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### **NSW planning reforms: the Green Paper and other developments**

**Briefing Paper No 07/2012**

by Daniel Montoya, Nathan Wales and Gareth Griffith

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# NSW planning reforms: the Green Paper and other developments

by

Daniel Montoya, Nathan Wales and Gareth Griffith

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## **SUMMARY**

This paper canvasses the ongoing NSW planning system reforms. Foreshadowed by the NSW Coalition prior to the 2011 election, the reforms involve wholesale change to the planning system including the development of a new Planning Act. Reviewed in the paper are divergent comments from selected stakeholders on four key areas of the proposed reforms; 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 Green Paper. The O'Farrell Government plans to release a *White Paper* and *Exposure Bill* in due course.

### **The Green Paper**

In July 2012, the NSW Government released *A New Planning System for NSW - Green Paper*. This was in response to an Independent Review of the NSW Planning System published in May 2012. The Green Paper sets out a blueprint for establishing a simple, strategic and flexible performance-based planning system. Four fundamental reforms are proposed: effective community participation in strategic planning; a shift to evidence based strategic planning in terms of planning effort; streamlined development assessment; and integration of planning for infrastructure with strategic planning of land use. Encompassing these four reforms is the proposal to introduce substantial operational and cultural changes for planning practitioners at all levels. [2.0]

### **Planning System Objectives**

It is unclear from the Green Paper how the new planning system and planning legislation will balance social, environmental and economic objectives. The Green Paper states that the achievement of sustainable development will remain the main objective of the new Planning Act. However, the Green Paper makes no reference to ecologically sustainable development (ESD), a key objective in the current *Environmental Planning and Assessment Act 1979*. Further, at other points in the Paper the emphasis appears to be on economic growth and development.

The new Planning Act is proposed to be an 'enabling' Act which establishes a broad framework for the planning system. Detailed development controls will not be included in the Act, but covered in delegated instruments, guidance and good practice advisory notes. [3.0]

### **Strategic Community Participation**

The Green Paper aims to establish community and public interest at the centre of the new planning system. Key to this is increased participation at the strategic planning stage. The NSW Government proposes to include statutory requirements for the engagement of communities early in the strategic planning process.

The corollary of this proposal is reduced community consultation at the development assessment stage. This is based on the argument that increased

community participation in strategic planning will reduce the need for community participation in development assessment. Strategic community participation will therefore serve two functions: empowering the community in the decision making process; and streamlining the development assessment process. **[4.0]**

### **Strategic Planning**

Five reforms are proposed to the strategic planning process in order to remove complexity and duplication in the planning system. The first four will establish a hierarchy of plans that establish a clear strategic context for decisions, and through which a clear line of sight can be drawn from the State level policy through to local land use controls. The four proposed plans are as follows: NSW Planning Policies; Regional Growth Plans; Subregional Delivery Plans; and Local Land Use Plans. Each plan will replace one or more plans in the current planning system.

The fifth reform will create three new zones: the Enterprise Zone; the Future Urban Release Area Zone; and the Suburban Character Zone. Each zone is intended to address a key constraint in current zone planning. **[5.0]**

### **Depoliticised Decision Making and Strategic Compliance**

Six reforms are proposed to development assessment and compliance. Two of these reforms are particularly significant: depoliticising decision making; and strategic compliance.

The Green Paper argues that, together with a new focus on strategic community participation, depoliticised decision making will restore public confidence in the planning system and merit based decision making. It therefore proposes to ensure that development approvals are based on non-biased, objective and independent decisions. To this end, it advocates the removal of a role for local councillors in development assessment decision making in favour of the establishment of independent expert panels.

The idea of strategic compliance translates the earlier focus on strategic community participation and strategic planning across to the development assessment stage. Strategic compliance is intended to address the perception that development assessment, as it currently operates, is unwieldy, slow, costly and complex. The Green Paper proposes that any development proposal which conforms to the parameters set out in a strategic plan should be allowed to proceed. Where Subregional Delivery Plans are incomplete, it is proposed that proponents with a strategy consistent development proposal will be able to access a Strategic Compliance Certificate. Once Subregional Delivery Plans are in place, three development assessment streams will operate: compliant development; partially compliant development; and non-compliant development. **[6.0]**

### **The Environmental Planning and Assessment Amendment Bill 2012**

The Environmental Planning and Assessment Amendment Bill 2012 was introduced in the Legislative Assembly on 24 October 2012 and passed without amendment on the same day. It sets out a number of amendments, including:



...

clarifying 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. While pre-emptive of the planning reform process, the amendments are in keeping with the general direction set in the Green Paper. Opinion on the amendments has been divided, particularly with regard to the proposed reform of Development Control Plans. For some, these Plans have become overly detailed and inflexible, varying from place to place and hindering development, whereas for others the detail they provide form the essential components of a planning process informed by local needs. **[7.0]**

## 1. INTRODUCTION

Planning can be defined as the formal process regulating the use of land and the development of the built environment in order to achieve strategic policy objectives. A key principle operational in Australian planning systems is that decision making processes must take into account economic, environmental and social considerations. Planning systems are multi-faceted, dealing with matters such as: strategic planning; development assessment, compliance and enforcement; and community participation. Planning systems also operate across sectoral boundaries (such as transport, the environment, housing and industry) and across administrative boundaries (local, regional and State).

The NSW planning system was established by the *Environmental Planning & Assessment Act 1979* and has undergone many reforms over the years (see the Research Service e-brief [NSW Planning Framework: History of Reforms](#)). It is widely held to have become too complex, too focussed on development assessment at the expense of strategic planning, and uncondusive 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 *Environmental Planning & Assessment Act 1979*. 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 NSW Legislative Council Standing Committee on State Development 2009 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. Increased emphasis on strategic planning is another key aspect of the proposed system.

Over 1,000 submissions were received from stakeholders in response to the Green Paper. Further consultation with stakeholders took place on 11 October 2012, when the NSW Government hosted The White Paper Workshop with the Minister for Planning and Infrastructure. A draft *White Paper* is due for release before the end of 2012. The NSW Government also plans to develop an *Exposure Bill* in discussion with planning stakeholders.

On 24 October 2012, the Government introduced the Environmental Planning and Assessment Amendment Bill 2012 that, while pre-emptive of the reform process, was nevertheless consistent with the general direction set out in the Green Paper. Proposed amendments include clarifying 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.

This briefing paper begins with an overview of the Green Paper. Chapter 2 also details the methodology by which seventeen stakeholders were selected to provide a broad cross-section of stakeholder responses to the Green Paper's proposals. This is followed by general stakeholder comments on the Green Paper. Stakeholder commentary is also provided in response to four key areas of the Green Paper. Finally, this paper considers the Environmental Planning and Assessment Amendment Bill 2012, its relationship to the Green Paper and some stakeholder responses to the proposed amendments.

## 2. THE GREEN PAPER: OVERVIEW

### 2.1 Green Paper proposals

The Green Paper, released in July 2012, is the NSW Government's initial response to the Recommendations of the [Independent Review of the NSW Planning System](#). According to the Green Paper, the existing system can no longer deal with the complexities that have increased as the system has evolved. It argues that a simpler, strategic and more flexible performance-based system is required.

The NSW Government has proposed four fundamental reforms to the planning system (see Figure 1):

- (1) **Community participation:** The major shift in the new planning system is to engage communities as an integral part of making key planning decisions that will affect the growth of their communities;
- (2) **Strategic focus of planning:** A major shift to evidence based strategic planning in terms of planning effort, community and stakeholder engagement and decision making;
- (3) **Streamlined approval:** A shift to a performance based system in which duplicative layers of assessment have been removed, decisions are fast and transparent, and code complying development is maximised; and
- (4) **Provision of infrastructure:** A genuine integration of planning for infrastructure with the strategic planning of land use so that infrastructure that supports growth is funded and delivered.<sup>1</sup>

Encompassing these four reforms is "Delivery Culture". According to the Green Paper:

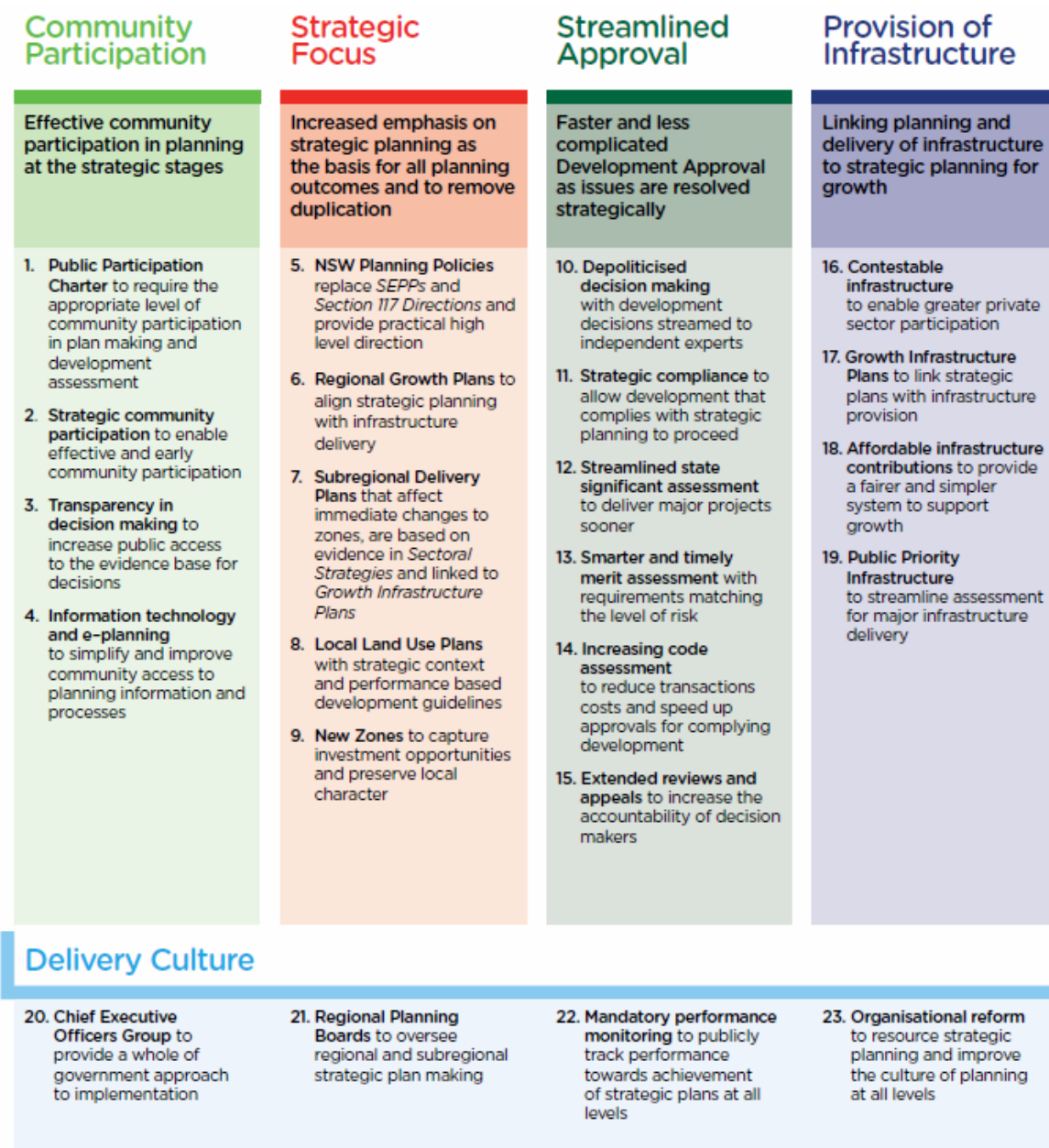
The achievement of these four fundamental reforms will necessitate substantial operational and cultural changes for planning practitioners at all levels. Therefore, an additional component of the 'blueprint for change' will be an increased focus on delivery and the creation of a more facilitative planning culture.<sup>2</sup>

The NSW Government is also proposing a new planning Act, as a broad framework for the planning system. Details such as prescriptive controls will not be included in the Act, but covered by guidance and good practice advisory notes.

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<sup>1</sup> NSW Government, [A New Planning System for NSW - Green Paper](#), July 2012, p.3

<sup>2</sup> Ibid., p.3

Figure 1: Blueprint for change<sup>3</sup>

## 2.2 Stakeholder comments

This briefing paper canvasses stakeholder responses to key changes proposed in the Green Paper (see Box 1). It does not purport to be representative of all stakeholder positions on the Green Paper. Rather, this paper sets out responses to key proposed changes from 17 submissions. These submissions were selected on 5 October 2012<sup>4</sup> using the following criteria:

<sup>3</sup> Ibid., p.4

<sup>4</sup> The Department of Planning & Infrastructure was daily adding additional submissions to the [online list](#) throughout October.

- A significant subset of the proposed changes, if not all of them, were discussed in some detail;
- The views expressed were broadly representative of a number of stakeholders; and
- A cross-section of stakeholders were represented, across different interests and perspectives.

#### BOX 1: SELECTED STAKEHOLDERS

##### Community:

- Baptist Community Services
- NSW Aboriginal Land Council
- Shelter NSW

##### Environment:

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

##### Governmental:

- Independent Commission Against Corruption

##### Heritage:

- Heritage Council of NSW
- National Trust of Australia

##### Industry:

- NSW Business Chamber
- NSW Minerals Council

##### Legal:

- The Law Society of NSW

##### Local Government:

- Local Government & Shires Associations

##### Planning:

- Planning Institute of Australia

##### Property/development:

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

##### Transport:

- Tourism & Transport Forum

Stakeholders made a number of general comments on the Green Paper, most significant of which was that more detail was required on many of the proposed changes. Other issues raised include:

- More detail was requested on how the transition from the current to new planning system would occur, along with timeframes for the introduction of key reforms;
- A number of stakeholders highlighted the significant amount of resources that would be required to effectively implement the proposed reforms;
- Several stakeholders noted that many of the recommendations made by the Independent Planning System Review were not addressed by the Green Paper;
- Tensions between aspects of the proposed planning system were identified by several stakeholders, notably between *certainty* and *flexibility*; and

- Many stakeholders supported the Government's proposal to undertake a review of building regulation in NSW.

Several stakeholders also identified key issues that were either absent from or, in their opinion, inadequately dealt with in the Green Paper. These include:

- The National Trust of Australia noted that enforcement was "discussed only twice and not in relation to enforcement of conditions on approval";<sup>5</sup>
- The Nature Conservation Council of NSW and Total Environment Centre submission observed that "the Green Paper fails to mention climate change in its vision for a new planning system and does not prescribe measures to mitigate emissions or adapt to climate change impacts";<sup>6</sup>
- The Heritage Council of NSW stated that "the Green Paper is silent on how heritage is proposed to be managed under the new planning system";<sup>7</sup>
- The NSW Aboriginal Land Council observed that "Aboriginal Land Councils and Aboriginal peoples are not recognised in the Green Paper";<sup>8</sup>
- Several stakeholders noted that the Green Paper does not include the statutory assessment criteria that decision makers must comply with in determining development applications; and
- The Green Paper is unclear as to how the proposed planning system will relate to other legislation, such as the *Environment Protection & Biodiversity Conservation Act 1999* (Cth) or *Local Government Act 1993*,<sup>9</sup> and whether or not the NSW Government is planning on introducing the other two statutes that the Independent Planning System Review recommended should accompany the new Planning Act - a *Planning Commission Act* and a *Spatial Information Act*.<sup>10</sup>

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<sup>5</sup> National Trust of Australia, [The Space Between the Notes: National Trust's Submission - A New Planning System for NSW Green Paper](#), September 2012, p.25

<sup>6</sup> Nature Conservation Council of NSW and the Total Environment Centre, [Planning for a Sustainable Future](#), Submission on the Green Paper - A New Planning System for NSW, September 2012, p.20

<sup>7</sup> Heritage Council of NSW, [Heritage Council of NSW - Submission to the Green Paper - A New Planning System for NSW](#), 14 September 2012, p.13

<sup>8</sup> NSW Aboriginal Land Council, [Submission to NSW Government Green Paper: A new planning system for NSW](#), September 2012, p.5. Note that a range of other stakeholders groups were also not mentioned in the Green Paper, for example people with disabilities - Baptist Community Services, [A New Planning System for New South Wales - Green Paper Submission by Baptist Community Services](#), 13 September 2012

<sup>9</sup> The Law Society of New South Wales, [A New Planning System for NSW - Green Paper: Submission](#), 14 September 2012

<sup>10</sup> Environmental Defender's Office NSW, [Submission on A New Planning System for NSW - Green Paper](#), September 2012

The following chapters focus on four key areas of the Green Paper:

- (1) Planning system objectives;
- (2) Strategic community participation;
- (3) Strategic planning; and
- (4) Depoliticised decision making and strategic compliance.

The selection of these areas was influenced in part by the stakeholder responses to the Green Paper. Together, the four areas relate to different aspects of the shift in focus to strategic planning. Key issues not addressed include extended reviews and appeals, the provision of infrastructure and proposed reforms to planning delivery culture.



### 3. PLANNING SYSTEM OBJECTIVES

#### 3.1 Green Paper proposals

It is unclear from the Green Paper how the new planning system and planning legislation will balance social, environmental and economic objectives. At some points, the emphasis appears to be on economic growth. For example, the Green Paper states that:

The new planning system will support the achievement of the NSW Government's priority to drive economic growth. It will facilitate NSW being the number one choice for business investment, enable the sustainable growth of our cities and towns as great places to live, support high quality developments and ensure that planning outcomes reflect the community's expectations.<sup>11</sup>

With regards to the objectives of the new planning Act, the Green Paper states:

The objectives of the Act will emphasise in particular the role of planning in facilitating and managing growth and economic development.<sup>12</sup>

However, page 17 of the Green Paper states that:

The achievement of sustainable development will remain the main objective of the Act.<sup>13</sup>

It is worth noting that the Green Paper does not make reference to Ecologically Sustainable Development (ESD). ESD, as defined in the [Protection of the Environment Administration Act 1991](#), is an object of the [Environmental Planning & Assessment Act 1979](#) (EP&A Act). The Independent Panel recommended the adoption of an overarching objective for the new Planning Act focusing on achieving 'triple bottom line' outcomes.<sup>14</sup> For the Independent Panel, sustainable development is a principle to which strategic planning, local land-use planning and development assessment processes should have regard.<sup>15</sup> It therefore recommended that sustainable development be defined in the Act, based on the current definition of ESD.

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<sup>11</sup> NSW Government, [A New Planning System for NSW - Green Paper](#), July 2012, p.17

<sup>12</sup> Ibid., p.3

<sup>13</sup> Ibid., p.17

<sup>14</sup> Recommendation 6: 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.* T Moore & R Dyer, [The Way Ahead for Planning in NSW: Recommendations of the NSW Planning System Review](#), Vol 1 - Major Issues, May 2012, p.14

<sup>15</sup> T Moore & R Dyer, [The Way Ahead for Planning in NSW: Recommendations of the NSW Planning System Review](#), Vol 2 - Other Issues, June 2012

The overarching purpose of the new planning system for NSW is to:

- Promote economic development and competitiveness;
- Connect people and places;
- Protect the environment;
- Improve people's quality of life;
- Resolve land use trade-offs based on social, economic and environmental factors; and
- Effectively manage growth and change.<sup>16</sup>

The objectives of the broader planning system, designed to inform the objectives of the new Act, are listed in the Green Paper as follows:

- Simple—reduce complexity and remove red tape;
- Certain—provide predictability and certainty about how decisions are made for both investors and the community;
- Transparent—base decisions on strong community participation and evidence;
- Efficient—achieve time frames for completion of planning processes through increased accountability for efficient decision making;
- Effective—planning strategies facilitate investment and manage change;
- Integrated—promote greater cooperation and partnerships between all levels of government, and balance environmental protection with economic growth; and
- Responsive—provide flexibility to respond to change and ensure markets are competitive.<sup>17</sup>

The way in which regulatory controls will be incorporated within the new planning system is not clarified in the Green Paper, which refers more generically to the need for guidance and good practice. With regards to the proposed Planning Act, the Green Paper states the following:

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.<sup>18</sup>

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<sup>16</sup> NSW Government, [A New Planning System for NSW - Green Paper](#), July 2012, p.17

<sup>17</sup> Ibid., p.17

<sup>18</sup> Ibid., p.3

### 3.2 Stakeholder comments

The Green Paper's proposed objectives for the NSW planning system encapsulate the NSW Government's vision for planning. These proposed objectives are informed by the Government's aim of reducing complexity in the system, expressed most clearly in its preference for an 'enabling' rather than prescriptive Act.

While all stakeholders supported reform of the current regulatory framework, different opinions were expressed with regard to the proposal for an 'enabling' Act that left detailed land use planning and development assessment policies to delegated instruments and/or practice notes and guidelines. Urban Taskforce Australia argued for a "focused piece of legislation ... [that] does not include issues that are not "core planning" matters."<sup>19</sup> In contrast, the Law Society of NSW stated that:

Key elements of the statutory scheme, in the Committee's view, should be contained in the Act itself and not be left to be made by regulation or notes and guidelines.<sup>20</sup>

Comments about the proposed objectives most often concerned the relative weight given to economic, environmental and social objectives. On one side, several stakeholders were concerned with the Green Paper's relative emphasis on economic growth and development. For example, the Nature Conservation Council of NSW and Total Environment Centre submission stated that:

In our view, the Green Paper proposes a planning system heavily focused on facilitating development and economic growth, with limited safeguards for the environment and local communities. We are genuinely concerned that while the development sector has achieved improved specific rights in the Green Paper, the environment and community rights are left largely to generalities.<sup>21</sup>

Some stakeholders explicitly supported the focus on economic growth and development. Urban Taskforce Australia stated that the Green Paper supports its argument for a "presumption for growth" in the planning system. It recommended that the:

... new Planning Act and planning system must focus on core planning concerns and promote development to meet the needs of growth and economic prosperity of New South Wales.<sup>22</sup>

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<sup>19</sup> Urban Taskforce Australia, [Delivering a better planning system for NSW Green Paper](#), Submission to the NSW Government on the NSW Planning System Review - Green Paper, 14 September 2012, p.10

<sup>20</sup> The Law Society of New South Wales, [A New Planning System for NSW - Green Paper: Submission](#), 14 September 2012, p.2. This submission was put together by the Law Society's Environmental Planning and Development Committee.

<sup>21</sup> Nature Conservation Council of NSW and the Total Environment Centre, [Planning for a Sustainable Future](#), Submission on the Green Paper - A New Planning System for NSW, September 2012, p.4

<sup>22</sup> Urban Taskforce Australia, [Delivering a better planning system for NSW Green Paper](#),

Concern was expressed in some submissions about the absence of the term ESD in the Green Paper. The Nature Conservation Council of NSW and Total Environment Centre submitted:

It is a real concern that the Government has not presented a clear commitment to *ecologically sustainable development* (ESD) in the Green Paper, particularly as it is recognised by various industry stakeholders in NSW as being a necessary component of a new planning system in NSW.<sup>23</sup>

Some submissions argued that a particular object of the proposed Act should have priority over others. The Local Government & Shires Associations (LGSA) proposed one overarching object amongst a limited number, as follows:

The objects of the Act should be kept minimal and high level, along the lines of the current objects of the Act with ESD as the overarching objective. The greater the number of objectives, the more likely is the tendency or necessity to give weightings to different objectives. Secondary objectives and more specific outcomes should flow out of a limited number of high level objectives, and the existing objects of the Act provide a good basis for these high order objectives.<sup>24</sup>

On the other hand, at least one submission argued for all "objects" to have equal weight. The NSW Minerals Council argued that:

The objects of the Act should continue to carry equal weight. Elevating one object over all others removes the ability to balance all competing benefits and impacts of a plan or project and make the best decision for NSW.<sup>25</sup>

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Submission to the NSW Government on the NSW Planning System Review - Green Paper, 14 September 2012, p.20

<sup>23</sup> Nature Conservation Council of NSW and the Total Environment Centre, [Planning for a Sustainable Future](#), Submission on the Green Paper - A New Planning System for NSW, September 2012, p.12

<sup>24</sup> Local Government & Shires Associations of NSW, [Submission to NSW Planning System Review - Green Paper](#), September 2010, p.14

<sup>25</sup> NSW Minerals Council, [A New Planning System for NSW - Green Paper, NSW Minerals Council Submission](#), September 2012, p.9

## 4. STRATEGIC COMMUNITY PARTICIPATION

### 4.1 Green Paper proposals

The Green Paper proposes placing "community and public interest at the centre of the new planning system".<sup>26</sup> It also aims to "restore community confidence and integrity in the planning system by making planning information accessible and planning decisions transparent".<sup>27</sup> Four changes are proposed: the introduction of a public participation charter; strategic community participation; transparency in decision making; and information technology and e-planning. Strategic community participation - increased participation in the strategic planning stage of the planning system - is a key aspect of the proposed reforms. This change is accompanied by proposed changes to community participation in the development assessment stage of the planning system.

Currently, one of the objects of the EP&A Act is to provide increased opportunity for public involvement and participation in environmental planning and assessment. Despite this, at present the Act does not contain an explicit statutory requirement for community consultation in strategic planning. For example, there is no formalised process for community participation for the making of SEPPs.

Under the Green Paper, the NSW Government therefore proposes to provide statutory requirements for the engagement of communities early in the strategic planning process (see Figure 2). Particular emphasis is placed on community participation at the subregional planning stage:

Under the new planning system, there will be genuine engagement with the whole community in the development of *Subregional Delivery Plans*. This will involve communities participating in the strategic planning for an area along with Local Government, NSW Government agencies and stakeholders. A strong evidence base for decisions will be prepared and made available to all and the trade-offs explained clearly. Planning objectives and scenarios for local growth and change will be tested publicly.<sup>28</sup>

The Green Paper makes the argument that increased community participation at the strategic planning stage will reduce the need for community participation at the development assessment stage:

The current approach often sees key issues being revisited by the community at various subsequent development assessment stages. This is generally a counter-productive exercise, avoidable under a framework that has a much stronger focus on community participation at the strategic planning stage.<sup>29</sup>

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<sup>26</sup> NSW Government, [A New Planning System for NSW - Green Paper](#), July 2012, p.19

<sup>27</sup> Ibid., p.19

<sup>28</sup> Ibid., p.22

<sup>29</sup> Ibid., p.22

Figure 2: Community engagement in the strategic planning process<sup>30</sup>

<b>Community</b>	<p><i>A Public Participation Charter will be an integral part of the planning system</i></p> <p>Community participation will be key and legislatively provided for in the making of <i>NSW Planning Policies, Regional Growth Plans, Subregional Delivery Plans and Local Land Use Plans</i></p> <p>Community representatives will be invited on Regional Planning Boards</p> <p>Community participation will occur for State Significant Development, Merit Assessed Development, Priority Infrastructure Projects and merit-related issues and design matters for Code Assessment Development</p> <p>Through 'e-Planning', the community will have access to zonings and other key development controls via 'Google style' viewer</p> <p>The community will have electronic access to planning system requirements, public tracking of decision process and public reporting of timeframes</p> <p>All members of the public will have electronic access to annual planning performance reports related to the planning and delivery of the number of dwellings and jobs, the area of environmental land protected and the delivery of major growth infrastructure</p> <p>Appeal rights to the Land and Environment Court will be maintained</p>
<b>Local Government</b>	<p>Local government will be key participants by legislation in the making of <i>Regional Growth Plans and Subregional Delivery Plans</i></p> <p>Local government be key participants on Regional Planning Boards</p> <p>Local government will be responsible for making <i>Local Land Use Plans</i></p> <p>Local government will participate in the assessment of State Significant Development and Priority Infrastructure Projects</p> <p>Local government will be the consent authority for Merit Assessed Development and merit-related issues and design matters for Code Assessment Development</p>
<b>Environmental Groups</b>	<p>Environmental groups will be consulted by law in the making of <i>NSW Planning Policies, Regional Growth Plans, Subregional Delivery Plans and Local Land Use Plans</i></p> <p>Environmental groups will participate in the assessment of State Significant Development, Merit Assessed Development, Public Priority Infrastructure and merit related issues and design matters for Code Assessment Development</p> <p>Representatives will be invited to participate on Regional Planning Boards</p>
<b>Stakeholders &amp; Industry</b>	<p>Stakeholders and industry will be consulted in the making of <i>NSW Planning Policies, Regional Growth Plans, Subregional Delivery Plans and Local Land Use Plans</i></p> <p>Key stakeholders (e.g. Catchment Management Authorities) and industry will sit on Regional Planning Boards to guide the development of growth plans</p> <p>Stakeholder engagement will be provided for in legislation</p>

According to the Green Paper, "development assessment in NSW is too complex, too lengthy, too process-driven, too detailed and too adversarial".<sup>31</sup> The proposed reduction in community participation at the development assessment stage is one of several reforms by which the Green Paper sets out to address this issue. The argument is expanded under proposed Change 11 - Strategic compliance:

<sup>30</sup> Ibid., p.8

<sup>31</sup> Ibid., p.45

At present, there are many layers in the development process. This process is unwieldy, extremely slow and costly and often does not lead to better outcomes. The many layers of assessment and determination are very confusing for the community and provide very little certainty for applicants.

However, if there is a strong focus on strategic planning which clearly sets the parameters for development in an area, involves genuine community participation and is endorsed by State and local government, then a more streamlined approval system could be put in place for development which is consistent with that strategic plan. Therefore, if a strategic plan has been endorsed for an area and has involved meaningful consultation with the community then any development proposal which conforms to the parameters set out in the strategic plan should be allowed to proceed. By making clear to the community that development that is consistent with an endorsed strategy is likely to proceed will further encourage community participation at the strategic planning phase.<sup>32</sup>

Under proposed Change 11, the Green Paper reiterates the point with specific reference to Subregional Delivery Plans:

*Subregional Delivery Plans* will be developed for an area with meaningful community consultation. Once the Plan is endorsed then it should be clear that any development proposal that conforms to the standards and requirements set out in the plan will go ahead. Making it clear to the community that a development proposal that is consistent with the plan will go ahead encourages better community participation in the strategic planning phase—when the *Subregional Delivery Plan* is being developed.<sup>33</sup>

## 4.2 Stakeholder comments

There was broad stakeholder support for the Green Paper's objective of placing community participation at the centre of the new planning system. Proposed Change 2 - strategic community participation - concerns effectively engaging communities early at the strategic planning stage. However, concern was also expressed about the opportunities for community participation at the subsequent development assessment stage.

Several stakeholders noted that significant effort and resources would be required to achieve strategic community participation. In the case of the LGSA, despite supporting the proposed change, it nevertheless questioned the feasibility of adopting such an approach, stating that:

... the Associations have concerns over the practical implementation of this engagement.

From extensive experience, Local Government knows that it is extremely difficult to involve the general community in the early stages of strategic

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<sup>32</sup> Ibid., p.51

<sup>33</sup> Ibid., p.52

planning. People have trouble envisaging and comprehending the abstract concepts and distant outcomes ...

... Getting 'up front' agreement from communities on these strategic planning decisions will require a whole new level of public engagement that has not been done at the state or regional before in NSW. Innovative approaches and huge resources will be needed to make this work.<sup>34</sup>

Divergent views were expressed on the place of community participation in the development assessment process. On the one hand, several stakeholders supported shifting community participation primarily to the strategic planning stage and limiting the community's involvement in the development assessment stage in order to streamline development assessment. Three arguments were advanced in favour of the proposal. First, the importance of delivering Statewide public policy objectives and catering for population growth was stressed. For example, the Property Council of Australia stated that:

The emphasis on community participation at the strategic planning phase is a valued strength of the proposed new system. It is important however that the Charter also establishes the purpose of engagement. This includes understanding the role the planning system plays in delivering on broader public policy objectives ... It also needs to be clear that the social, environmental and economic consequence of choices made in spatial planning extends beyond local or parochial concerns.<sup>35</sup>

Second, the Urban Development Institute of Australia contended that providing for community participation at the individual development assessment stage would act as a disincentive to community participation at the strategic planning stage:

Community consultation upfront in strategic planning is essential if the new planning system is to be more inclusive and transparent, and if it is to provide more certainty of long-term outcomes. If local communities retain a say on individual development assessment, there is a risk they will be reluctant to actively engage in setting the standards and envelopes for what is acceptable and complying development across local areas in strategic plan creation. Community confidence in the success of strategic plans in determining appropriate outcomes is important, particularly as it relates to development the strategic plan may permit immediately adjacent to a person's property.<sup>36</sup>

Third, the Tourism & Transport Forum argued that this proposal would increase certainty for investors:

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<sup>34</sup> Local Government & Shires Associations of NSW, [Submission to NSW Planning System Review - Green Paper](#), September 2010, p.17

<sup>35</sup> Property Council of Australia, [Making it Work: How to translate good ideas into best practice](#), September 2012, p.18

<sup>36</sup> Urban Development Institute of Australia, [Making it Happen, UDIA NSW response to the Planning Green Paper](#), September 2012, p.16



TTF supports greater guidance for community participation in the planning system. As noted in the Green Paper, the multiple opportunities to revisit planning issues create uncertainty for long-term investment decisions.<sup>37</sup>

Several arguments were advanced against the proposed reduction in community participation at the development assessment stage. The proposition that increasing community involvement at the strategic planning stage would mitigate the need for community participation at later development assessment stages was questioned. The LGSA stated:

People engage in the planning process in different ways and at different stages. It is somewhat naïve to assume that expecting communities to agree in advance on building types, height and densities will resolve all planning issues or be able to predict the future development scenarios. At this stage, we therefore question whether the approach proposed in the *Green Paper* may be too radical a conceptual change to achieve 'buy-in' from community members and also to bring along the many stakeholders.<sup>38</sup>

Several stakeholders argued that community participation in the development assessment process should be ongoing, particularly where community interests are directly affected. The NSW Aboriginal Land Council submitted:

Proposals to remove a number of community rights in relation to developments, including proposals that seek to substitute community engagement at the 'strategic' or sub-regional levels at the expense of community involvement at the development assessment stages are not supported. Such proposals fail to recognise the need for sustained community consultation throughout the life of a project, particularly where the impacts of that project are large.<sup>39</sup>

Stakeholders also contended that the community will interpret any removal of community participation at the development assessment stage as disempowerment. For example, the Law Society of NSW said of the proposal that:

The difficulty with such an approach is that community members will perceive the lack of opportunity to participate in later stages as disenfranchisement, in favour of non-community members (developers).<sup>40</sup>

The Nature Conservation Council of NSW and Total Environment Centre argued that not only would some of the Green Paper's proposed changes disempower the community, but that this was being done at the same time as

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<sup>37</sup> Tourism & Transport Forum, [A New Planning System - Green Paper, TTF Submission](#), September 2012, p.6

<sup>38</sup> Local Government & Shires Associations of NSW, [Submission to NSW Planning System Review - Green Paper](#), September 2010, p.20

<sup>39</sup> NSW Aboriginal Land Council, [Submission to NSW Government Green Paper: A new planning system for NSW](#), September 2012, p.7

<sup>40</sup> The Law Society of New South Wales, [A New Planning System for NSW - Green Paper: Submission](#), 14 September 2012, p.5

proposing increased rights for development proponents:

... we do not support the notion that community engagement at the strategic planning stage is a substitute for community engagement at the development assessment stage. Communities are more likely to be engaged in the planning process once clear details about proposed development [are made available]. The community can also add an additional level of scrutiny at this step of the process, ensuring that important matters that failed to emerge at the strategic planning phase are addressed.

The Green Paper confirms that community participation will occur for State Significant Development, Merit Assessed Development, Priority Infrastructure Projects and merit-related issues and design matters for Code Assessment. However, there is concern that, in practice, community engagement at the development assessment stage will be curtailed by proposals in the Green Paper to:

- expand code complying development, which has the potential to exclude a greater number of developments from the scrutiny of community participation and third party appeal rights
- increase rights for proponents without reciprocal rights for the community (for example proposals relating to rezoning applications, strategic compliance certificates).

Further, the Government has given no commitment to remove the restrictions to merits appeal rights for state significant development. State significant development is likely to have the most significant impact on the environment and communities and should require the greatest level of scrutiny, including genuine and meaningful public participation that includes merit appeal rights.<sup>41</sup>

A number of stakeholders endorsed public consultation in the planning system on the ground that it would facilitate greater transparency. As stated by the National Trust of Australia:

Public consultation is an invaluable, independent mechanism to monitor compliance with strategic objectives. In the absence of third party merit-based appeals to the Land and Environment Court, public consultation remains vital.<sup>42</sup>

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<sup>41</sup> Nature Conservation Council of NSW and the Total Environment Centre, [Planning for a Sustainable Future](#), Submission on the Green Paper - A New Planning System for NSW, September 2012, p.33

<sup>42</sup> National Trust of Australia, [The Space Between the Notes: National Trust's Submission - A New Planning System for NSW Green Paper](#), September 2012, p.26

## 5. STRATEGIC PLANNING

### 5.1 Green Paper proposals

The strategic planning reforms proposed in the Green Paper are designed to be the cornerstone of all future planning decisions in NSW. Under this new planning system, the NSW Government is seeking a clear strategic context for decisions, and a clear line of sight through the hierarchy of plans from the State level policy through to local land use controls. As stated in the Green Paper:

Strategic planning at all levels will be evidence based, prepared collaboratively with local councils with strong community participation and completely integrated with infrastructure provision. Strategic Plans will be approved by the whole of government removing the need for subsequent concurrences.<sup>43</sup>

Five changes to strategic planning are described the Green Paper, the first four of which establish a hierarchy of plans (see Figure 3):

- NSW Planning Policies will replace SEPPs and Section 117 Directions and provide practical high level direction;
- Regional Growth Plans will align strategic planning with infrastructure delivery;
- Subregional Delivery Plans will effect immediate changes to zones based on evidence based *Sectoral Strategies*, and will be linked to *Growth Infrastructure Plans*;
- Local Land Use Plans will replace Local Environmental Plans and Development Control Plans; and
- New Zones will be created to capture investment opportunities and preserve local character.<sup>44</sup>

Together, these five changes are intended to remove complexity and duplication in the planning system. Integration between plans will be achieved in part by including a set of common elements in each plan, such as:

- Upfront community participation;
- A strong evidence base;
- Incorporation of all government agency requirements, hence switching off concurrence or referrals at the zoning or development application stage; and

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<sup>43</sup> NSW Government, [A New Planning System for NSW - Green Paper](#), July 2012, p.25

<sup>44</sup> Ibid., p.4

- Opportunities for streamlined decision making at development stages, including exempt/complying development and strategically complying development.<sup>45</sup>

**Figure 3: Proposed structure of strategic planning in NSW<sup>46</sup>**

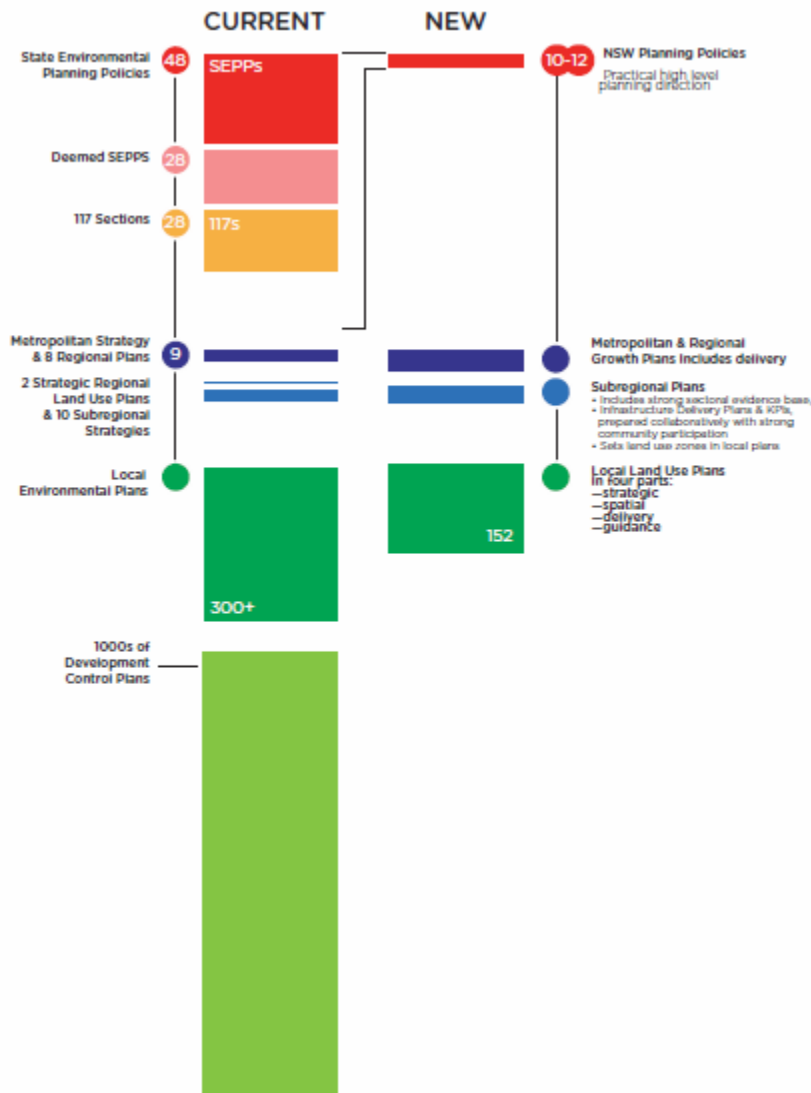


The proposed hierarchy of strategic plans will replace a raft of current planning instruments, as illustrated in Figure 4.

<sup>45</sup> Ibid., p.27

<sup>46</sup> Ibid., p.26

**Figure 4: Current and proposed planning hierarchy in NSW<sup>47</sup>**



**NSW Planning Policies:** State environmental planning instruments, including *State Environmental Planning Policies* (SEPPs) and *Local Environmental Plans* (LEPs), currently regulate land use and development in NSW. In addition, Section 117 Directions, issued by the Minister for Planning, ensure that relevant planning authorities such as local councils follow guidelines specified by the Minister when preparing planning proposals for new LEPs. There are currently 48 SEPPs, 28 deemed SEPPs, and 28 s117 Directions. SEPPs deal with land use and development issues that may be very broad in scope, or that apply to more specific locations. For example, while SEPP No. 91 is specifically concerned with planning controls that will enable the Western Sydney Parklands Trust to develop the Western Parklands into multi-use urban parkland, SEPP No. 128 is concerned with rural land development across NSW.

<sup>47</sup> Ibid., p.44

The Independent Panel Review of the NSW Planning System identified the need to change the way that State level planning controls are established and administered. The three main proposed changes to NSW planning policy under the Green Paper are as follows:

- A shift from statutory to non-statutory planning instruments;
- A significant reduction in the number of planning policies; and
- Development control provisions, currently part of individual SEPPs, will be incorporated into Local Land Use Plans.

It is proposed that approximately 10–12 State level planning policies will be updated and approved by Cabinet. These policies, which will be identified in the Act, will provide a statement of policy principle for how planning will be delivered. They will be given effect through the development of a hierarchy of plans, and be developed in consultation with the community and stakeholders. Ten potential topics for the NSW Planning Policies are suggested:

- Housing supply and affordability;
- Employment;
- Biodiversity conservation;
- Agricultural resources;
- Mining and petroleum extraction;
- Coastal management;
- Retail development;
- Tourism;
- Regional development; and
- Infrastructure.

**Regional Growth Planning:** The Green Paper proposes to reform regional planning in order to better align strategic planning with infrastructure delivery. Regional and metropolitan strategic planning in NSW currently takes place under three main strategies: the Sydney Metropolitan Strategy, which is currently being reviewed; Regional Strategies, which are currently prepared for eight of 14 regions across NSW; and Draft Strategic Regional Land Use Plans, which are currently prepared for the Upper Hunter and New England—North West.

The Regional Growth Plans will be referred to in the new Act, but will not be statutory instruments. The most significant proposed changes to regional

planning in NSW include:

- Increased community and stakeholder engagement;
- Improving the evidence base associated with regional level strategic planning;
- Stronger alignment of regional strategic planning with infrastructure funding and delivery;
- Policy objectives, priorities and 10 year growth targets for subregions to guide the future preparation of Subregional Delivery Plans; and
- A consideration of cumulative impacts in setting the parameters for growth.

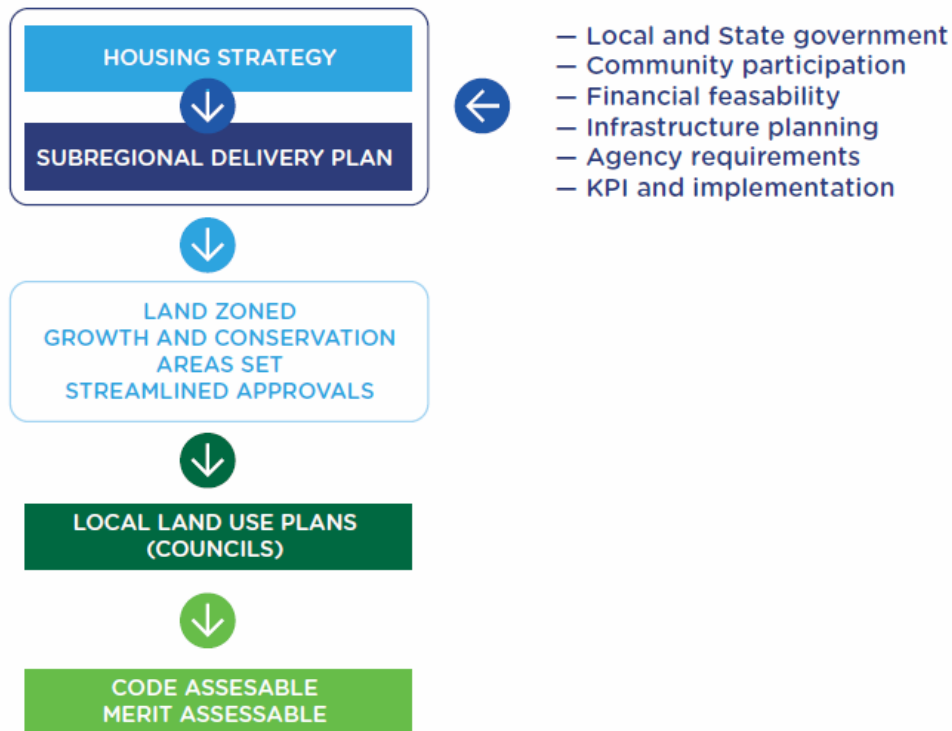
**Subregional Delivery Plans:** Subregional planning in NSW has been identified in the Green Paper as an issue because, it is said, at present statutory planning controls at the local level do not always reflect regional level strategic planning. It is argued that this results in complexity for practitioners of the system and inconsistent planning outcomes.

The most notable proposed change to subregional planning is the introduction of Subregional Delivery Plans. At this stage, Subregional Delivery Plans are proposed for areas within Metropolitan Sydney and growth centres within the Hunter and Illawarra. The Green Paper states that additional subregions will also be identified in areas of change. These Plans are intended to function as a transformative delivery tool for high growth areas in NSW by:

- Directly rezoning land;
- Providing a framework for code based assessment;
- Determining the distribution of the targets defined in Regional Growth Plans (e.g. housing affordability);
- Consolidating NSW Government agency development requirements; and
- Linking subregional planning to infrastructure planning and delivery.

Proposed subregional delivery planning, as it relates to housing delivery for example, is illustrated in Figure 5.

Regional Planning Boards will oversee the development of the Subregional Delivery Plans. The boards will comprise an independent chair, key stakeholders with relevant experience, the General Manager or Director of Planning of each of the Local Government Areas within the subregion, and senior representatives of NSW Government Departments, including Planning and Infrastructure, Transport, DTIRIS, Office of Environment and Heritage, and Infrastructure NSW.

Figure 5: Housing delivery under the new planning system<sup>48</sup>

The Green Paper aims to support development of the Subregional Delivery Plans with a strong evidence base and links to detailed infrastructure planning. Sectoral Strategies will be developed for each subregional driver of growth, such as major employment generating uses and land release and housing precincts in urban areas. Developed on a strong evidence base, they will become components of the Subregional Delivery Plans. Growth Infrastructure Plans (proposed Change 17) are intended to be another component of the Subregional Delivery Plans. Each Growth Infrastructure Plan will "provide a single, evidence based capital program facilitating private sector contestability and improving certainty and accountability for infrastructure delivery".<sup>49</sup>

In addition, the Green Paper suggests allowing councils located in the same subregion to 'trade' allocated growth requirements as a way of assisting councils to meet their growth targets:

Some councils may be eager to accommodate more growth and thereby share in the benefits that this can bring. Alternatively other communities may wish their council to plan for a smaller share of housing supply and employment opportunities, in turn accepting a smaller share of new infrastructure investment from the State Government, and the prospect of lower economic growth in their areas.<sup>50</sup>

<sup>48</sup> Ibid., p.37

<sup>49</sup> Ibid., p.69

<sup>50</sup> Ibid., p.36



**Local Land Use Plans:** The Green Paper proposes replacing existing Local Environmental Plans (LEPs) and Development Control Plans (DCPs) with Local Land Use Plans. Existing Local Environmental Plans are environmental planning instruments made by the Minister under Division 4 of Part 3 of the EP&A Act.

According to the Green Paper, LEPs are rigid statutory instruments with development controls that often lack strategic context. Their lack of flexibility and responsiveness to change, and the lack of consideration of unintended financial impacts of decisions, has meant that in many cases they have inhibited the achievement of good planning outcomes, and have been unable to accommodate innovation to the detriment of local communities (see Figure 6).

**Figure 6: Proposed changes to Local Environmental Plans<sup>51</sup>**



Local Land Use Plans will be structured in four parts:

- A strategic section;
- A statutory spatial land use plan;
- A section on delivery of infrastructure and services; and
- A section providing development guidelines and performance monitoring requirements (see Figure 7).

<sup>51</sup> Ibid., p.39

Figure 7: Proposed structure of Local Land Use Plans<sup>52</sup>

PART A Strategic	PART B Spatial Land Use Plan	PART C Infrastructure and Services	PART D Development Guidelines and Performance Monitoring
<p>This part will provide:</p> <ul style="list-style-type: none"> <li>a clear, simple, plain English explanation of the strategic framework that the plan is trying to implement. It will reflect: <ul style="list-style-type: none"> <li><i>NSW Planning Policies</i> <ul style="list-style-type: none"> <li>—regional (including metropolitan) and subregional planning outcomes</li> <li>—Local council strategic direction</li> <li>—Community expectations</li> <li>—concise statements on the desired planning and development outcomes to be achieved across the local government area</li> </ul> </li> </ul> </li> </ul> <p>This part will draw on the existing <i>Community Strategic Plans</i> prepared by councils</p>	<p>This part will provide:</p> <ul style="list-style-type: none"> <li>Standardised zoning based on a reformed more flexible standard instrument</li> <li>Local land use allocation to reflect strategic planning</li> </ul>	<p>This part will provide:</p> <ul style="list-style-type: none"> <li>An outline of infrastructure (local, regional and State) to be provided to support development including timing and delivery mechanism</li> <li>This part will be closely linked to the local infrastructure funding plan</li> </ul>	<p>This part will provide:</p> <ul style="list-style-type: none"> <li>All necessary guidelines/performance measures for development. Development guidelines/performance measures will inform and provide context to assist in the assessment of development proposals</li> <li>Provisions for code assessable development</li> <li>Key performance indicators and monitoring requirements to assess the Plan's performance in achieving the planning and development outcomes articulated in Part A</li> </ul>

**Zone Planning:** Zone planning was identified in the Green Paper as a constraint to development in NSW. Three key constraints were identified. First, the current approach to zone planning can, according to the Green Paper, inhibit innovation and investment. The process for changing land uses through a Local Environmental Plan is time consuming, difficult to navigate and inefficient. In addition, existing local planning controls are inflexible.

Second, the current practice for future urban release area planning requires that, for the first stage of the development, zone boundaries be identified at the initial rezoning process. Many release areas develop over extended periods of time and decisions in relation to the location of local centres, and higher density areas, can change in response to market preferences. This usually requires a statutory zone boundary adjustment or spot rezoning.

The third constraint relates to the impact of new developments on the existing local character of a suburban area. According to the Green Paper, the current zoning framework includes a low density residential zone that legally provides for development opportunities which community members believe negatively impact on the character of an area.

<sup>52</sup> Ibid., p.41

Three new zones have been proposed. The Enterprise Zone will be:

... characterised by very little, if any, development controls providing they do not result in any significant adverse environmental impacts. *Enterprise Zones* will generally be targeted to attract employment generating development but could provide opportunities for mixed use housing investment. In this regard, *Enterprise Zones* will constitute a more flexible zone.<sup>53</sup>

The Future Urban Release Area Zone will:

... provide greater flexibility for a Council to identify an area as a future urban release area.

It is proposed to introduce a *Future Urban Release Area Zone* for growth areas that have been identified by the Council. This will provide a clear indication of a Council's intention to provide housing in designated Greenfield locations over time, but does not necessarily require immediate infrastructure coordination and delivery.<sup>54</sup>

The Suburban Character Zone will apply:

... to an area that will explicitly preclude development that adversely impacts on the local character.

... if there is clear evidence in support for the character of an area to be preserved, Council will have the capacity to apply a zone that will ensure the preservation of the character of that area by excluding medium or high density development.<sup>55</sup>

## 5.2 Stakeholder comments

The establishment of strategic planning as the cornerstone of the new planning system was supported in principle by all stakeholders. Most stakeholders were of the opinion that the proposed strategic planning framework is a significant improvement on the current system.<sup>56</sup> Nonetheless, several concerns were raised.

**Statutory versus non-statutory planning:** The Law Society of NSW contended that it is difficult to foresee how the proposed framework will

... work in practice where most of the policies and plans will not be given statutory force.<sup>57</sup>

With regard to the NSW Planning Policies, some stakeholders pointed out that

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<sup>53</sup> Ibid., p.43

<sup>54</sup> Ibid., p.43

<sup>55</sup> Ibid., p.43

<sup>56</sup> See for example: NSW Business Chamber, [Submission](#), 11 September 2012

<sup>57</sup> The Law Society of New South Wales, [A New Planning System for NSW - Green Paper: Submission](#), 14 September 2012, p.7

potential difficulties may arise if the Planning Policies are non-statutory. One concern was that non-statutory Planning Policies would reduce the status of provisions in SEPPs relating to issues such as:

- Environmental protections (Nature Conservation Council of NSW and Total Environment Centre);
- Heritage protections (Heritage Council of NSW); and
- Mining protections (NSW Minerals Council).

Several stakeholders argued that non-statutory Planning Policies would undermine certainty in the planning system. According to the LGSA:

In keeping with the overall objective of providing certainty and confidence in the planning system, there is a need to be clear about the certainty, longevity and legal status of the state policies. While we recognise that these policies will “*not be statutory planning instruments in themselves*” (*Green Paper*, p 32) the Associations strongly advocate that they must be given sufficient legal recognition (through the new Act and through reference in strategic regional, sub regional and local plans) that will create confidence that they will not be subject to potential change on a whim of some future Minister or Government. The *Green Paper* seems to provide for a degree of flexibility that could fail to provide this confidence.<sup>58</sup>

Both the Law Society of NSW and the NSW Minerals Council noted that such uncertainty may increase the prevalence of litigation in the new system.

It was also argued that the NSW Planning Policies need to be statutory instruments in order to maintain community confidence in the planning system. The ICAC observed that non-statutory Planning Policies may:

... create confusion about the applicability of the provisions [transferred from the SEPPs to the Planning Policies]. Lack of certainty is a key cause of inconsistent decision-making which undermines public confidence in the planning system.<sup>59</sup>

**Prioritising objectives:** The strategic planning framework will have to prioritise competing social, economic and environmental objectives, as well as balancing a variety of different land uses. At this stage, it is unclear how this will be addressed. Key to the resolution of this matter is the way in which competing objectives and land uses are addressed in the NSW Planning Policies. Quoted in the Green Paper is the International Review of Best Practice finding that ‘Best Practice for Consolidating State Policies is to combine policies into one document as much as possible and reduce its size’.<sup>60</sup> Following this, the

<sup>58</sup> Local Government & Shires Associations of NSW, [Submission to NSW Planning System Review - Green Paper](#), September 2010, p.21

<sup>59</sup> Independent Commission Against Corruption, [Submission to the NSW Planning System Team Re: A New Planning System for NSW \(Green Paper\)](#), September 2012, p.1

<sup>60</sup> NSW Government, [A New Planning System for NSW - Green Paper](#), July 2012, p.30

Planning Institute of Australia recommended the creation of a single NSW Planning Policy in order to address the question of prioritising issues:

PIA recommends the preparation of a single NSW Planning Policy. The Green Paper's proposal of some 10 - 15 (sic) separate policies would require them to be read in conjunction to obtain a holistic understanding of the planning vision for NSW. It also requires consideration of other plans that have been prepared for other purposes (e.g. NSW 2021, proposed State Infrastructure Plan, and draft Transport Master Plan). The Green Paper pre-supposes that each of its proposed NSW Planning Policies will be prepared consistently and collectively to deliver a co-ordinated approach to setting the planning agenda for NSW. PIA submits that this is more likely to lead to a continuation of the current uncertain, fragmented and uncoordinated approach to State level planning.<sup>61</sup>

It further argued that:

A requirement for all relevant planning policies to be incorporated into a single planning document will introduce a discipline to coordinate and prioritise often competing policy areas 'up front' rather than leaving those conflicts to be dealt with in 'down stream' decision making by agencies on individual projects.<sup>62</sup>

Notwithstanding the importance of the overarching NSW Planning Policies in the strategic planning framework, the issue of resolving competing objectives and land uses comes into sharpest focus at the Subregional Delivery Plan level, the point at which strategic planning connects to what happens on the ground. The Green Paper envisages evidence-based Sectoral Strategies playing a key role in determining how the Subregional Delivery Plans deal with each subregional driver of growth. The Property Council of Australia warned that, due to the interplay between proposed elements of the Subregional Delivery Plans:

The outcome is that there is the potential for major disconnect between what the Government seeks, the community seeks and what the market can support.

The Green Paper does not address how this conflict will be resolved.<sup>63</sup>

In part, the issue turns on the choice of topics that will be addressed by the Sectoral Strategies. However, at this stage it is unclear what topics Sectoral Strategies will address and whether or not this will vary by subregion. The only concrete example given in the Green Paper was the proposed adoption of [Strategic Regional Land Use Plans](#) (SRLUPs) as Sectoral Strategies. The NSW Minerals Council noted several issues with this approach:

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<sup>61</sup> Planning Institute of Australia, [A New Planning System for NSW Green Paper - Principal submission prepared by the NSW Division of the Planning Institute of Australia](#), September 2012, p.10

<sup>62</sup> Ibid., p.11

<sup>63</sup> Property Council of Australia, [Making it Work: How to translate good ideas into best practice](#), September 2012, p.29

A very lengthy and detailed consultation process has been undertaken to develop the criteria for the identification of Strategic Agricultural Land and the Gateway process which will be set out in the SRLUPs. It is not clear how the status of a sectoral strategy will give these elements of the SRLUPs the weight that is required. It is currently proposed to formalise the Gateway process through the SEPP.

There are other elements of the SRLUP, such as the Upper Hunter Strategic Assessment of Biodiversity, and its proposed outcome, the Upper Hunter Biodiversity Plan that need to be accorded a status in the planning system that will allow the benefits of a strategic approach to be realised at the development application stage. The sectoral strategy approach does not appear to provide the status that the Biodiversity Plan would require.<sup>64</sup>

**Complexity:** The LGSA argued that the proposed planning system may in fact turn out to be more complicated than the current system:

With all the new plans and strategies proposed (such as regional growth plans growth infrastructure plans, and sectoral strategies) ... there is a concern that there may be too many. There is the potential to create more confusion and to introduce new complexity in the system, which is contradictory to the overall aim to develop a simpler and more efficient system.<sup>65</sup>

The Nature Conservation Council and Total Environment Centre submission specifically questioned the need for Subregional Delivery Plans:

The proposal to introduce both subregional delivery plans and maintain a simplified local land use plan appears, from our initial reading of the Green Paper, to be adding further complexity [to] the system.<sup>66</sup>

**Tensions:** Several stakeholders identified potential inherent conflicts in the proposed system, one of which is the tension between a top-down strategic planning system and empowering the community. The Green Paper proposed establishing the strategic planning framework on the basis of a "clear line of sight through the hierarchy of plans".<sup>67</sup> Most stakeholders expressly supported this objective. Several also stressed the importance of NSW Government leadership in achieving this objective. For example, the Property Council of Australia stated that:

The new system also builds in some mechanisms to help achieve the goal of maintaining a consistency of policy outcomes.

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<sup>64</sup> NSW Minerals Council, [A New Planning System for NSW - Green Paper, NSW Minerals Council Submission](#), September 2012, p.16

<sup>65</sup> Local Government & Shires Associations of NSW, [Submission to NSW Planning System Review - Green Paper](#), September 2010, p.20.

<sup>66</sup> Nature Conservation Council of NSW and the Total Environment Centre, [Planning for a Sustainable Future](#), Submission on the Green Paper - A New Planning System for NSW, September 2012, p.36.

<sup>67</sup> NSW Government, [A New Planning System for NSW - Green Paper](#), July 2012, p.5

Past practice however illustrates the difficulty of achieving such objectives – and reinforces the case for more authority to sustain discipline across the system.<sup>68</sup>

In contrast, the LGSA drew attention to the possible tension between having a hierarchy of plans and the objective of empowering communities:

... while the *Green Paper* proposes a top-down approach supported by a hierarchy of cascading plans, it also talks of empowering communities to have a say about what they would like to see in their local and regional areas. A huge challenge and one on which the system hinges is public engagement. The Associations question how the paper proposes to include the community's input when the plans are being driven from the top down.<sup>69</sup>

Another potential inherent conflict in the Green Paper is the tension between *certainty* and *flexibility*. Some stakeholders identified a few examples of this tension in relation to: the suggestion that councils within the same subregion may be allowed to 'trade' allocated growth requirements; a proposed shift to flexible development guidelines in the Local Land Use Plans; and the proposed introduction of two new flexible zones.

The most controversial aspect of the Subregional Delivery Plans appeared to be the suggestion that councils within the same subregion may be allowed to 'trade' allocated growth requirements. Several stakeholders expressed concern regarding this suggestion. The ICAC stated that:

... the suggestion that councils within a subregion could be permitted to trade their allocated growth requirements between them undermines the evidentiary basis and credibility of strategic plans. This is because such trade-offs may be non-compliant with strategic plans.<sup>70</sup>

The NSW Minerals Council warned that:

Concepts such as the allowing of local councils to trade their allocated growth requirements will not be feasible in regions where growth depends on the development of fixed resources.<sup>71</sup>

The Property Council of Australia, after noting that some councils "fail to contribute to future growth or deliberately stifle development",<sup>72</sup> recommended that the Government:

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<sup>68</sup> Property Council of Australia, [Making it Work: How to translate good ideas into best practice](#), September 2012, p.12

<sup>69</sup> Local Government & Shires Associations of NSW, [Submission to NSW Planning System Review - Green Paper](#), September 2010, p.9.

<sup>70</sup> Independent Commission Against Corruption, [Submission to the NSW Planning System Team Re: A New Planning System for NSW \(Green Paper\)](#), September 2012, p.1

<sup>71</sup> NSW Minerals Council, [A New Planning System for NSW - Green Paper, NSW Minerals Council Submission](#), September 2012, p.14

<sup>72</sup> Property Council of Australia, [Making it Work: How to translate good ideas into best practice](#), September 2012, p.29

Give primacy to the requirement for market feasibility in plan making over the option for councils to 'trade growth'.<sup>73</sup>

In contrast, the Planning Institute of Australia expressed cautious support:

While unfettered trading of targets is considered inappropriate, limited trading of targets, for example up to 10%, could be used to provide flexibility in local delivery of subregional targets, subject to any local shortfall being 'made up' over the timeframe of the target. However, infrastructure requirements of low growth areas should not be overlooked.<sup>74</sup>

The Green Paper contrasts the inflexibility of current Local Environmental Plans and Development Control Plans with the flexibility of the proposed Local Land Use Plan development guidelines. Several arguments for flexible development guidelines were advanced in the submissions. The NSW Business Chamber contended that:

The proposal to provide greater flexibility within Local Land Use Plans will greatly assist in terms of ensuring that the priorities identified within the Metropolitan Strategy and Regional Growth Plans can be delivered at the local level.<sup>75</sup>

Several stakeholders also made the case for the creation of development guidelines that encourage design flexibility. The Property Council of Australia recommended that:

... guidelines should facilitate outcomes desirable to the market, not dictate solutions that preclude choice and flexibility.<sup>76</sup>

In keeping with the recommendation of the Independent Review Panel, the Environmental Defender's Office NSW also supported additional flexibility in development controls. However, it went on to identify several issues with the focus on flexibility. It argued that the Green Paper did not make a case for the public benefits of flexible development guidelines:

Given the potential significance of the shift, the Green Paper does not clearly articulate the argument – in terms of public benefits – for the proposed shift to flexible standards across all development controls. ICAC has noted the 'increasing tendency towards departures from the stated requirements', and stated that 'wide discretion to approve projects... creates a corruption risk and community perception of lack of appropriate boundaries'.<sup>77</sup>

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<sup>73</sup> Ibid., p.29

<sup>74</sup> Planning Institute of Australia, [A New Planning System for NSW Green Paper - Principal submission prepared by the NSW Division of the Planning Institute of Australia](#), September 2012, p.13

<sup>75</sup> NSW Business Chamber, [Submission](#), 11 September 2012, p.3

<sup>76</sup> Property Council of Australia, [Making it Work: How to translate good ideas into best practice](#), September 2012, p.38

<sup>77</sup> Environmental Defender's Office NSW, [Submission on A New Planning System for NSW - Green Paper](#), September 2012, p.26



The Environmental Defender's Office NSW also stated:

A further criticism of adopting flexible development standards is that this prioritises developer rights and interests over those of the community (by way of a 'second bite of the cherry' after strategic planning). On one hand, proponents could literally 'push the envelope' by seeking merit assessment if their development exceeds local standards. On the other hand, communities are to accept that, 'having done that strategic planning, it will be a case of full steam ahead', with less opportunity to shape individual projects in their neighbourhood.

There is therefore significant potential for the implementation of flexible standards at the local level to undermine the strategic goals for an area, as identified through a comprehensive and inclusive strategic planning process.

These proposals seem inconsistent with State Plan objectives to promote 'Certainty for communities and investors' and 'Return planning powers to local communities'.<sup>78</sup>

Several stakeholders supported the proposed Enterprise Zones and Future Urban Release Area Zones. According to the NSW Business Chamber:

The introduction of the new enterprise, future urban release and suburban (sic) character zones will help to give both greater flexibility and greater predictability in terms of growth plans for an area. The White Paper will however need to provide more detail in terms of the processes and threshold tests to be applied in circumstances where a planning authority might determine an area of "suburban (sic) character" as such a classification will significantly restrict development options in that area and may land lock appropriate growth options.<sup>79</sup>

The ICAC did not oppose the proposed provision of Enterprise Zones and Future Urban Release Area Zones, noting that policy objectives such as the encouragement of innovation, investment and precinct diversity are the prerogative of government. However, it also warned that the proposed increase in flexibility these zones would bring to the planning system:

... will create a corruption risk, especially when combined with the potential for proponents to obtain huge windfall profits through obtaining an approval. For this reason, where a zone emphasises market based processes, flexibility, innovation and limited development control mechanisms, it is important to have strong decision-making and governance processes in place. These processes should include requirements for evidence based justifications for land uses, defined design quality standards, including those related to density and scale, and oversight mechanisms. This will help ensure that conflicts about permitted uses and design principles are resolved in an objective and robust manner.<sup>80</sup>

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<sup>78</sup> Ibid., p.26

<sup>79</sup> NSW Business Chamber, [Submission](#), 11 September 2012, p.3

<sup>80</sup> Independent Commission Against Corruption, [Submission to the NSW Planning System Team Re: A New Planning System for NSW \(Green Paper\)](#), September 2012, p.2

The LGSA emphasised the apparent discrepancy such a proposal would have with stated principles of the new planning system:

It is difficult to see how such a zone is consistent with the evidence based, consultative strategic planning approach and greater certainty proposed throughout the *Green Paper*. Without further detail, the Associations question how potentially significant environmental implications would be managed in the Enterprise Zones.<sup>81</sup>

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<sup>81</sup> Local Government & Shires Associations of NSW, [Submission to NSW Planning System Review - Green Paper](#), September 2010, p.25

## 6. DEPOLITICISED DECISION MAKING AND STRATEGIC COMPLIANCE

### 6.1 Green Paper proposals

The proposed streamlining of approvals is designed to reduce complexity and speed up the process of development assessment, consistent with strategic planning. As stated in the Green Paper:

Development that is consistent with the strategic plan will be able to proceed in a timely and straightforward manner, and other development will be assessed on its merits against strategic outcomes. Code complying development will be maximised and where more detailed assessment is needed, the level of assessment will match the level of impact.

Six changes associated with this area of reform are proposed:

- (1) Depoliticised decision making;
- (2) Strategic compliance;
- (3) Streamlined State significant assessment;
- (4) Smarter and timely merit assessment;
- (5) Increasing code assessment; and
- (6) Extended reviews and appeals.

Two of these reforms are particularly significant: proposed Change 10 - depoliticising decision making; and proposed Change 11 - strategic compliance. Together with a new focus on strategic community participation, the Green Paper argues that depoliticised decision making will "restore public confidence in the planning system and merit based decision making".<sup>82</sup> The idea of strategic compliance translates the earlier focus on strategic community participation and strategic planning across to the development assessment stage.

**Depoliticised decision making:** The Green Paper proposes to depoliticise decision making by ensuring that development approvals are based on non-biased, objective and independent decisions. The argument for depoliticised decision making, as a key aspect of streamlining development approvals, is summarised in the Green Paper as follows:

The NSW Government strongly supports a fundamental shift in the planning system that will see decision making on development applications streamed to appropriate, independent, and expert decision makers. State and regional scale development will continue to be assessed by the Planning Assessment

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<sup>82</sup> NSW Government, [A New Planning System for NSW - Green Paper](#), July 2012, p.51

Commission and the Joint Regional Planning Panels. The Government is proposing that all councils follow the lead of a number of major councils in adopting the use of independent experts to determine development applications.<sup>83</sup>

The Green Paper advocates the removal of a role for local councillors in development assessment decision making in favour of the establishment of independent expert panels:

To restore public confidence in the planning system and merit based decision making, the Government considers a shift towards independent expert decision making as highly desirable. The Government strongly supports those councils which are already using independent expert panels and encourages all other councils to consider and implement this reform, initiated by local government, in the transition to [a] new planning system for NSW.

The move towards independent expert panels for development decision making reflects a change in community attitudes about how decisions on development should be made and the role of elected councillors.<sup>84</sup>

A decision making hierarchy for development assessment is proposed by the NSW Government as shown in Figure 8.

**Figure 8: Decision making hierarchy**<sup>85</sup>

DEVELOPMENT TYPE	DECISION MAKER
<b>State Significant Infrastructure</b> <i>including Public Priority Infrastructure</i>	<i>Minister for Planning and Infrastructure</i>
<b>State Significant</b>	<i>Planning Assessment Commission/Department of Planning and Infrastructure</i>
<b>Regional</b>	<i>Joint Regional Planning Panel</i>
<b>Local</b>	<i>Council General Manager and Staff Under Delegation/ Local Expert Panel</i>
<b>Code Assessable</b>	<i>Council/Accredited Certifier</i>

<sup>83</sup> Ibid., p.48

<sup>84</sup> Ibid., p.49

<sup>85</sup> Ibid., p.50

One of the main components of the decision making hierarchy is the role of Joint Regional Planning Panels (JRPP) in decision making for projects of regional significance. The role of the JRPP is supported by the Independent Panel Review of the NSW Planning System. The Review also supported the continued need for an independent expert body, such as the Planning Assessment Commission, in decision making for projects of State significance. The Panel:

... endorsed the continuation of the Minister for Planning and Infrastructure's role in determining major infrastructure proposals while reaffirming the continued need for an independent expert body like the Planning Assessment Commission (PAC) to decide proposals of State significance. The *Independent Review* recommended that the PAC become a quasi-judicial body in the new planning system.<sup>86</sup>

The proposed role of the PAC and JRPPs in decision making on matters of State significance is stated in the Green Paper as follows:

The NSW Government's main objective is to strengthen the PAC and Joint Regional Planning Panels to equip them to carry out their enhanced roles effectively and transparently. This includes strengthening their procedures and codes of practice, how they engage with the community, performance monitoring and how they receive feedback, particularly from stakeholders through user groups.

In the light of operational experience the PAC's role to make decisions on State significant proposals on behalf of the Minister for Planning and Infrastructure will be more focussed. As a decision maker the PAC will evaluate the evidence based merit assessment carried out by the Department of Planning and Infrastructure, particularly in response to the issues raised in submissions and the proponent's responses to those issues, rather than reassessing a proposal itself.<sup>87</sup>

**Strategic compliance:** The main concern with development assessment as it operates currently in NSW, as stated in the Green Paper, is that it is unwieldy, slow and costly, and often does not lead to better outcomes. In addition, the many layers of assessment and determination are confusing for the community and provide little certainty for applicants. The Green Paper advocates the need for a more streamlined approval system to be put in place, which involves genuine community participation and endorsement by State and local governments:

... if a strategic plan has been endorsed for an area and has involved meaningful consultation with the community then any development proposal which conforms to the parameters set out in the strategic plan should be allowed to proceed. By making clear to the community that development that

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<sup>86</sup> Ibid., p.50

<sup>87</sup> Ibid., p.50

is consistent with an endorsed strategy is likely to proceed will further encourage community participation at the strategic planning phase.<sup>88</sup>

The process of streamlining the development assessment system will involve removal of some components of development applications:

Once a whole of government strategy has been endorsed then referral and concurrence at the zoning or development application stage will be removed.<sup>89</sup>

Two stages to the reform of the development assessment process in NSW are proposed. The first relates to the issue of compliance before Subregional Delivery Plans are complete. Changes to the Subregional Delivery Planning process, and associated Local Land Use Plans, are expected to speed up the implementation of metropolitan and regional strategies. However, a period between the finalisation of these strategies and completion of subregional delivery planning remains. In this period the provisions of local land use plans may not reflect metropolitan and regional strategic directions and may even actively work to prevent the delivery of those strategic outcomes. As stated in the Green Paper:

The consideration of development proposals that deliver on the metropolitan or regional strategies should not have to wait until the *Subregional Delivery Plans* have been done. In this period the focus must also be on delivering on the ground outcomes of that strategic plan. Where local land use plans do not reflect metropolitan and regional strategic planning outcomes following a strategic planning process with community participation, applications should be assessed primarily against those strategies, rather than out of date controls in the existing local land use plan.<sup>90</sup>

The Green Paper proposes to allow for Strategic Compatibility Certificates to address this issue:

A proponent with a strategy consistent development proposal that will deliver metropolitan or regional strategic planning outcomes before the subregional planning process is complete will be able to seek a *Strategic Compatibility Certificate* from the Director General of the Department of Planning and Infrastructure. That certificate will authorise the assessment and consideration of a strategy consistent development proposal where the provisions of the local land use plan prevent the implementation of the strategy.

If dissatisfied with the Director General's decision a proponent or council will also be able to seek a review of the Director General's decision from the relevant Joint Regional Planning Panel.

If a certificate is issued by the Director General or the Joint Regional Planning Panel the proponent can lodge an application for the development proposal

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<sup>88</sup> Ibid., p.51

<sup>89</sup> Ibid., p.51

<sup>90</sup> Ibid., p.52

with the appropriate consent authority and it will be determined by the usual decision maker after the consideration of community views.<sup>91</sup>

The second stage of the proposed reforms relates to the streamlining of development assessments once Subregional Delivery Plans are in place. Three development assessment streams are proposed: compliant development; partially compliant development; and non-compliant development (see Figure 9).

### Figure 9: Proposed process for compliant, partially compliant and non-compliant development<sup>92</sup>

Process when development is compliant:



Process when development is partially compliant:

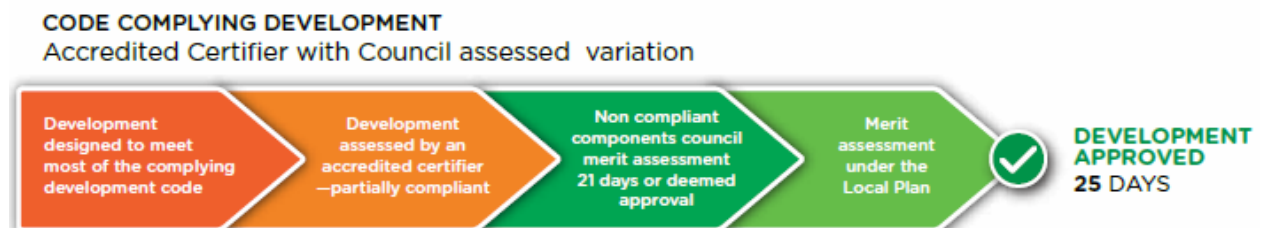
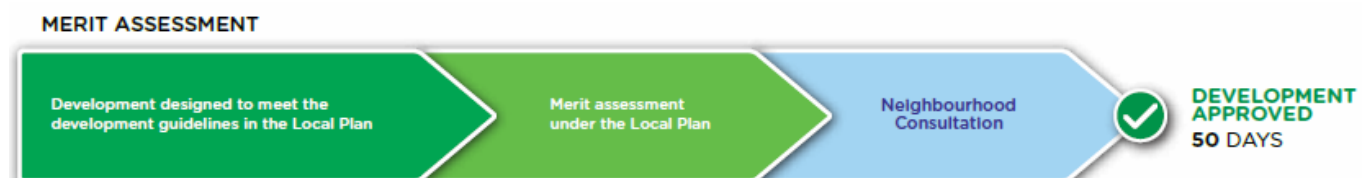


FIGURE 16 PROCESS WHEN DEVELOPMENT IS PARTIALLY COMPLIANT

Process when development is non-compliant:



In the case of compliant development, endorsement of Subregional Delivery Plans would allow any development proposal that conforms to the standards and requirements set out in the plan to go ahead. The assessment of these proposals will be streamlined through a code assessment:

<sup>91</sup> Ibid., p.52

<sup>92</sup> Ibid., p.62

There will be two types of code assessment in the new planning system. The first is code assessment where the consent authority, generally the council, will make the decision. The second is where an accredited certifier, whether private or council employed, decides.

Consent authority code assessment will be carried out by the council, or other consent authority, like the Joint Regional Planning Panel. The development proposal which may be a residential flat building, office building or shopping centre, would be assessed against the zones, standards and requirements of the *Subregional Delivery Plan*, such as building envelopes and car parking. If the proposal meets the standards and requirements in the Plan, it must be approved within prescribed time frames.<sup>93</sup>

Partially compliant development will be subject to combined merit assessment (proposed Change 13) and code assessment (proposed Change 14) against strategic objectives (see Figure 9). This would apply to a development proposal where it is not deemed possible to provide for all necessary standards and requirements in the Subregional Delivery Plan. Under these circumstances:

- The code assessment will be against all the predetermined standards and requirements in the Plan;
- The proposal cannot be refused if it meets the standards and requirements in the Plan;
- Merit assessment will be strictly limited to those areas where there are no predetermined standards and requirements in the Plan;
- Flexibility will allow standards and requirements to be tailored to local circumstances;
- Some of the standards and requirements may be varied where over time market conditions may change and the envelopes and land uses set out in a Subregional Delivery Plan may no longer provide for desired development outcomes; and
- It may not always be possible to develop the necessary standards and requirements for consent authority code assessment when the Subregional Delivery Plan is developed.

It is proposed that non-compliant development will be subject to a merit assessment basis. The Green Paper states:

The consent authority's merit assessment will be strictly limited to those areas where there are no predetermined standards and requirements in the Plan. The merit assessment will not be an opportunity to re-open discussion on the standards and requirements set by the previous strategic planning exercise. This will be a flexible regime that allows standards and requirements to be

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<sup>93</sup> Ibid., p.52



tailored to local circumstances through strategic planning. It will not be a one size fits all approach.

Over time market conditions may change and the envelopes and land uses set out in a *Subregional Delivery Plan* may no longer provide for desired development outcomes. In that case a proponent may come forward with a proposal that seeks to vary some of the standards and requirements set out in the Plan. If so, the consent authority's merit assessment will extend over those areas where the proponent seeks to vary the standards as well as those areas where standards have not been developed.<sup>94</sup>

## 6.2 Stakeholder comments

**Depoliticising decision making:** While all stakeholders supported development of a *transparent* decision making process, opinion was divided on whether or not the process needed to be *depoliticised* by removing a role for local councillors. Several stakeholders fully supported the depoliticisation of decision making. For example, the Urban Taskforce Australia said:

... we would expect that the determination of any development application will be carried out by professional planning staff, not elected councillors. In the end, professional planning staff and/or an independent panel of experts should be free to determine development proposals without political interference.<sup>95</sup>

Other stakeholders raised several potential issues. The Planning Institute of Australia identified that:

... there are issues concerning transparency, accountability, probity and public confidence that must be adequately addressed as part of that shift in decision making power. In order to counter the risk that the community will feel disenfranchised by the removal of elected representatives from the development approval process, the new Planning Act (or preferably the accompanying Regulations) must prescribe the conduct of, meeting procedures for and appointment to expert panels.<sup>96</sup>

The ICAC made several observations with regard to the issues of transparency and probity, stating that:

The Commission recognises that decisions about whether the state government or local councils should determine development applications are a matter of government policy and has previously observed that there is no reason to suppose that a minister or state-level planning official is any more or less susceptible to corrupt approaches than a local-level councillor or professional planning officer. The Commission's key concern is the adequacy

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<sup>94</sup> Ibid., p.55

<sup>95</sup> Urban Taskforce Australia, [Delivering a better planning system for NSW Green Paper](#), Submission to the NSW Government on the NSW Planning System Review - Green Paper, 14 September 2012, p.28

<sup>96</sup> Planning Institute of Australia, [A New Planning System for NSW Green Paper - Principal submission prepared by the NSW Division of the Planning Institute of Australia](#), September 2012, p.21

of the in-built anti-corruption safeguards in decision-making processes. In the interests of efficiency, adopted safeguards should be commensurate with the level of corruption risk involved in a decision.

... The Commission also favours the involvement of expert planning panels in determining high corruption risk proposals as this helps ensure that decision-makers have the requisite knowledge and skills base. The involvement of multiple decision-makers also makes influence by a proponent difficult. In the Commission's experience, quality group decision-making is an effective anti-corruption safeguard that limits the ability of a proponent or partial public official to influence decisions. The quality of group decision-making is influenced by factors such as access to relevant and rigorous information independent of that provided by the proponent, the knowledge, skills and independence of decision-makers, and clear sets of criteria.<sup>97</sup>

The Nature Conservation Council of NSW and Total Environment Centre further emphasised the importance of establishing objective, transparent development assessment criteria:

While the Green Paper proposes depoliticised decision making as a way of restoring the communities' confidence in the planning system we say that more important to restoring the communities' confidence in the planning system is a clear and objective decision making framework.<sup>98</sup>

Shelter NSW and the LGSA both argued that a removal of local councillors from the decision making process reduced accountability in the system. As articulated by the LGSA:

While there may be an argument for keeping decisions 'at arms length from politics', creating a system in which *all* decisions are made by delegation at officer level (i.e. by bureaucrats/technical officers) shifts responsibility for these decisions to those who are one or two steps further removed from those in councils who are ultimately accountable back to their communities.<sup>99</sup>

According to Shelter NSW, the "seductive appeal" of the argument for removing local councillors from the decision making process is:

... based on an assessment that there is something wrong with 'politics' and politicians, especially local councillors. The alternative, 'evidence-based' assessment of what is best for economic growth is presented, on the other hand, as common sense.<sup>100</sup>

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<sup>97</sup> Independent Commission Against Corruption, [Submission to the NSW Planning System Team Re: A New Planning System for NSW \(Green Paper\)](#), September 2012, p.2

<sup>98</sup> Nature Conservation Council of NSW and the Total Environment Centre, [Planning for a Sustainable Future](#), Submission on the Green Paper - A New Planning System for NSW, September 2012, p.38

<sup>99</sup> Local Government & Shires Associations of NSW, [Submission to NSW Planning System Review - Green Paper](#), September 2010, p.27

<sup>100</sup> Shelter NSW, [Shelter NSW Submission: A new planning system for New South Wales](#), 11 September 2012, p.6

**Strategic compliance:** The Green Paper's development assessment proposals have been made with a view to streamlining and speeding up the assessment process. Each proposal is predicated on compliance with, or assessment against, the strategic planning framework. Five development assessment proposals, and the arguments for and against, are reviewed below: Strategic Compliance Certificates; removal of concurrences; expansion of code assessable development and non-refusal of code compliant development; a development assessment stream for partially compliant development; and a merit assessment stream for non-compliant development.

**Strategic Compliance Certificates:** A number of stakeholders strongly supported the idea of Strategic Compliance Certificates. According to the NSW Business Chamber, these Certificates will address the following problem with the current system:

A common frustration with the current planning system has been that development that is consistent with priorities under a strategic plan has often been subjected to the same level of scrutiny and assessment as development that is inconsistent with a strategic plan.<sup>101</sup>

Several stakeholders supported this proposal as an important interim step in the roll-out of the new strategic planning framework. According to the Planning Institute of Australia:

This is an important interim step to ensure that the planning system does not get bogged down in the intervening period between the making of subregional delivery plans and local land use plans.<sup>102</sup>

The Property Council of Australia and Urban Taskforce Australia contended that the Strategic Compliance Certificates should not only be an interim step, but remain available once Subregional Delivery Plans and Local Land Use Plans are in place. As explained by the Property Council of Australia:

The Green Paper appears to indicate that the strategic compatibility certificate will only be able to be obtained prior to subregional delivery plans being completed. This is grounded on the premise that once in place, subregional delivery plans will have established the key areas for growth, established the new zoning and code assessable framework, making them essentially redundant.

As identified earlier in this submission, it is likely that subregional plans may not always achieve such outcomes on initial approval. Therefore strategic compatibility statements should be capable of being sought at any time - reflecting that the subregional delivery plans are themselves an evolving document.

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<sup>101</sup> NSW Business Chamber, [Submission](#), 11 September 2012, p.3

<sup>102</sup> Planning Institute of Australia, [A New Planning System for NSW Green Paper - Principal submission prepared by the NSW Division of the Planning Institute of Australia](#), September 2012, p.22

[We also note that the Green Paper acknowledges the SDPs may not have the full suite of controls for the growth areas. SCCs will have a role to play in resolving these circumstances.]<sup>103</sup>

In contrast, some stakeholders strongly opposed Strategic Compliance Certificates. A key concern was that these Certificates would provide an opportunity to override the strategic planning process. The Environmental Defender's Office NSW identified several issues with this proposal:

EDO NSW opposes the Green Paper's suggestion that 'any development proposal that conforms to the parameters set out in the strategic plan should be allowed to proceed', in advance of local plan updates, via a departmental 'strategic compatibility certificate'. We would also oppose review rights for proponents whose strategic compatibility applications are rejected, particularly without corresponding third party objector rights.

Our reasons for opposing the strategic compatibility concept are as follows:

- such approval would pre-empt local community input on subregional or local plans;
- it reduces clarity and rule certainty, by bypassing conditions in existing local plans;
- regional and subregional plans (and certainly State-level plans) would likely be too high-level to allow meaningful application to the details of individual developments;
- the proposed mechanism lacks important safeguards to protect local social and environmental values (for example, where strategic data and principles do not account for site-specific values); and
- upfront 'strategic compliance' approvals risk repeating mistakes of the former Part 3A regime, across a broad range of development, for example, by fettering subsequent discretion, engagement and review.<sup>104</sup>

**Removal of concurrences:** The Green Paper proposes removal of concurrences at the zoning and development application stages on the condition that they become integrated into the strategic planning framework.

On the one hand, owing to perceived problems with the current system, this was supported by several stakeholders. The Property Council of Australia stated that:

The imposition and complication of securing state agency concurrence is one of the most onerous tasks facing proponents.

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<sup>103</sup> Property Council of Australia, [Making it Work: How to translate good ideas into best practice](#), September 2012, p.47

<sup>104</sup> Environmental Defender's Office NSW, [Submission on A New Planning System for NSW - Green Paper](#), September 2012, p.37

This is particularly true on major projects which drag major investment to NSW.

The Green Paper identifies that this impediment can be diminished (if not removed) through the participation of state agencies in strategic planning.

However, we do caution that previous reform efforts have attempted to reduce or simplify requirement for concurrences – yet they still exist.<sup>105</sup>

On the other hand, some stakeholders opposed this proposal on the grounds that site-specific issues could not be dealt with at the strategic planning stage. According to the Heritage Council of NSW:

Heritage considerations are site specific and merit based with qualitative outcomes. The Heritage Council therefore requests that concurrences and referrals are not switched off for developments relating to State Heritage Items.<sup>106</sup>

The NSW Aboriginal Land Council expressed similar concerns:

... as it is often only at the local level that the details of specific projects become apparent and can be addressed, including in relation to Aboriginal heritage.<sup>107</sup>

**Code-compliant development:** The code-compliant development assessment stream is based on the strategic compliance proposal that "any development proposal which conforms to the parameters set out in the strategic plan should be allowed to proceed".<sup>108</sup> The Green Paper also proposes to maximise the use of code complying assessment (see also proposed change 14).

A number of stakeholders strongly supported these proposals. For example, the Property Council of Australia stated:

The proposed expansion of complying or code assessment is a fundamental feature of the new system.

It will be welcomed by investors who have been frustrated when they comply with the rules – but are rejected.<sup>109</sup>

In contrast, both proposals were opposed by other stakeholders for several reasons. The Environmental Defender's Office NSW argued that:

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<sup>105</sup> Property Council of Australia, [Making it Work: How to translate good ideas into best practice](#), September 2012, p.49

<sup>106</sup> Heritage Council of NSW, [Heritage Council of NSW - Submission to the Green Paper - A New Planning System for NSW](#), 14 September 2012, p.11

<sup>107</sup> NSW Aboriginal Land Council, [Submission to NSW Government Green Paper: A new planning system for NSW](#), September 2012, p.13

<sup>108</sup> NSW Government, [A New Planning System for NSW - Green Paper](#), July 2012, p.51

<sup>109</sup> Property Council of Australia, [Making it Work: How to translate good ideas into best practice](#), September 2012, p.48

Development assessment and approval processes should lead to well-planned, sustainable cities and neighbourhoods. It is not clear how a presumed 'right to develop' is better public policy than allowing the consent authority, with community input, to decide whether a proposed project is the best design and use of a site in the particular circumstances.

The Land and Environment Court has recognised that it may not always be appropriate to develop a site to the maximum standards allowed, for example, at the interface of zones where neighbours' amenity may be adversely affected.

While 'rule certainty' could be one possible justification for removing authorities' discretion to refuse compliant projects, this is undercut by the Green Paper's further proposals that proponents could seek to vary standards and requirements set out in subregional plans.<sup>110</sup>

The ICAC identified the potential for corrupt conduct to arise where development is allowed to proceed if it complies with the parameters set out in a strategic plan:

Currently, there is a tendency for strategic plans to be general in nature. If this tendency continues the potential exists for development approvals to be obtained based only on compliance with vague sets of criteria. The Commission believes that subjective and ill-defined criteria are inherently open to varying interpretation and consequently provide a convenient cloak for corrupt conduct. Corrupt conduct can also be difficult to prove where any number of possible outcomes can be justified based on unclear standards.<sup>111</sup>

**Partially compliant development:** Opinions on the proposed assessment process for partially compliant development were also mixed. On one side, the NSW Business Chamber argued that combining code and merit based assessment will "narrow the issues in development assessment".<sup>112</sup> The Property Council of Australia set out several issues it believed also needed to be considered:

Introduction of a new stream that effectively combines code and merit assessment is sound.

It recognises the need for innovation and flexibility that provide for outcomes beyond the standards and requirements conceived when the [SDP] was prepared.

Similarly, it recognises strategic planning documents can be static but the market can move swiftly.

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<sup>110</sup> Environmental Defender's Office NSW, [Submission on A New Planning System for NSW - Green Paper](#), September 2012, p.38

<sup>111</sup> Independent Commission Against Corruption, [Submission to the NSW Planning System Team Re: A New Planning System for NSW \(Green Paper\)](#), September 2012, p.3

<sup>112</sup> NSW Business Chamber, [Submission](#), 11 September 2012, p.3

To be successful as a positive policy innovation, it will require strict adherence to the principles articulated in the Green Paper – and consider other issues.

These include:

- strictly limiting the merit assessment to those components which do not meet predetermined requirements
- not allowing assessing agencies or consent authorities to revisit issues dealt with during strategic planning
- limiting comment by objectors (and the requirement for proponents to respond) to those components subject to merit assessment
- deemed approval provisions applying
- application of the principles of the 'amber light approach' to the merit-assessed component (though there is a need to be careful that councils don't simply require proponents to revert back to the confines of a code assessable project).<sup>113</sup>

Conversely, several stakeholders expressed concerns about the proposal. For example, the National Trust of Australia stated the following:

A strategic compliance approach delivers certainty to the applicant in providing an approval with conditions that cannot be altered by the community or government. However, it does not prevent an applicant seeking a variation to the approved plan.

It is recognised that non-complying elements of a proposal will be merit assessable. This appears sound in theory but will present a challenge in practice.

The code assessable component already provides approval in principle for the project lending considerable momentum to the development application being approved.<sup>114</sup>

**Non-compliant development:** The Green Paper proposal that all non-compliant development will enter a merit assessment stream elicited a variety of responses. Urban Taskforce Australia supported this proposal, stating:

Merit Assessment is supported for projects outside the Code Assessable system and for components of projects outside Code requirements. Merit assessment needs early involvement of assessment bodies to avoid wasted work. Financial viability must be taken into account in assessment and conditions should be clear and cost effective.<sup>115</sup>

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<sup>113</sup> Property Council of Australia, [Making it Work: How to translate good ideas into best practice](#), September 2012, p.48

<sup>114</sup> National Trust of Australia, [The Space Between the Notes: National Trust's Submission - A New Planning System for NSW Green Paper](#), September 2012, p.17

<sup>115</sup> Urban Taskforce Australia, [Delivering a better planning system for NSW Green Paper](#),

Urban Taskforce Australia also noted that:

... the assessment of such proposals must be subject [to] a robust assessment process that is divorced from political intervention and/or rejection due to vocal minority groups, not representative of true community composition and sentiment. For this reason we support the greater use of independent experts.<sup>116</sup>

While the Environmental Defender's Office NSW also expressly supported robust merit assessment processes, it was critical of a proposed assessment stream for non-compliant development:

This has the potential to reduce certainty, clarity and consistency. It also undermines an equitable strategic planning processes, whereby all parties would be expected to comply with the resulting standards.

While we do not support the above proposal, if it is adopted, we strongly recommend there be legislated rights for public participation and for third party merit appeals. As noted in relation to LLUPs above, the Green Paper proposes there will be scope for 'community participation', but does not discuss objector appeal rights in these circumstances.<sup>117</sup>

The ICAC agreed with the contention that such a proposal may undermine strategic planning. It also identified the potential for corrupt conduct to occur:

The Commission has similar concerns about the creation of a stream of "merit assessment" for non-compliant proposals. This appears to be an equivalent to the former SEPP 1- Development Standards and clause 4.6 of the Standard Instrument Local Environmental Plan. There is no indication of what set of criteria alternative to those that have been developed through the strategic planning process will be used to establish "merit". As noted, the prospect of sizable windfall gains combined with wide discretion creates a corruption risk and has been associated with many instances of proven corruption. The idea that non-compliant proposals simply enter an alternative "stream" also seems to run counter to the proposition that strategic planning is to be the cornerstone of all planning decisions and has the potential to undermine the stated measure of success for the new system, which is "increased trust between the community and the government in relation to planning decisions and processes."<sup>118</sup>

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Submission to the NSW Government on the NSW Planning System Review - Green Paper, 14 September 2012, p.5

<sup>116</sup> Ibid., p.27

<sup>117</sup> Environmental Defender's Office NSW, [Submission on A New Planning System for NSW - Green Paper](#), September 2012, p.47

<sup>118</sup> Independent Commission Against Corruption, [Submission to the NSW Planning System Team Re: A New Planning System for NSW \(Green Paper\)](#), September 2012, p.3



## 7. THE ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT BILL 2012

The [Environmental Planning and Assessment Amendment Bill 2012](#) [2012 Bill] was introduced in the Legislative Assembly on 24 October 2012 and passed without amendment on the same day. It was also read a first time in the Legislative Council on that day. Introducing the 2012 Bill, the Minister for Planning and Infrastructure, Brad Hazzard, described it as an:

... interim but essential measure to address two significant areas of the former Labor Government's past policy neglect: housing supply and building certification, including the accreditation of certifiers. The Government needs to act now and not wait for the new planning legislation. Nevertheless the proposals in this bill are consistent with the policy direction set out in the green paper.<sup>119</sup>

The second reading speech then proceeded to set out the various amendments proposed by the 2012 Bill, which include:

- **Development control plans** - clarifying the purpose, status and content of Development Control Plans and how they are to be taken into account during the development assessment process.
- **Bush fire prone land** - enabling the regulations to exclude certain residential development on bush fire prone land from the special consultation and development requirements of the NSW Rural Fire Service, as well as authorising the Commissioner of the NSW Rural Fire Service to review and revise the designation of land on a bush fire prone land map at any time after the map is certified.
- **Assessment of accredited certifiers** – providing for the ongoing assessment of accredited certifiers by the Building Professionals Board and for other amendments relating to certification work.

The following commentary deals primarily with the first of these proposed amendments, Development Control Plans (DCPs). In respect to DCPs, the Minister in his [second reading speech](#) commented:

The problem this bill addresses is twofold. First, development control plans have gone from guiding development to being given the same weight, and sometimes seemingly more weight, than the relevant local environmental plans. This follows court decisions that have determined greater weight will be given to plans that are consistently—that is, repeatedly—applied. As a result, councils have become increasingly unwilling to depart from the guidance provided in the development control plan when assessing applications.

Secondly, the controls in development control plans have grown and become ever more complex and prescriptive. This makes it harder for projects to

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<sup>119</sup> [NSWPD](#), 24 October 2012.

comply with the controls. Taken together, these changes have led to greater complexity, greater prescription and greater inflexibility. The bill will redress the imbalance and ensure that consent authorities will be able to continue assessing development against their existing development control plans, but they must adopt a more flexible performance-based approach. The bill makes it clear that development control plans are guidelines, and have less status than local environmental plans and State environmental planning policies in the assessment process. The bill also makes it clear that development control plans implement planning instruments rather than the other way around.

**DCPs under the current Act:** Provision is made for DCPs under Part 3, Division 6 of the EP&A Act. They are not defined to be environmental planning instruments (EPIs) with statutory force. Rather, they are best described as policy instruments,<sup>120</sup> which have to be considered by a consent authority when determining a development application.<sup>121</sup>

By section 74C(1)(a) of the EP&A Act:

- (1) The relevant planning authority may prepare a development control plan (or cause such a plan to be prepared) if it considers it necessary or desirable:
  - (a) to make more detailed provision with respect to development to achieve the purpose of an environmental planning instrument applying to the land concerned...

A brief overview of the legislative scheme is found in *Environmental & Planning Law in New South Wales* by Rosemary Lyster et al (third edition). There it is said that:

Development control plans (DCPs) can be prepared by a council in relation to LEPs, or by the Director General in relation to SEPPs. A DCP can be prepared to make more detailed provision with respect to development, or to make provision for advertised development, or for publication or advertising of specified development, or to specify criteria to be taken into account by a council in making an order under Pt 6 of the EP&A Act (s 74c(1)).<sup>122</sup>

By section 74C(2), only one DCP made by the same relevant planning authority may apply in respect of the same land. Thus a council and the Department of Planning and Infrastructure may prepare a DCP relating to the same land. As Lyster et al explain:

<sup>120</sup> BJ Preston ed, *Local Government Planning and Environment NSW, Vol C*, LexisNexis, [450.175]

<sup>121</sup> A DCP is a mandatory consideration by force of s 79C(1)(a)(iii) of the EP&A Act; [Andrews v Botany Bay City Council](#) (2008) 158 LGERA 541 at para 48 (Biscoe J). Biscoe J stated that: "In *Zhang v Canterbury City Council* [2001] NSWCA 167; (2001) 51 NSWLR 589 at 601 Spigelman CJ (Meagher and Beazley JJA agreeing), after referring at [62] to the formulation that "proper, genuine and realistic consideration" was required, said at [64] that "mere advertence to a matter required to be taken into consideration is not sufficient".

<sup>122</sup> R Lyster et al, *Environmental & Planning Law in New South Wales*, 3<sup>rd</sup> ed, The Federation Press 2012, p 79.

Unless directed otherwise by the Minister, a council can choose to make one DCP for its entire area, or localities within its area, or to have a site-specific DCP.

One comment made by Lyster et al is that "A provision of a DCP will be of no effect to the extent that it is inconsistent with an EPI, or contains provisions which prevent compliance with an EPI (EP&A Act (s 74C(5))".<sup>123</sup> Comment is also made on the procedures for preparation of DCPs by councils and by the Director General, as required under Part 3 of the Environmental Planning and Assessment Regulation 2000. This includes the requirement that "A draft DCP must be publicly exhibited for at least 28 days, and any person may make submissions".

Discussed by Ron Hoenig, leading for the Opposition, in the second reading debate<sup>124</sup> on the 2012 Bill was the case of [\*Stockland Development Pty Ltd v Manly Council\*](#) (2004) 136 LGERA 254, specifically the judgment of McClellan J summarising the principles relevant to DCPs as follows:

A development control plan is a detailed planning document which reflects a council's expectation for parts of its area, which may be a large area or confined to an individual site. The provisions of a development control plan must be consistent with the provisions of any relevant local environmental plan. However, a development control plan may operate to confine the intensity of development otherwise permitted by a local environmental plan.

A development control plan adopted after consultation with interested persons, including the affected community, will be given significantly more weight than one adopted with little or no community consultation.

A development control plan which has been consistently applied by a council will be given significantly greater weight than one which has only been selectively applied.

A development control plan which can be demonstrated, either inherently or perhaps by the passing of time, to bring about an inappropriate planning solution, especially an outcome which conflicts with other policy outcomes adopted at a State, regional or local level, will be given less weight than a development control plan which provides a sensible planning outcome consistent with other policies.

Consistency of decision-making must be a fundamental objective of those who make administrative decisions. That objective is assisted by the adoption of development control plans and the making of decisions in individual cases which are consistent with them. If this is done, those with an interest in the site under consideration or who may be affected by any development of it have an

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<sup>123</sup> Cited as authority is *Guideline Drafting and Design v Marrickville Municipal Council* (1988) 64 LGRA 275. But note that "some restrictions imposed by a DCP may be able to stand consistently with the provisions of an EPI", for which *North Sydney Council v Ligon 302 Pty Ltd (No 2)* (1996) 93 LGERA 23 is cited as authority.

<sup>124</sup> [NSWPD](#), 24 October 2012.

opportunity to make decisions in relation to their own property which is informed by an appreciation of the likely future development of nearby property. (para 49)

Applying those principles in [Andrews v Botany Bay City Council](#) (2008) 158 LGERA 541 Biscoe J observed that in the earlier case McClellan J had held that "even council urban design controls which may not have been embodied in a development control plan require cogent reasons before the Court should depart from them if they have been carefully thought out after detailed consultation with relevant parties". At issue in [Andrews v Botany Bay City Council](#) was whether a Commissioner of the Land and Environment Court had substituted his own standards for those of the applicable DCP. Biscoe J held that:

In the present case, the detailed and carefully thought out DCP was adopted after consultation with interested persons. It has been consistently applied by the council. It has not been demonstrated (nor has it been suggested) that it brings about an inappropriate planning solution. Consistency of decision-making is a fundamental objective. In my opinion, there are no cogent reasons apparent from the judgment for not requiring the development to conform to development control C98. (para 51)

**DCPs and the Green Paper:** The focus of comment in the [Green Paper](#) on DCPs is on the need for greater flexibility in the planning process, something which is currently hindered, it is suggested, by DCPs which are overly long, detailed and prescriptive. According to the Green Paper:

Existing *Local Environmental Plans* are rigid statutory instruments with development controls that often lack strategic context. Their lack of flexibility and responsiveness to change, and the lack of consideration of unintended financial impacts of decisions (e.g. house prices and retail competition), has meant that in many cases they have inhibited the achievement of good planning outcomes and have been unable to accommodate innovation to the detriment of local communities.<sup>125</sup>

The Green Paper added:

In addition, the ever increasing use of planning controls within Development Control Plans adds another layer of complexity and regulation which has further exacerbated dysfunctions in the system.<sup>126</sup>

Proposed by the Green Paper is a system based on Subregional Delivery Plans and Sectoral Strategies, which will set the applicable development parameters and criteria, which in turn will be translated into relevant development controls and guidelines in the Local Land Use Plans. These Plans are to comprise four parts, as follows:

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<sup>125</sup> NSW Government, [A New Planning System for NSW - Green Paper](#), July 2012, p.38

<sup>126</sup> *Ibid.*, p.38

- A strategic section;
- A statutory spatial land use plan;
- A section on delivery of infrastructure and services; and
- A section providing development guidelines and performance monitoring requirements.

The Green Paper explains that the proposed legislative scheme should:

... provide for development controls and standards to be clearly applied by way of guidance. The current practice of implementing *Development Control Plans* as statutory instruments results in lack of flexibility and can inhibit viable outcomes. The complexity and layering of the controls combined with their inflexible application increase compliance costs and stifle innovation. Non-compliance with the controls should not be construed as prohibition. A merit assessment of the development proposals should be undertaken to fully justify the basis of non-compliance. This approach is consistent with the recommendations of the *Independent Review*.<sup>127</sup>

Emphasising the Government's approach, the Green Paper states that:

The Government's clear intent for this area of development assessment is that guidelines should facilitate outcomes desirable to the market, not dictate solutions that preclude choice and flexibility. Development guidelines will guide development through merit assessment but will not mandate a result.<sup>128</sup>

A key argument of the Green Paper is that, unlike DCPs, these proposed development guidelines "will be fully integrated within the Local Land Use Plan".

**Submissions on DCPs:** Few of the submissions covered by this paper deal directly or in any detail with the proposed changes to DCPs. Some are very supportive. In particular, the Property Council of Australia strongly endorsed the proposals for reform, describing the DCPs in their current form as "completely irrational, obstructive and out of control".<sup>129</sup> One example cited was that the City of Sydney DCP 2012 "amounts to over 600 pages". The Property Council of Australia argued that:

The length and specificity of DCPs has exploded in recent years. Councils are obsessed by controls – and oversight by the State has been absent. In other words, subject to being developed in accordance with the Regulations, councils have largely been left to their own devices.<sup>130</sup>

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<sup>127</sup> Ibid., p.41

<sup>128</sup> Ibid., p.41

<sup>129</sup> Property Council of Australia, [Making it Work: How to translate good ideas into best practice](#), September 2012, p.38

<sup>130</sup> Ibid., p.38

The same submission expressed support for "a number of positive indicators in the Green Paper",<sup>131</sup> including "that legislation provide for development controls and standards to be clearly applied by way of guidance. In particular, non-compliance with controls should not be construed as a prohibition".<sup>132</sup> Support was also expressed for "fully integrating development guidelines with the Local Land Use Plan package as opposed to separate DCP documents".<sup>133</sup>

However, the Property Council of Australia went on to say that certain aspects of the Green Paper's proposals warranted further consideration. For example, it was submitted that:

The Property Council has consistently critiqued the ability of each council to create its own rules and guidelines. It adds time and complexity to projects. For development such as multi-unit housing, it is simply nonsense to have councils expressing different standards for the same development in terms of apartment size, balcony size, unit mix and others.

In contrast, the Victoria Planning Provisions set out general standards for medium density housing that apply across the State, with some minor areas where local variations can be enabled.

The only way to move to a streamlined system is to create more consistent controls across the State adopting the same philosophy as the Standard Instrument. For example, there is a need for clarity on key SEPPs such as SEPP 65 and the Codes SEPP and how these controls will form the basis of controls or guidelines in each LLUP. Unfortunately the Green Paper does not articulate this objective, which we consider fundamental to the success of the proposed local land use plan reforms.<sup>134</sup>

A specific concern of Urban Taskforce Australia was that:

... the Government must not be tempted to simply collapse all or the vast majority of existing development control provisions in the existing SEPPs into the new local land use plans. If this was to occur, then complexity and conflict in the planning system will simply be moved from the state to the local level.<sup>135</sup>

Of those submissions not otherwise covered in this paper, one example of an endorsement of the current DCP scheme is found in the submission of the Walter Burley Griffin Society, which argued that DCPs "need to be retained" stating:

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<sup>131</sup> Ibid., p.38

<sup>132</sup> Ibid., p.38

<sup>133</sup> Ibid., p.38

<sup>134</sup> Ibid., p.39

<sup>135</sup> Urban Taskforce Australia, [Delivering a better planning system for NSW Green Paper](#), Submission to the NSW Government on the NSW Planning System Review - Green Paper, 14 September 2012, p.23

Only with DCPs is there sufficient guiding design detail and sufficient development controls to adequately protect conservation areas and heritage items from the inappropriate development. The mandatory LEP template introduced by the NSW Government in 2009 disallows diagrams and other detail necessary to adequately protect heritage.<sup>136</sup>

On the issue of detail, the Great Lakes Council submitted:

The Green Paper indicates that important development controls will be collapsed into LLUPs and associated development standards and guidelines; or adopted in the development of the relevant SDPs. The latter would result in very detailed higher level plans which would not seem to be the desired outcome.<sup>137</sup>

**DCPs under the 2012 Bill:** In respect to DCPs, the key reforms proposed under the 2012 Bill would involve:

- The insertion of new section 74BA into the EP&A Act, defining the status of DCPs as providing "guidance" only in giving effect to an EPI and expressly stating that the provisions of a DCP are "not statutory requirements".
- Substituting for current section 74C(5) a provision that includes the present limitations on DCPs in respect to EPIs and adding that a DCP, whenever made, has no effect where the "practical effect" of a DCP is to prevent or unreasonably restrict development that is otherwise permitted under an EPI.<sup>138</sup>
- The insertion of new section 79C(3A) expressly providing that, when considering a development application, a consent authority is to: (a) give "less weight and significance" to a DCP than to an EPI; (b) not use a DCP to require more onerous standards than would otherwise apply to an aspect of a development application; (c) where a development application does not comply, to be flexible in the application of conflicting standards and in allowing "alternative solutions"; (d) to only consider provisions of a DCP in connection with the assessment of that particular development application; and (e) to have no regard to how those provisions have been applied in the past or may be applied in future.

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<sup>136</sup> Walter Burley Griffin Society, [Re The Walter Burley Griffin Society's response to the New Planning System for NSW Green Paper](#), 12 September 2012, p.2

<sup>137</sup> Great Lakes Council, [A New Planning System for NSW - Green Paper](#), September 2012, p.8

<sup>138</sup> Section 74C(5) currently provides:

- (5) A provision of a development control plan (whenever made) has no effect to the extent that:
- (a) it is the same or substantially the same as the provision of an environmental planning instrument applying to the same land, or
  - (b) it is inconsistent with a provision of any such instrument or its application prevents compliance with a provision of any such instrument.

**Comments on the 2012 Bill:** The Minister in his second reading speech described the arrangements proposed under the 2012 Bill as both "interim" and "essential" measures. One obvious question is whether the proposed amendments to DCPs could not have waited until the review of the EP&A Act had been finalised, thereby ensuring consistency with the completed package of reforms and that due regard was given to the consultation process? But, then, the 2012 Bill is broadly consistent with the policy direction of the Green Paper and, it could be argued, the reforms proposed are urgently needed. Of course opinion will vary on this point, as suggested by the overview of submissions, which confirm that planning law and practice will invariably produce different and conflicting perspectives, heritage versus commercial, local against general and so forth. For some, DCPs have become overly detailed and inflexible, varying from place to place and hindering development, whereas for others the detail they provide form the essential components of a planning process informed by local needs.

As for the 2012 Bill, this could be viewed as an inappropriate and pre-emptive amendment, one that will retain DCPs on paper only to nullify their effectiveness in such areas as heritage conservation. The issue was discussed in an article in the [Sydney Morning Herald](#) on 12 November 2012, which quoted Peter Williams, the director of planning at the University of NSW's school of built environment as saying that the Bill was an "overreaction" to the perception of the development industry that some councils were "overly zealous". The article also quoted the heritage consultant David Logan, who helped draft DCPs for Paddington, Woollahra and Watsons Bay, stating:

... he supported the bid to improve housing supply, but warned that heritage conservation suburbs should be exempted, as they would otherwise end up as collateral damage. "None of those terrace houses in Paddington or the houses in all the other heritage conservation areas around the state are identified as heritage items in the Local Environment Plan," he said.<sup>139</sup>

According to the article:

... the opposition's planning spokesman, Luke Foley, and the Greens' David Shoebridge, have attacked the draft legislation as flying in the face of the government's promise to return powers to local communities. "DCPs are the fine-grained controls that protect local communities from inappropriate development," Mr Shoebridge said. "This government intends to gut them."<sup>140</sup>

Alternatively:

The NSW executive director of the Property Council of Australia, Glenn Byres, said the change rightly reordered the weight given to DCPs.<sup>141</sup>

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<sup>139</sup> L McKenny, "Terraces under threat from changes to planning controls", [SMH](#), 12 November 2012, p.2

<sup>140</sup> *Ibid.*, p.2

<sup>141</sup> *Ibid.*, p.2



From this perspective, therefore, the 2012 Bill can be seen as a clarification of the current provision and, to an extent, a correction to a trend in the judicial interpretation of DCPs. A key reform in this respect is that which would restrict consent authorities from taking a broader or more historical approach to the application of DCPs and requiring instead that provisions of a DCP only be considered in isolation and without regard to past or potential future applications. That may suggest a difference in emphasis, away from the current judicial concern for consistency of application and towards the appropriateness of a DCP provision in each particular instance, having regard to the "practical effect" of a DCP and preventing or unreasonably restricting development that is otherwise permitted under an EPI.

In terms of the relationship between the 2012 Bill and the reform process more generally, the Minister said in the [second reading speech](#):

These changes are also not an opportunity for councils to delay the preparation of their standard instrument local environmental plans or to seek, at this stage, to include unnecessary development controls in those plans. Further work will be done in this area. Now is not the time to require councils to redraft their development control plans. The Government plans to have more comprehensive reform in this area in its forthcoming white paper.<sup>142</sup>

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<sup>142</sup> [NSWPD](#), 24 October 2012.

## **8. CONCLUSION**

One perspective on planning law and practice is that it is a point at which many conflicts of interests and ideas in our society meet and sometimes collide. There is a need for meaningful community participation but also for an effective streamlined planning process; the arguments for consistency must be reconciled with those for flexibility; big ideas need to be aligned with detailed and sometimes specific requirements; there are local interests to be satisfied, along with the claims of development and strategic planning on a larger scale; and there is the challenge of accommodating environmental, commercial, heritage, housing and other interests and concerns.

The Green Paper, supplemented by the 2012 Bill, is a particular response to the challenges posed by planning law and practice, to be followed shortly by a White Paper and an Exposure Bill. Key ideas include increased emphasis on strategic planning and a focus on community participation at that stage rather than at the development assessment stage. As for this briefing paper, it has sought to focus on the main issues in the debate generated by the Green Paper and to set out the responses of key stakeholders. The one certainty is that, at every level of detail and generality, views will differ.