature Conservation Council of NSW & the Total Environment Centre, op. cit., p.31

- These matters should apply to the 'Division' (6.2) not just the 'section' (6.6) – so that the Department head must have regard to the same matters (at a minimum) in giving their advice, when the Planning Minister *consults* with the Environment Minister under clause 6.5.¹¹⁸

¹¹⁸ Environmental Defenders' Office NSW, *Ibid.*, p.77

6. ENVIRONMENTAL IMPACT ASSESSMENT

6.1 The current planning system

Environmental Impact Assessment (EIA) is a process in the current planning system that, for some types of development, is required when making a decision as to whether or not the development may be carried out. Environmental Impact Statements (EIS) document the potential impacts of a proposed development, and must accompany applications for development consent for particular types of development. A Species Impact Statement (SIS) is required where the development is on land that is, or is a part of, critical habitat or is likely to significantly affect threatened species, populations or ecological communities, or their habitats.

Under Parts 4 and 5 of the EP&A Act, EISs and SISs must have regard to the principles of ESD. An EIS must be prepared in accordance with Schedule 2 of the [Environmental Planning and Assessment Regulation 2000](#). According to clause 7, Schedule 2 of the Regulation, an EIS must include:

- (f) the reasons justifying the carrying out of the development, activity or infrastructure in the manner proposed, having regard to biophysical, economic and social considerations, including the principles of ecologically sustainable development set out in subclause (4)

where subclause 4 sets out the ESD principles contained in the POEA Act.

An SIS required under Part 4 or 5 must comply with Section 110 of the [Threatened Species Conservation Act 1995](#), which requires:

- a description of any feasible alternatives to the action that are likely to be of lesser effect and the reasons justifying the carrying out of the action in the manner proposed, having regard to the biophysical, economic and social considerations and the principles of ecologically sustainable development (s 110(2)(h)).

6.2 Proposed planning reforms

Several sections of the Planning Bill 2013 provide for Environmental Impact Assessment (EIA) of development proposals, including preparation of Environmental Impact Statements (EIS) and/or Species Impact Statements (SIS) where appropriate. There is very little detail in the Bill regarding what must be considered when conducting EIA, these matters in general having been left for the regulations.

With regard to the following development categories, which will be assessed under Part 4 of this Bill, the preparation, contents, form and submission of the required EIS is left to the regulations:

- EIS assessed development that is not State Significant Development (cl 4.20(1); Sch 4 cl 4.6(1)(j)); and
- State Significant Development (cl 4.30(1); Sch 4 cl 4.6(1)(j)).

Note that not all State significant development will also be classified as EIS assessed development. Clause 4.30(1) and (2) provide that:

(1) An application for development consent for State significant development is (if it is also EIS assessed development) to be accompanied by an environmental impact statement prepared by or on behalf of the applicant in accordance with the regulations.

(2) In the case of State significant development that is not also EIS assessed development and that is of a class prescribed by the regulations:

(a) the Director-General may issue environmental assessment requirements for an application for development consent for that development, and

(b) the application is to be accompanied by a statement of the environmental effects of the development prepared by or on behalf of the applicant in accordance with the regulations.

Under Part 5 of the Bill, assessment of development that is neither State infrastructure development, public priority infrastructure nor subject to Part 4, and that is likely to significantly affect the environment, must be subject to an EIA. As part of the EIA, the determining authority must take into consideration an EIS that has been prepared according to the regulations (cl 5.4(1)(a)). Clause 5.4 of Schedule 5 sets out several matters to which determining authorities must have regard when conducting an EIA under Part 5 and clause 5.5 sets out provisions for what issues may be covered in the regulations. Neither of these clauses include sustainable development as a matter to be taken into consideration.

Environmental impact assessment of State Infrastructure Development must include preparation of an EIS according to the regulations (cl 5.13(2); Sch 5 cl 5.8(e)). Sustainable development is not identified as a matter that must be taken into consideration when assessing State Infrastructure Development.

Clauses 4.42 and 5.5 set out the conditions under which an SIS may be required. Unlike the EP&A Act, neither clause identifies the matters that must be addressed in the SIS.

6.3 Stakeholder comments

There was very little commentary on sustainable development and EIA. In the context of commenting on State Significant Development, the Environmental Defenders' Office NSW submission stated:

EDO NSW submits that *all* SSD should be 'impact assessed' – that is, subject to an Environmental Impact Statement (**EIS**) and mandatory consultation during assessment ... This would promote greater clarity, certainty, and consistency with existing safeguards – which require an EIS for all State Significant Development.

...

EDO NSW has consistently proposed that any framework for assessing State Significant Development (**SSD**) must operate within a clear and prescriptive legislative framework ... that seeks to achieve ecologically sustainable development. Within this framework, it may be appropriate to assess SSD proposals under additional criteria to those for 'local' development, provided that assessment remains proportionate to potential impacts [emphasis in original].¹¹⁹

The Office also made the following recommendation regarding EIA for infrastructure under Part 5:

The general duty to consider environmental impacts of relevant development should be strengthened by:

- a contextual reference stating that this duty arises 'For the purposes of attaining the objects of this Act relating to achieving ESD and the protection and enhancement of the environment...';
- a requirement to 'examine and take into account *to the fullest extent possible all matters* affecting or likely to affect the environment...';
- requiring that the '7-part test' be carried out where threatened species may be in or around the site (per clause 5.3) [emphasis in original].¹²⁰

¹¹⁹ Environmental Defenders' Office NSW, op. cit., p.59

¹²⁰ Ibid., p.18

7. CONCLUSION

Planning legislation must deal with a range of potentially conflicting objectives and land uses. Each aspect of a planning system, including legislative objects, strategic plans and development assessment processes, influences the way in which conflicts are resolved in practice. Sustainable development as first conceptualised in 1987 is a principle by which environmental protection and stewardship can be balanced with economic and social considerations. As such, it is a principle that enables planning systems to deal with conflicting objectives and land uses.

Since 1992, ecologically sustainable development has served as a uniquely Australian formulation of sustainable development in the objects clauses of a large number of Commonwealth and State statutes, including the NSW planning legislation. It includes important principles for dealing with development and land use, such as intergenerational equity, the integration of economic, social and environmental considerations, and the precautionary principle. The Exposure Planning Bill retains sustainable development as an object of the system, but in much narrower form.

While all stakeholders support the need for reform of the NSW planning system, the replacement of ecologically sustainable development with a new definition of sustainable development is contentious. Why the NSW Government has not retained ecologically sustainable development is unclear. What is clear, however, is that while some stakeholders are generally supportive of the direction taken in relevant aspects of the Bill, its objects clauses and beyond, other stakeholders are of the view that the new definition and the reduced emphasis generally on sustainable development in the draft legislation is a significant step backwards.

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.”¹²¹ 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.¹²²

Figure: The new planning system at a glance¹²³



¹²¹ NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.5

¹²² Ibid., p.5

¹²³ 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.¹²⁴

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.¹²⁵

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.

¹²⁴ Ibid., p.20

¹²⁵ 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.

APPENDIX 2: OBJECT CLAUSES IN RELEVANT NSW LEGISLATION

Coastal Protection Act 1979

The objects of the Act are set out in section 3:

The objects of this Act are to provide for the protection of the coastal environment of the State for the benefit of both present and future generations and, in particular:

(a) to protect, enhance, maintain and restore the environment of the coastal region, its associated ecosystems, ecological processes and biological diversity, and its water quality, and

(b) to encourage, promote and secure the orderly and balanced utilisation and conservation of the coastal region and its natural and man-made resources, having regard to the principles of ecologically sustainable development, and

(c) to recognise and foster the significant social and economic benefits to the State that result from a sustainable coastal environment, including:

(i) benefits to the environment, and

(ii) benefits to urban communities, fisheries, industry and recreation, and

(iii) benefits to culture and heritage, and

(iv) benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water, and

(d) to promote public pedestrian access to the coastal region and recognise the public's right to access, and

(e) to provide for the acquisition of land in the coastal region to promote the protection, enhancement, maintenance and restoration of the environment of the coastal region, and

(f) to recognise the role of the community, as a partner with government, in resolving issues relating to the protection of the coastal environment, and

(g) to ensure co-ordination of the policies and activities of the Government and public authorities relating to the coastal region and to facilitate the proper integration of their management activities, and

(h) to encourage and promote plans and strategies for adaptation in response to coastal climate change impacts, including projected sea level rise, and

(i) to promote beach amenity.

Fisheries Management Act 1994

The objects of the Act are set out in section 3:

(1) The objects of this Act are to conserve, develop and share the fishery resources of the State for the benefit of present and future generations.

(2) In particular, the objects of this Act include:

(a) to conserve fish stocks and key fish habitats, and

(b) to conserve threatened species, populations and ecological communities of fish and marine vegetation, and

(c) to promote ecologically sustainable development, including the conservation of biological diversity,

and, consistently with those objects:

(d) to promote viable commercial fishing and aquaculture industries, and

(e) to promote quality recreational fishing opportunities, and

(f) to appropriately share fisheries resources between the users of those resources, and

(g) to provide social and economic benefits for the wider community of New South Wales, and

(h) to recognise the spiritual, social and customary significance to Aboriginal persons of fisheries resources and to protect, and promote the continuation of, Aboriginal cultural fishing.

Marine Parks Act 1997

The objects of the Act are set out in section 3:

The objects of this Act are as follows:

(a) to conserve marine biological diversity and marine habitats by declaring and providing for the management of a comprehensive system of marine parks,

(b) to maintain ecological processes in marine parks,

(c) where consistent with the preceding objects:

(i) to provide for ecologically sustainable use of fish (including commercial and recreational fishing) and marine vegetation in marine parks, and

(ii) to provide opportunities for public appreciation, understanding and enjoyment of marine parks.

Mining Act 1992

The objects of the Act are set out in section 3A:

The objects of this Act are to encourage and facilitate the discovery and development of mineral resources in New South Wales, having regard to the need to encourage ecologically sustainable development, and in particular:

- (a) to recognise and foster the significant social and economic benefits to New South Wales that result from the efficient development of mineral resources, and
- (b) to provide an integrated framework for the effective regulation of authorisations for prospecting and mining operations, and
- (c) to provide a framework for compensation to landholders for loss or damage resulting from such operations, and
- (d) to ensure an appropriate return to the State from mineral resources, and
- (e) to require the payment of security to provide for the rehabilitation of mine sites, and
- (f) to ensure effective rehabilitation of disturbed land and water, and
- (g) to ensure mineral resources are identified and developed in ways that minimise impacts on the environment.

National Parks and Wildlife Act 1974

The objects of the Act are set out in section 2A:

(1) The objects of this Act are as follows:

- (a) the conservation of nature, including, but not limited to, the conservation of:
 - (i) habitat, ecosystems and ecosystem processes, and
 - (ii) biological diversity at the community, species and genetic levels, and
 - (iii) landforms of significance, including geological features and processes, and
 - (iv) landscapes and natural features of significance including wilderness and wild rivers,
- (b) the conservation of objects, places or features (including biological diversity) of cultural value within the landscape, including, but not limited to:
 - (i) places, objects and features of significance to Aboriginal

people, and

(ii) places of social value to the people of New South Wales, and

(iii) places of historic, architectural or scientific significance,

(c) fostering public appreciation, understanding and enjoyment of nature and cultural heritage and their conservation,

(d) providing for the management of land reserved under this Act in accordance with the management principles applicable for each type of reservation.

(2) The objects of this Act are to be achieved by applying the principles of ecologically sustainable development.

Native Vegetation Act 2003

The objects of the Act are set out in section 3:

The objects of this Act are:

(a) to provide for, encourage and promote the management of native vegetation on a regional basis in the social, economic and environmental interests of the State, and

(b) to prevent broadscale clearing unless it improves or maintains environmental outcomes, and

(c) to protect native vegetation of high conservation value having regard to its contribution to such matters as water quality, biodiversity, or the prevention of salinity or land degradation, and

(d) to improve the condition of existing native vegetation, particularly where it has high conservation value, and

(e) to encourage the revegetation of land, and the rehabilitation of land, with appropriate native vegetation,

in accordance with the principles of ecologically sustainable development.

Plantations and Reafforestation Act 1999

The objects of this Act are set out in section 3:

The objects of this Act are:

(a) to facilitate the reafforestation of land, and

(b) to promote and facilitate development for timber plantations on essentially cleared land, and

(c) to codify best practice environmental standards, and provide a streamlined and integrated scheme, for the establishment, management

and harvesting of timber and other forest plantations, and

(d) to make provision relating to regional transport infrastructure expenditure in connection with timber plantations,

consistently with the principles of ecologically sustainable development (as described in section 6 (2) of the *Protection of the Environment Administration Act 1991*).

Water Management Act 2000

The objects of this Act are set out in section 3:

The objects of this Act are to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations and, in particular:

- (a) to apply the principles of ecologically sustainable development, and
- (b) to protect, enhance and restore water sources, their associated ecosystems, ecological processes and biological diversity and their water quality, and
- (c) to recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of water, including:
 - (i) benefits to the environment, and
 - (ii) benefits to urban communities, agriculture, fisheries, industry and recreation, and
 - (iii) benefits to culture and heritage, and
 - (iv) benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water,
- (d) to recognise the role of the community, as a partner with government, in resolving issues relating to the management of water sources,
- (e) to provide for the orderly, efficient and equitable sharing of water from water sources,
- (f) to integrate the management of water sources with the management of other aspects of the environment, including the land, its soil, its native vegetation and its native fauna,
- (g) to encourage the sharing of responsibility for the sustainable and efficient use of water between the Government and water users,
- (h) to encourage best practice in the management and use of water.

APPENDIX 3: OBJECT CLAUSES IN PLANNING LEGISLATION

NSW: Environmental Planning and Assessment Act 1979

Section 5 of the [Environmental Planning and Assessment Act 1979](#) sets out the objects as follows:

The objects of this Act are:

(a) to encourage:

(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

(ii) the promotion and co-ordination of the orderly and economic use and development of land,

(iii) the protection, provision and co-ordination of communication and utility services,

(iv) the provision of land for public purposes,

(v) the provision and co-ordination of community services and facilities, and

(vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and

(vii) ecologically sustainable development, and

(viii) the provision and maintenance of affordable housing, and

(b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and

(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment.

ACT: Planning and Development Act 2007

Section 6 of the [Planning and Development Act 2007](#) sets out the object as follows:

The object of this Act is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT—

(a) consistent with the social, environmental and economic aspirations of the people of the ACT; and

(b) in accordance with sound financial principles.

Sustainable development is defined under section 9 of the Act:

For this Act:

sustainable development means the effective integration of social, economic and environmental considerations in decision-making processes, achievable through implementation of the following principles:

(a) the precautionary principle;

(b) the inter-generational equity principle;

(c) conservation of biological diversity and ecological integrity;

(d) appropriate valuation and pricing of environmental resources.

the inter-generational equity principle means that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

the precautionary principle means that, if there is a threat of serious or irreversible environmental damage, a lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

Northern Territory: Planning Act

The objects of the [Planning Act](#) read as follows (s2A):

(1) The objects of this Act are to plan for, and provide a framework of controls for, the orderly use and development of land.

(2) The objects are to be achieved by:

(a) strategic planning of land use and development and for the sustainable use of resources;

(b) strategic planning of transport corridors and other public infrastructure;

(c) effective controls and guidelines for the appropriate use of land, having regard to its capabilities and limitations;

(d) control of development to provide protection of the natural environment, including by sustainable use of land and water resources;

(e) minimising adverse impacts of development on existing amenity and,

wherever possible, ensuring that amenity is enhanced as a result of development;

(f) ensuring, as far as possible, that planning reflects the wishes and needs of the community through appropriate public consultation and input in both the formulation and implementation of planning schemes; and

(g) fair and open decision making and appeals processes.

Queensland: Sustainable Planning Act 2009

Section 3 of the [*Sustainable Planning Act 2009*](#) sets out the purpose of the Act as follows:

The purpose of this Act is to seek to achieve ecological sustainability by—

(a) managing the process by which development takes place, including ensuring the process is accountable, effective and efficient and delivers sustainable outcomes; and

(b) managing the effects of development on the environment, including managing the use of premises; and

(c) continuing the coordination and integration of planning at the local, regional and State levels.

Section 5 sets out provisions by which the Act's purpose is to be advanced:

(1) Advancing this Act's purpose includes—

(a) ensuring decision-making processes—

(i) are accountable, coordinated, effective and efficient; and

(ii) take account of short and long-term environmental effects of development at local, regional, State and wider levels, including, for example, the effects of development on climate change; and

(iii) apply the precautionary principle; and

(iv) seek to provide for equity between present and future generations; and

(b) ensuring the sustainable use of renewable natural resources and the prudent use of non-renewable natural resources by, for example, considering alternatives to the use of non-renewable natural resources; and

(c) avoiding, if practicable, or otherwise lessening, adverse environmental effects of development, including, for example—

- (i) climate change and urban congestion; and
- (ii) adverse effects on human health; and
- (d) considering housing choice and diversity, and economic diversity; and
- (e) supplying infrastructure in a coordinated, efficient and orderly way, including encouraging urban development in areas where adequate infrastructure exists or can be provided efficiently; and
- (f) applying standards of amenity, conservation, energy, health and safety in the built environment that are cost-effective and for the public benefit; and
- (g) providing opportunities for community involvement in decision making.

(2) For subsection (1)(a)(iii), the precautionary principle is the principle that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment if there are threats of serious or irreversible environmental damage.

(3) In this section—

natural resources includes biological, energy, extractive, land and water resources that are important to economic development because of their contribution to employment generation and wealth creation.

Ecological sustainability is defined in section 8:

Ecological sustainability is a balance that integrates—

- (a) protection of ecological processes and natural systems at local, regional, State and wider levels; and
- (b) economic development; and
- (c) maintenance of the cultural, economic, physical and social wellbeing of people and communities.

South Australia: Development Act 1993

The object of the [Development Act 1993](#) reads as follows:

The object of this Act is to provide for proper, orderly and efficient planning and development in the State and, for that purpose—

- (a) to establish objectives and principles of planning and development; and
- (b) to establish a system of strategic planning governing development;

and

(c) to provide for the creation of Development Plans—

(i) to enhance the proper conservation, use, development and management of land and buildings; and

(ii) to facilitate sustainable development and the protection of the environment; and

(iia) to encourage the management of the natural and constructed environment in an ecologically sustainable manner; and

(iii) to advance the social and economic interests and goals of the community; and

(d) to establish and enforce cost-effective technical requirements, compatible with the public interest, to which building development must conform; and

(e) to provide for appropriate public participation in the planning process and the assessment of development proposals; and

(ea) to promote or support initiatives to improve housing choice and access to affordable housing within the community; and

(f) to enhance the amenity of buildings and provide for the safety and health of people who use buildings; and

(g) to facilitate—

(i) the adoption and efficient application of national uniform building standards; and

(ii) national uniform accreditation of buildings products, construction methods, building designs, building components and building systems.

Tasmania: Land Use Planning and Approvals Act 1993

Schedule 1 of the [Land Use Planning and Approvals Act 1993](#) sets out the objectives of the Act as follows:

PART 1 - Objectives of the Resource Management and Planning System of Tasmania

1. The objectives of the resource management and planning system of Tasmania are –

(a) to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic

diversity; and

(b) to provide for the fair, orderly and sustainable use and development of air, land and water; and

(c) to encourage public involvement in resource management and planning; and

(d) to facilitate economic development in accordance with the objectives set out in paragraphs (a), (b) and (c); and

(e) to promote the sharing of responsibility for resource management and planning between the different spheres of Government, the community and industry in the State.

2. In clause 1(a), ***sustainable development*** means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while –

(a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and

(c) avoiding, remedying or mitigating any adverse effects of activities on the environment.

PART 2 - Objectives of the Planning Process Established by this Act

The objectives of the planning process established by this Act are, in support of the objectives set out in Part 1 of this Schedule –

(a) to require sound strategic planning and co-ordinated action by State and local government; and

(b) to establish a system of planning instruments to be the principal way of setting objectives, policies and controls for the use, development and protection of land; and

(c) to ensure that the effects on the environment are considered and provide for explicit consideration of social and economic effects when decisions are made about the use and development of land; and

(d) to require land use and development planning and policy to be easily integrated with environmental, social, economic, conservation and resource management policies at State, regional and municipal levels; and

(e) to provide for the consolidation of approvals for land use or development and related matters, and to co-ordinate planning approvals with related approvals; and

- (f) to secure a pleasant, efficient and safe working, living and recreational environment for all Tasmanians and visitors to Tasmania; and
- (g) to conserve those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value; and
- (h) to protect public infrastructure and other assets and enable the orderly provision and co-ordination of public utilities and other facilities for the benefit of the community; and
- (i) to provide a planning framework which fully considers land capability.

Victoria: Planning and Environment Act 1987

Section 1 of the [Planning and Environment Act 1987](#) sets out the purpose of the Act:

The purpose of this Act is to establish a framework for planning the use, development and protection of land in Victoria in the present and long-term interests of all Victorians.

The objectives of the Act are set out in section 4:

- (1) The objectives of planning in Victoria are—
 - (a) to provide for the fair, orderly, economic and sustainable use, and development of land;
 - (b) to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity;
 - (c) to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;
 - (d) to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value;
 - (e) to protect public utilities and other assets and enable the orderly provision and co-ordination of public utilities and other facilities for the benefit of the community;
 - (f) to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e);
 - (g) to balance the present and future interests of all Victorians.
- (2) The objectives of the planning framework established by this Act are—
 - (a) to ensure sound, strategic planning and co-ordinated action at State,

regional and municipal levels;

(b) to establish a system of planning schemes based on municipal districts to be the principal way of setting out objectives, policies and controls for the use, development and protection of land;

(c) to enable land use and development planning and policy to be easily integrated with environmental, social, economic, conservation and resource management policies at State, regional and municipal levels;

(d) to ensure that the effects on the environment are considered and provide for explicit consideration of social and economic effects when decisions are made about the use and development of land;

(e) to facilitate development which achieves the objectives of planning in Victoria and planning objectives set up in planning schemes;

(f) to provide for a single authority to issue permits for land use or development and related matters, and to co-ordinate the issue of permits with related approvals;

(g) to encourage the achievement of planning objectives through positive actions by responsible authorities and planning authorities;

(h) to establish a clear procedure for amending planning schemes, with appropriate public participation in decision making;

(i) to ensure that those affected by proposals for the use, development or protection of land or changes in planning policy or requirements receive appropriate notice;

(j) to provide an accessible process for just and timely review of decisions without unnecessary formality;

(k) to provide for effective enforcement procedures to achieve compliance with planning schemes, permits and agreements;

(l) to provide for compensation when land is set aside for public purposes and in other circumstances.

Western Australia: Planning and Development Act 2005

Section 3 of the [Planning and Development Act 2005](#) sets out the purposes and interpretation of the Act as follows:

(1) The purposes of this Act are to —

(a) consolidate the provisions of the Acts repealed by the *Planning and Development (Consequential and Transitional Provisions) Act 2005* (the *Metropolitan Region Town Planning Scheme Act 1959*, the *Town Planning and Development Act 1928* and the *Western Australian Planning Commission Act 1985*) in a rewritten form; and

(b) provide for an efficient and effective land use planning system in the State; and

(c) promote the sustainable use and development of land in the State.