



# briefing paper



## NSW Parliamentary Research Service

### **NSW planning reforms: decision-making**

**Briefing Paper No 11/2013**

by Jack Finegan

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NSW planning reforms:  
decision-making

**by**

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## **SUMMARY**

In April 2013 the Government of NSW released a White Paper and two Exposure Bills detailing its proposals for the reform of the State planning laws. These proposals included significant changes to the decision-making powers of several bodies, and reforms to development assessment.

Reform of the planning system continues to be a work in progress. In response to concerns voiced by the community and key stakeholders, including local government, on 19 September 2013 the Minister for Planning announced a number of changes to the proposals set out in the White Paper. However community and environmental groups have continued to argue that fundamental problems remain. Specific details of the changes announced by the Minister remain unclear.

This paper examines the distribution of decision-making powers under the proposed system with particular reference to Ministerial discretionary powers, development assessment, and appeals. Commentary from selected stakeholders in response to the White Paper provides some analysis of the proposed system; these comments are too complex and extensive to be encapsulated in this summary. While a broad cross-section of stakeholders was selected, this paper does not purport to represent all stakeholder positions on the White Paper and Exposure Bills.

### **Depoliticisation of decision-making**

The depoliticisation of decision-making, under which planning decisions are increasingly made by experts and independent bodies rather than elected officials, is a “key transformational change” of the planning proposals. This principle underlies a number of individual reforms which attempt to make planning a technical exercise, rather than a political process. Government publications identify these changes as the introduction of a track-based DA process, the increased use of expert panels and wider appeal rights. **[2.0]**

### **Ministerial Discretion**

The Minister and Director-General of the Department of Planning are able to exercise a number of planning functions under the Exposure Bills. The breadth of Ministerial powers specified in the draft legislation has proven controversial, with several stakeholders commenting on a perceived lack of oversight or accountability. Significant powers available to the Minister include:

- The power to make or amend a strategic plan or policy as the Minister sees fit;
- The power not to make a strategic plan;
- The power to declare development to be State significant, thus becoming the consent authority for the development;
- The power to declare public priority infrastructure, which then can be carried out without additional approval or consent;
- The power to appoint a regional planning panel as a consent authority in

- the place of a council; and
- The power to make wide-ranging regulations, including exempting any persons or organisations from any provisions of the planning legislation. **[3.0]**

## **Development Assessment and Independent Bodies**

A stated goal of the White Paper is increasing the proportion of development assessment conducted by independent experts. To this end the Government will “encourage” councils to establish independent assessment panels and have them assess all applications. **[5.0]** It also intends to widen the scope of complying development (which is automatically assessed against predetermined standards by a certifier). **[4.5]**

The development assessment process will undergo major changes under the Government’s proposals, with the introduction of a track-based development scheme including a new stream to be known as code-based assessment. Under this assessment stream, certain kinds of low-impact development (which includes mixed-use developments, commercial buildings, and up to 20 villas/townhouses) will be assessed against pre-determined development codes. Development that meets the standards set out in these codes must be approved. The codes will be based upon model development codes set out by the State government and subregional planning boards, which can be modified by councils. **[4.6]**

The White Paper proposed that 80% of development would either be assessed as complying or code-assessable; a target that has now been revised with development codes to be used only in nominated growth areas. This development assessment stream has been criticised by a number of submissions on the ground that it removes the right of councils and communities to have any input into the development assessment process.

## **Appeals**

Under proposals in the White Paper, appeal and review rights for proponents of development would be expanded. Appeal rights available to the community would remain the same. An additional “very fast track” appeals process will be available for proponents of small developments. For consent authorities, the increased availability of appeal rights would result in less certainty that their determinations would be final.

The Planning Bill also contains wide-ranging exemptions from judicial review for the exercise of certain planning functions, and specifies that other functions under the Bill are “not mandatory” and accordingly cannot be the grounds for seeking judicial review. The Law Society has submitted that the relevant section of the Bill may be open to constitutional challenge. **[6.0]**



## 1 INTRODUCTION

The NSW Government is currently engaged in reforming the State's planning system. This paper examines how the proposed changes to the planning system will affect the decision-making powers of different bodies.

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

Reform of the planning system continues to be a work in progress. In response to concerns voiced by the community and key stakeholders, including local government, on 19 September 2013 the Minister for Planning announced a number of changes to the proposals set out in the White Paper. These were:

- Allowing councils to modify the State-wide codes to better reflect their local area
- Code assessable development will only apply in nominated growth areas (for example around the North West and South West train lines or areas nominated by councils)
- The target for code assessable developments has been removed entirely
- Councils will be made to prepare Neighbourhood Impact Statements if they intend to implement code assessable development
- The full range of current land zonings will remain as they are
- Appeal rights will remain as they are and
- Local and State heritage protections will continue.<sup>1</sup>

Commentary and criticism continues, with for example the Better Planning Network arguing that fundamental problems remain. They are quoted in the *Sydney Morning Herald* on 15 October 2013 as saying, among other things, that the proposals "allow the minister and his director general wide discretion to override strategic plans and controls". Wherever relevant, this paper notes the changes announced by the Minister for Planning, but is not able to account for the extent to which these changes may or may not have affected the views

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<sup>1</sup> Hazzard B, [Government Listens to Community and Councils on Planning Bill](#), media release dated 19 September 2013

expressed by stakeholders in response to the White Paper.

This paper begins with an overview of the guiding principle of the “depoliticisation” of the planning system which has informed the reform process. Section 2 outlines this principle and examines the rationale behind it.

As noted, one focus of stakeholder criticism has centred on the issue of discretionary Ministerial decision making power. With this in mind, Section 3 of the paper presents a broad overview of the range of Ministerial powers provided under the Exposure Bills.

A major focus of the paper is on decision-making in the context of development assessment, or the ability to determine what development is appropriate for an area. Section 4 of the paper outlines the development assessment process under the current system and identifies proposed changes, including the introduction of code development and strategic compatibility certificates. Section 5 describes the decision-making bodies identified in the White Paper and Exposure Bills, and how these bodies will operate and be constituted. This section also considers the effect of the proposed reforms on different consent authorities. Section 6 details appeal and review rights under the proposed new planning system, including changes to the rights of third-party appeals.

This is the fourth paper published by the Research Service on the NSW planning system. The first two discussed sustainable development and infrastructure; the third focused on building regulation and certification. Commentary on aspects of the proposed planning system not covered in any of these, or the current paper, such as community participation and strategic planning, may be found in an earlier Research Service publication *NSW planning reforms: the Green Paper and other developments*.<sup>2</sup>

## 1.1 Stakeholder comments

Each paper in this series on the NSW planning reforms canvasses stakeholder responses to the way in which the White Paper and Exposure Bills deal with the issues relevant to the paper. They do not purport to be representative of all stakeholder positions. Rather, each paper sets out responses from 17 submissions that were selected using the following criteria (see Box 1):

- A significant subset of the proposed NSW planning reforms, 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 was represented, across different interests and perspectives.

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<sup>2</sup> Montoya D, Wales M and Griffith G, [NSW planning reforms: the Green Paper and other developments](#), November 2012

**BOX 1: CORE STAKEHOLDERS****Community:**

- Better Planning Network
- NSW Aboriginal Land Council

**Environment:**

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

**Governmental:**

- Independent Commission Against Corruption
- UrbanGrowth NSW

**Heritage:**

- Heritage Council of NSW

**Industry:**

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

**Legal:**

- The Law Society of NSW

**Local Government:**

- City of Sydney
- Local Government NSW

**Planning:**

- Planning Institute of Australia

**Property/development:**

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

**2 DEPOLITICISATION OF DECISION MAKING**

The Green Paper identifies a depoliticised decision making process as a “key transformational change” to the planning system,<sup>3</sup> and many of the proposed changes to the development assessment must be seen through this prism of depoliticisation.

As set out later in this section, the Green Paper proposed three reforms for depoliticised decision making: through a track-based DA process; increased use of expert panels; and wider appeal rights. Each of these three reforms has been carried through to the White Paper and Exposure Bills. However the White Paper places much less explicit emphasis on the concept of depoliticisation, and only refers to it briefly in the context of expert assessment panels.

With regards to the use of expert panels in the development assessment process, under the current planning system approximately three per cent of development decisions are made by elected councillors. The remainder are made by council staff under delegated authority and accredited certifiers. The three per cent of development decisions made by elected councils are typically larger applications with more significant implications for economic growth and potential impacts.<sup>4</sup>

<sup>3</sup> NSW Government, [A New Planning System for NSW – Green Paper](#), July 2012, p.48

<sup>4</sup> NSW Government, [A New Planning System for NSW – Green Paper](#), July 2012

When discussing depoliticisation, the Green Paper did not explicitly identify the problems that have arisen from politicisation of the existing planning system. Rather, these were implied when making the case for its proposed reforms:

There are strong arguments for ensuring that development proposals, big or small, should be entitled to be judged exclusively on their merits, by those with appropriate expertise, and free from political influence... When elected officials are not involved in determining development applications they are much less likely to be exposed to lobbying and political pressures that can influence decision making.<sup>5</sup>

Further to this line of reasoning, a smaller role in the development assessment process is envisaged for elected councillors, with an even greater proportion of assessment falling to expert panels and council staff. It is proposed that directly elected representatives in local government will devote their attention and efforts to the formulation of robust strategic plans, which clearly set out the desired objectives and controls for development. To this end, and in line with the Green Paper, the White Paper “continues to call on all councils to establish expert independent hearing and assessment panels to determine development applications, to enable elected councillors to concentrate on making key strategic decisions about their areas.”<sup>6</sup>

A number of submissions to the Green Paper questioned both the value of depoliticisation and whether it was actually possible.<sup>7</sup> Issues raised in a number of submissions included:

- That the planning process is inherently political;
- That it is appropriate in a representative democracy for elected councillors to influence the type of development occurring in their locality;
- That the removal of elected councillors’ influence over development assessment amounts to a loss of democratic control; and
- That depoliticisation would not lead to more satisfactory development outcomes.<sup>8</sup>

## 2.1 Submissions

Very few of the submissions to the White Paper explicitly addressed “depoliticisation” *per se*. This is likely due to the fact that it receives far less emphasis in the White Paper. However many of the submissions provide detailed commentary on the overall distribution of decision-making abilities under the proposed system; some submissions address these issues directly

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<sup>5</sup> NSW Government, [A New Planning System for NSW – Green Paper](#), July 2013, pp.48-49

<sup>6</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 116

<sup>7</sup> Submissions on this issue in response to the White Paper have been somewhat more muted, potentially due to the principle being much less explicit in the latter document although the policies have remained largely unchanged

<sup>8</sup> Montoya D, Wales N and Griffith G, [NSW planning reforms: the Green Paper and other developments](#), NSW Parliamentary Research Service, November 2012

while others consider them more obliquely, referring to the rights of different groups to participate in development assessment or commenting on who the 'design' of the system is likely to benefit.

Many submissions are overwhelmingly supportive of the proposed changes and overall decision-making in the new planning system. Urban Growth NSW, the Urban Development Institute of Australia and Housing Industry Association all support the changes to development assessment, with the Urban Development Institute representative in commenting under the heading of "Depoliticising Decision Making" that:

Currently, decision making is prone to being heavily politicised and does not promote transparency or good planning outcomes. This has created uncertainty and angst for the community and industry in particular. UDIA NSW believes that robust strategic planning based on clear and readily available information, which also incorporates upfront community consultation, will help achieve better planning outcomes.

UDIA NSW contends that with independent and transparent decision making – through delegation to the PAC, JRPP or local expert panels – there can be greater confidence in the decisions being made.

The mandatory introduction of expert panels for local developments is therefore considered necessary for transparency in decision making and to remove the subjective and political decision making that currently takes place.<sup>9</sup>

The Property Council agreed with the general thrust of the proposed changes and the focus on "depoliticisation", commenting that:

Reinforcement of the primacy of depoliticised development assessment is a stand out feature of the draft legislation. It confirms that independent decision-making can:

- Give the community comfort in the integrity of decisions,
- Provide investors with confidence in the objectivity of the assessments, and
- Reduce the angst which has recently riddled the system.<sup>10</sup>

However a number of submissions critiqued the distribution of decision-making power in the proposed system<sup>11</sup>. A major criticism of the overall proposals for

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<sup>9</sup> UDIA, [The Next Act: UDIA Response to the Planning White Paper](#), June 2013, p. 9

<sup>10</sup> Property Council of Australia, [Delivering on the Promise: Submission to the NSW Government's White Paper – A New Planning System for NSW](#), June 2013, p. 38

<sup>11</sup> The elements of submissions supporting the proposed changes were generally quite brief, pointing out their support and reiterating the need for the changes. Those that criticise elements of the system however often go into more detail, and discuss decision-making in depth. The commentary provided here (and throughout this paper) should not be taken as indicative of the number of responses in support of or opposition to proposed changes; rather it is reflective of the level of detail provided in submissions.

decision-making and development assessment is that they are overly restrictive of the community's right to influence development outcomes. Sometimes this criticism may refer directly to communities' rights to make submissions on development and to be considered in the development assessment process. It also is used to refer more broadly to the influence of local government as the most immediate representative of community sentiment. A number of submissions see community and local government power diminishing at the expense of State government and developers.

LGNSW expresses concerns about the community's role in the planning system, commenting that "A recurring theme in this submission [*to the White Paper*] is the desire to maintain the rights of the community to have a say in decisions that may affect them."<sup>12</sup> Similarly, the Environmental Defender's Office is of the view that community rights have been overly restricted, and that:

the White Paper reforms imply a false choice – between economic prosperity on one hand, and environmental values and community rights on the other. **By contrast, according to a Grattan Institute analysis of leading practice decision-making in a range of comparable international cities (*Cities: Who Decides?* 2010), communities can make sound choices on difficult issues, provided they are given the appropriate information, rights and resources and time to do so.**<sup>13</sup> [*emphasis in original*]

In some submissions, this reduction in community rights is seen to complement a broader systematic trend of encouraging and facilitating development:

It is notable that under the new system, property developers will not face the same trade-off of existing rights... On one hand, the community is expected to engage in strategic level rule-making, and accept the results in order to 'improve confidence and certainty' in planning. On the other hand, once strategic and Local Plans are in place, developers will have an expanded range of rights to 'push the envelope' beyond locally agreed rules and standards.<sup>14</sup>

The Better Planning Network, commenting on the balance of the overall system, comments that:

The BPN is deeply concerned that the emphasis given to economic growth in the Planning Bills, together with the Government's other reforms and proposals as outlined above, will result in poor outcomes for NSW residents, including an overall reduction in quality of life, residential amenity, good urban design, and environmental and heritage protection.

The BPN is also concerned that the Planning Bills will result in significantly more flexibility for decision-makers and an increased concentration of powers in

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<sup>12</sup> LGNSW, [Submission to the Planning White Paper and Exposure Bills](#), June 2013, p. 11

<sup>13</sup> EDO NSW, [Submission on A New Planning System for New South Wales – White Paper](#), June 2013, p.8

<sup>14</sup> EDO NSW, [Submission on A New Planning System for New South Wales – White Paper](#), June 2013, p.31

the Minister and Director-General of Planning.<sup>15</sup>

This second point, that sees power being centralised at the expense of local government, was expressed in a number of submissions including those of LGNSW and the City of Sydney. LGNSW details its concerns as follows:

Our interpretation of the proposed new system is that it strengthens state-led planning controls and diminishes council powers to apply local controls to local development...

There needs to be a clearer demarcation between what is considered to be the NSW Government's and Local Government's role within the planning system. The proposed changes again blur the lines of responsibilities, extending the NSW Government's role further into local plan making matters. The partnership would be strengthened if the NSW Government respected councils' primacy in managing local plan making and development decisions, and enabled Local Government take the lead in advising and implementing changes to local planning processes.<sup>16</sup>

Similarly, the Environmental Defender's Office comments that:

the new system needs to minimise the risk of top-down determinism, where local preferences are shoe-horned into pre-set State priorities (such as the State Plan, NSW Planning Policies and Regional Growth Plans). There are numerous examples in the Planning Bill where matters will be prescribed at the State or high regional level, and cannot be overridden at the local level (such as categories of code development and other development assessment matters, regional precincts and rezoning, and a new Standard Instrument Local Plan).<sup>17</sup>

### 3 MINISTERIAL DISCRETION

The Minister and Director-General of the Department of Planning are able to exercise a number of planning functions under the Exposure Bills. At this stage it is not clear how common the use of any of these functions will be. It may be that many of these functions will be reserved for exceptional circumstances; it is notable in this context that many of the Minister's powers are able to be delegated to other bodies. The routine operation of the new planning system is likely to be established through practice and regulations, and may evolve over time. Given the absence of guidelines or practice notes at present, it is impossible to say how the powers granted to the Minister under the Exposure Bills will be used.

A number of Ministerial powers have attracted extensive commentary in submissions and in public debate. These include:

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<sup>15</sup> Better Planning Network, [Submission on the White Paper: A New Planning System for NSW and Associated Planning Bills](#), June 2013, p. 3

<sup>16</sup> LGNSW, [Submission to the Planning White Paper and Exposure Bills](#), June 2013, p. 5

<sup>17</sup> EDO NSW, [Submission on A New Planning System for New South Wales – White Paper](#), June 2013, p. 47

- The power to make or amend a strategic plan or policy as the Minister sees fit;
- The power not to make a strategic plan;
- The power to declare development to be State significant, thus becoming the consent authority for the development (cl. 4.29);
- The Director General’s ability to issue strategic compatibility certificates which allow development to be assessed when prohibited by a local plan (cl. 4.32; see Section 4.7);
- The power to declare public priority infrastructure, which then can be carried out without additional approval or consent (cl. 5.23; see [NSW Planning System Reforms: Infrastructure](#));
- The power appoint a regional planning panel as a consent authority in the place of a council; and
- The power to make wide-ranging regulations, including exempting any persons or organisations from any provisions of the planning legislation.

Table 1 below sets out a comprehensive list of the powers available to the Minister and Director General under the draft Planning Bill.<sup>18</sup> Commentary is only included under the “notes” column of Table 1 where some background information is required.

**Table 1: Ministerial powers under the Planning Bill**

Clause	Excerpt	Notes
<b>Part 3 – Strategic planning</b>		
3.7 (2)	The Minister may make a NSW planning policy, regional growth plan or subregional delivery plan in the form in which it was submitted or with such modifications as the Minister considers appropriate. The Minister may decide not to make the draft policy or plan.	Under 3.7 (1) relevant planning authorities may prepare a planning policy, regional growth plan or subregional delivery plan and submit it to the Minister.  This subsection allows the Minister to amend or ignore a draft plan as he sees fit, bypassing the standard plan-making process including consultation or exhibition.
3.9 (3)	The Minister may make or amend a strategic plan without compliance with the provisions of this Division relating to the conditions precedent to doing so in order to do any one or more of the following: (a) to correct an obvious error or misdescription or to address matters that are of a consequential, transitional, machinery or other minor nature, (b) to deal with matters that the Minister considers do not warrant compliance with those conditions precedent because they will not have any significant adverse impact on	Strategic plans are those plans referred to in 3.7 (2) (above).  Removes Minister’s obligation to follow standard plan-making procedure. “Conditions precedent” include those that specify what must be

<sup>18</sup> For a full account of strategic plan making and community involvement in the planning system, the reader is referred to the Research Service publication [NSW planning reforms: the Green Paper and other developments](#)



	<p>the environment or adjoining land,</p> <p>(c) to deal in an expeditious manner with matters that give effect to strategic or infrastructure plans or that are of State, regional or subregional significance.</p>	<p>identified in a plan, who may prepare a draft plan, and that mandate compliance with other strategic plans.</p>
3.12 (1)	<p>(1) The Minister may, in accordance with this Part, make, amend or replace any provisions of a local plan.</p>	<p>Local Plans are to be established for each LGA, and prepared by the relevant planning authority (typically councils).</p>
3.13	<p>(2) The Minister may direct that the Director-General (or other person or body referred to in subsection (1) (c)) is the relevant planning authority for proposed provisions of a local plan in the following cases:</p> <p>(a) the proposed provisions relate to a matter that, in the opinion of the Minister, is of State, regional or subregional planning significance,</p> <p>(b) the Planning Assessment Commission or a regional planning panel has recommended to the Minister that the proposed provisions should be submitted to the Minister for consideration or that the proposed provisions should be made,</p> <p>(c) the council for the area concerned has, in the opinion of the Minister, not carried out its obligations as a relevant planning authority in a satisfactory manner or has failed to comply with a direction of the Minister in relation to its functions as a relevant planning authority,</p> <p>(d) the proposed provisions are to apply to an area that is not within the area of a council.</p> <p>...</p> <p>(4) The relevant planning authority may submit to the Minister draft provisions of a local plan (other than planning control provisions) it has prepared. The Minister may make any such provisions of a local plan in the form in which the draft provisions were submitted or with such modifications as the Minister considers appropriate (or decide not to do so).</p>	<p>Persons or bodies referred to in subsection (1) (c) are the Director-General, a regional planning panel or any other person or body prescribed by the regulations.</p> <p>The functions of the relevant planning authority are set out in Division 3.4.</p> <p>They include the ability to prepare and submit draft plans, and prepare “planning proposals” explaining proposed provisions.</p>
3.14	<p>The Minister may make, amend or replace any provisions of a local plan without compliance with the requirements of the planning legislation relating to the conditions precedent to doing so in order to do any one or more of the following:</p> <p>(a) to correct an obvious error or misdescription or to address matters that are of a consequential, transitional, machinery or other minor nature,</p> <p>(b) to deal with matters that the Minister considers do not warrant compliance with those conditions precedent because they will not have any significant adverse impact on the environment or adjoining land,</p> <p>(c) to deal with matters that the relevant planning authority has been duly directed to deal with by the Minister but has failed to deal with or to deal with appropriately,</p> <p>(d) to deal in an expeditious manner with matters that give effect to strategic plans or infrastructure plans or that are of State, regional or subregional significance,</p> <p>(e) to rezone land or make other changes as a consequence of any development that is made permissible with development consent by a strategic compatibility certificate if development consent has been granted for the development,</p> <p>(f) to declare the development whose likely effect on threatened species may be assessed in accordance with a biodiversity assessment procedure adopted by the regulations (as referred to in clause 1.5 (2) of Schedule 1).</p>	
3.21	<p>(1) After preparing a planning proposal, the relevant planning authority may forward it to the Minister.</p> <p>(2) After reviewing the planning proposal, the Minister is to determine the following (a gateway determination):</p>	<p>A planning proposal sets out the justification for a proposed local plan; at present they are often</p>

	(a) whether the matter should proceed (with or without variation), ... (3) The Minister may, at any time, alter a gateway determination.	used to explain proposed changes to an existing plan.
3.24 (1)	The Minister may: (a) make planning control provisions of a local plan (with or without variation of the final proposals submitted by the relevant planning authority) in the terms the Minister considers appropriate, or (b) decide not to make the proposed planning control provisions.	
<b>Part 4 – Development (other than infrastructure) assessment and consent</b>		
4.29	(1) The Minister may, by Ministerial planning order, declare specified development on specified land to be State significant development. (2) The Minister may make that declaration only if the Minister has first obtained and made publicly available advice from the Planning Assessment Commission about the State or regional planning significance of the development.	State significant development is subject to a special assessment and approvals process as outlined in Section 4.8 of this report.  State significant development is either declared by the Minister, or specified as such in a local plan.
4.32 & 4.33	4.32 (1): A strategic compatibility certificate is a certificate issued by the Director-General that certifies that the carrying out of specified development on specified land is permissible with development consent under this Part, despite any prohibition on the carrying out of the development under the planning control provisions of the local plan.  4.33: A strategic compatibility certificate may be issued for development only if the Director-General is satisfied that: (a) a regional growth plan or subregional delivery plan has been made that applies to the development, and (b) the planning control provisions prohibiting the development have not yet been amended to give effect to the relevant provisions of that plan, and (c) the development is consistent with that plan, and (d) the development will not have any significant adverse impact on likely future uses of the surrounding land.	A strategic compatibility certificate is issued when development is compliant with a strategic plan, and allows the development to be assessed and approved even if it is identified as prohibited under a local plan.  The White Paper comments that the use of Strategic Development Certificates will be limited to an interim measure.
<b>Part 5 – Infrastructure and environmental impact assessment</b>		
5.10 (3)	The Minister may, by Ministerial planning order, declare specified development on specified land to be State infrastructure development.	State infrastructure development is subject to a separate approval process, and is approved by the Minister.  State infrastructure development is either declared by the Minister, or specified as such in a local plan.
5.12	(1) The proponent may apply for the approval of the Minister under this Division to carry out State infrastructure development. (2) The application is to: (a) describe the State infrastructure development, and (b) contain any other matter required by the Director-General.	
5.16 (2)	The Minister, when deciding whether or not to approve the carrying out of State infrastructure development, is to consider:	

	<ul style="list-style-type: none"> <li>(a) the Director-General's report on the State infrastructure development and the reports, advice and recommendations contained in the report, and</li> <li>(b) any advice provided by the Minister having portfolio responsibility for the proponent, and</li> <li>(a) (c) any findings or recommendations of the Planning Assessment Commission following a public hearing or review in respect of the State infrastructure development.</li> </ul>	
5.23	<ul style="list-style-type: none"> <li>(1) The Minister may, by Ministerial planning order, declare that particular development is public priority infrastructure for the purposes of this Act.</li> <li>(2) A declaration under this section may only be made if: <ul style="list-style-type: none"> <li>(a) the particular development is generally of the kind that is identified in a strategic plan (other than a local plan) or in a growth infrastructure plan as priority infrastructure for the area to which the plan applies, or</li> <li>(b) a Minister with portfolio responsibility for the carrying out of the particular development applies for the declaration and the Minister administering this Act is of the opinion that the development is essential</li> </ul> </li> </ul>	A Ministerial declaration of PPI is sufficient for development to take place: under 5.25 (1), "Development for the purposes of public priority infrastructure may be carried out without any planning approval under this Act and despite any provision of or made under the planning legislation, other than this Division."
<b>Part 6 – Concurrences, consultation and other legislative approvals</b>		
6.9	<ul style="list-style-type: none"> <li>(2) The Minister may, for the purpose of facilitating the carrying out of any particular development or any particular kind of development, amend the planning control provisions of a local plan to provide that a consultation or concurrence requirement, or a relevant statutory provision, to which this section applies does not apply to that development.</li> <li>...</li> <li>(4) The Minister may, under Part 3, amend the planning control provisions of the relevant local plan for any of the following purposes: <ul style="list-style-type: none"> <li>(a) to impose additional or alternative environmental impact assessment requirements or conditions that apply to that development,</li> <li>(b) to prescribe matters to be included in an application for planning approval for that development,</li> <li>(c) to prescribe matters to be taken into account in determining any such application,</li> <li>(d) to prescribe standard conditions of development consent that are to apply to any consent for that development,</li> <li>(e) to prescribe any other matter relating to the assessment, determination or carrying out of that development</li> </ul> </li> <li>...</li> <li>(6) The Minister may amend the provisions of a local plan for the purposes of this section without compliance with the provisions of the planning legislation relating to the conditions precedent to doing so.</li> </ul>	
<b>Part 7 – Infrastructure and other contributions</b>		
7.5 (3)	Despite subsections (1) and (2) <i>[which refer to how contributions can be imposed]</i> , if the Minister is the consent authority, the Minister can impose a local infrastructure contribution that is not in accordance with the local plan for the area but must have regard to that local plan and the local infrastructure plan when imposing the contribution.	Refers to levying local infrastructure contributions, which must normally be specified in a local plan.

7.9 (4)	If the Minister considers that a council is not complying with this section <i>[by spending contributions on infrastructure]</i> in a timely manner, the Minister may direct the council on how the money held by the council is to be applied to further the local infrastructure requirements of the relevant subregion and the council is required to comply with any such direction. A direction is to be consistent with the infrastructure priorities in the subregional delivery plan and may require money collected in one local government area to be applied in another local government area in the subregion.	
7.11 (4)	The Minister may make a local infrastructure plan in the form in which it was submitted or with such modifications as the Minister considers appropriate. The Minister may decide not to make the draft plan.	Councils to prepare and submit draft infrastructure plans to Minister.
7.20 (4)	The Minister may make a growth infrastructure plan in the form in which it was submitted or with such modifications as the Minister considers appropriate. The Minister may decide not to make the draft plan.	Director-General to prepare growth infrastructure plans for any part of the State and submit to Minister.
<b>Part 10 - Enforcement</b>		
10.1 (1)	The Minister may direct a public authority or a person or body having functions under the planning legislation (including under a local plan) to exercise those functions at or within such times as are specified in the direction.	
<b>Schedule s</b>		
Schedule 10 Section 10.1	(1) The Minister may appoint a regional planning panel to exercise functions of a council if: <ul style="list-style-type: none"> <li>(a) the Minister is of the opinion that the council has failed to comply with its obligations under the planning legislation, or</li> <li>(b) the Minister is of the opinion that the performance of a council in dealing with planning and development matters (or any particular class of such matters) is unsatisfactory because of the manner in which the council has dealt with those matters, the time taken or in any other respect (having regard to criteria published by the Minister for the purposes of this clause), or</li> <li>(c) the council agrees to the appointment, or</li> <li>(d) a report referred to in section 74C of the Independent Commission Against Corruption Act 1988 recommends that consideration be given to the appointment because of serious corrupt conduct by any of the councillors in connection with the exercise or purported exercise of functions conferred or imposed on the council by or under the planning legislation.</li> </ul>	Requires concurrence of Minister for Local Government under Schedule 10 cl. 10.1 (6).
Schedule 10 Section 10.3	(1) This clause applies to any function (a protected function) conferred or imposed on the Minister (including a delegate of the Minister) relating to the appointment of a regional planning panel to exercise the functions of a council. (2) The exercise by the Minister of any protected function may not be: <ul style="list-style-type: none"> <li>(a) challenged, reviewed, quashed or called into question before any court of law or administrative review body in any proceedings, or</li> <li>(b) restrained, removed or otherwise affected by any proceedings.</li> </ul>	
Schedule 10 Section	The Minister may revoke or modify a development control order given by a council.	Refers to development control orders, which have

10.28 (1)		a number of functions include stop usage orders, stop work orders, demolition orders, and repair orders.
Schedule 11 Section 11.1	Regulations may be made, in particular, for or with respect to the following: (a) exempting specified or classes of persons, premises or other matters from any specified provision of the planning legislation, (b) any function conferred by the planning legislation on any person	
<b>Planning Administration Bill</b>		
Planning Admin. Bill cl. 6	(1) The Minister or Director-General may, by order published on the NSW planning website, establish committees or panels for the purposes of the planning legislation. (2) The chairperson and other members of any such committee or panel are to be appointed by the Minister or Director-General (as the case requires).	

### 3.1 Submissions

Where submissions comment on Ministerial powers, they are generally of the view that the draft Bills provide significant discretion to the Minister and Director-General in the exercise of power. The Better Planning Network, for example, comments that:

The Planning Bills will result in significantly more flexibility for decision-makers and an increased concentration of powers in the Minister and Director-General of Planning... the Minister and Director-General of Planning will have broad discretion powers to amend strategic planning controls at any point in time, with or without consulting the affected community.<sup>19</sup>

Submissions were generally of the view that the extent of Ministerial discretion, and the ability to override decisions made by local authorities, would erode local control over decision-making. The City of Sydney addressed this issue at some length:

The draft Planning Bill goes too far in placing power in the hands of the Minister and, therefore, provides extensive opportunities for the erosion of local and community control over planning. This is best exemplified by the far reaching regulation making power in schedule 11, subsection 11.1 (a) which allows regulations to be made **“exempting specified classes of persons, premises or any other matters from any specified provision of the planning legislation”**. [emphasis in original]

In its potential application, this power significantly undermines the entire planning regime. At any time, the Minister of the day may choose to exempt an entire activity, such as mining, or one particular development (or developer) or the Minister himself from any provision of the legislation, by simply making a statutory instrument without reference to Parliament. This is a very significant

<sup>19</sup> Better Planning Network, [Submission on the White Paper: A New Planning System for NSW and Associated Planning Bills](#), June 2013, p. 2

executive power, beyond the power of other Ministers, the use of which would significantly reduce public confidence in the transparency of the system as well as undermining principles of certainty and meaningful community participation...

There are a number of mechanisms whereby the draft Planning Bill will enable the Minister to override local zoning and development control.

The first is pursuant to division 3.3 of the draft Bill in circumstances where the Minister is of the view that the relevant council has not carried out its obligations in a satisfactory manner or has failed to comply with a Direction of the Minister in relation to its functions as a Planning Authority.<sup>20</sup>

The second is where the Minister makes a Subregional Delivery Plan which by virtue of its provisions modifies the zoning of a particular precinct.

Thirdly, and most problematically, the Minister can simply decide not to make a Local Plan, and thus enable development to be carried through the existing EPIs or through the Director-General's use of Strategic Compatibility Certificates.

While councils are largely responsible for preparing a Local Plan, the Minister will have extensive power to delve into local planning in certain circumstances and modify locally developed planning controls.

The City is of the opinion that the unchecked extent of such power needs to be narrowed. This is particularly the case given that the move to strategic planning which envisages extensive upfront community consultation. *[sic]* The utility of this consultation, and the principle of meaningful community participation and consultation, will be undermined significantly where the Minister utilises his or her power to override the provisions of a made Local Plan...

The Planning Bills should be revised to ensure transparency and probity through statutory safeguards for discretionary decisions by the Minister and include mandated consultation with any council prior to being affected by the exercise of the Minister's discretion.<sup>21</sup>

Similarly, the Heritage Council is of the view that Ministerial powers may limit the community's right to participate in the planning system:

The power of the Minister for Planning to amend strategic plans including local plans without community consultation as currently written in section 3.9 of the Planning Bill 2013 is significantly at odds with the "community participation" pillar of the White Paper and Draft Exposure Bills. The Minister for Planning should not have the ability to amend strategic plans and the very things that community has been consulted about and signed off on without further community consultation. Proposed amendments to strategic plans must be publicly exhibited and the community provided with the opportunity to

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<sup>20</sup> See also Section 4.12 of this paper

<sup>21</sup> City of Sydney, [NSW Planning System White Paper and Draft Exposure Bills: Submission to the Department of Planning and Infrastructure](#), June 2013, pp. 42, 44

comment.<sup>22</sup>

A number of other submissions point out that the degree of Ministerial discretion involved in the system would be contrary to the Government's stated aim of ensuring transparency in planning and development, and argue that the Minister should be subject to the same degree of accountability as other authorities in the exercise of power. The Better Planning Network for example comments that:

**The broad and unrestrained powers of the Minister to amend strategic plans (including Local Plans) without community consultation or community access to judicial review rights must be curtailed. As they stand, these powers can render community consultation meaningless** as everything agreed to by the community can be subsequently amended and changed by the Minister. There needs to be a provision in the Planning Bill which states that the Minister cannot amend strategic plans without further community consultation... **Community engagement in strategic planning is further rendered meaningless by the range of ways in which strategic planning controls can be disregarded** [including spot rezonings, strategic compatibility certificates, and SSD declarations].<sup>23</sup> [emphasis in original]

The Nature Conservation Council/Total Environment Centre joint submission expresses a similar view:

Unfortunately, and despite the repeal of Part 3A, components of the EPA Act that are recognised as having potential corruption risk, or which are criticised for limiting accountability and transparency in decision-making have been carried into the Exposure Planning Bill. Of greater concern are new provisions that increases corruption risk and are contrary to Government messaging about increasing transparency and accountability in the new system. Our key concerns are outlined below.

Concentration of discretionary powers in the Minister and Director General: The White Paper suggests that there will be improved accountability and transparency in the new planning system however a substantial amount of discretionary power remains with the Minister and Director General... far from increasing certainty and improving transparency, these proposals have the potential to be misused by developers and undermine any certainty and community buy-in that would have come out of effective strategic planning.

Recommendation 31: Ensure that discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective and open to judicial review<sup>24</sup>

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<sup>22</sup> Heritage Council of NSW, [Submission to the White Paper and Draft Planning Bills 2013](#), June 2013, p. 8

<sup>23</sup> Better Planning Network, [Submission on the White Paper: A New Planning System for NSW and Associated Planning Bills](#), June 2013, p. 5

<sup>24</sup> NSW NCC & Total Environment Centre, [Charting a new course: Delivering a planning system that protects the environment and empowers local communities](#), pp. 36-37

An additional concern – particularly given the lack of public confidence in the planning system at present<sup>25</sup> – is the risk of corrupt conduct, and the extent to which the planning system would prevent it. A number of stakeholders – including ICAC and the Law Society of NSW – are of the opinion that the draft Bills would provide additional opportunities for corrupt behaviour.

Speaking generally, ICAC comments that:

A performance based assessment regime may introduce a high level of discretion into the system if performance outcomes are ill-defined. A system that does not provide one clear rational choice for development determinations will create inconsistency. Corrupt conduct can also be difficult to prove where any number of possible outcomes can be justified based on unclear standards and the likelihood of varying interpretations.<sup>26</sup>

The Commission then proceeds to observe that:

In some cases, the discretion conferred on decision-makers in the draft legislation appears largely unfettered. The most notable examples involve Ministerial decision-making. Examples include the power of the Minister on various occasions to alter local plans and make local infrastructure plans.<sup>27</sup>

The Law Society also perceives the breadth of discretion available to the most senior decision-makers as opening the system to the risk of corruption:

the Minister may make, amend or replace provisions of local plans by an instrument published on the NSW legislation website. This may be done without compliance with the procedural requirements of the planning legislation relating to the conditions precedent to do so in order to achieve matters that give effect to strategic plans or infrastructure plans, or matters that are of State, regional or subregional significance. This gives the Minister a very wide discretion to amend local plans. If one of the purposes of the new legislation is to minimise the risk for actual or perceived corruption in decision-making in the planning sphere, the breadth of the Minister's discretionary powers is of concern.<sup>28</sup>

#### 4 DEVELOPMENT ASSESSMENT

Significant changes to the process of development assessment have been identified for the new planning system. This section provides an overview of the existing development assessment and approvals process. It then proceeds to consider in detail how development assessment will function under the new system, including the track-based assessment process.

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<sup>25</sup> NSW Planning System Review, [The Way Ahead for Planning in NSW: Recommendations of the NSW Planning System Review](#), May 2012

<sup>26</sup> NSW Independent Commission Against Corruption, [Submission Regarding a New Planning System for NSW \(White Paper and Accompanying Bills\)](#), June 2013, p. 1

<sup>27</sup> *Ibid.*, p. 2

<sup>28</sup> Law Society of NSW, [Environmental Planning and Development Committee submission on A New Planning System for NSW – White Paper](#), 28 June 2013, p. 4



Development can refer to the use or subdivision of land, the erection or demolition of a building, or the carrying out of work, and development assessment is the process by which a development receives approval to be carried out. Local environment plans (local plans under the proposed system) identify what development is permitted for a given area, and the type of approval that is required before it can be carried out. Often local environmental plans will specify that consent is required from a consent authority. A number of bodies can act as consent authorities, including councillors and council staff, the Minister, and regional planning panels.

The extent to which a consent authority is free to determine development applications – and to which it is bound by pre-defined standards and outcomes – is a key locus of decision-making power.

#### 4.1 The current planning system

There are three broad categories of development outlined in the *EP&A Act*: development which does not require consent; development which requires consent; and prohibited development.<sup>29</sup> These three types can be distinguished further by the extent to which their approval requires environmental assessment or the involvement of a consent authority. On that basis, five types of development assessed by local councils can be distinguished:<sup>30</sup>

- Development prohibited under a land use plan;
- Exempt development (does not require consent or environmental assessment under Part 5 of the EP&A Act);
- Development permitted without consent that requires assessment under Part 5 (may be carried out by government agencies or require approval under other legislation);
- Complying development (that is, development that conforms to a strictly-defined set of standards and can be approved by a certifier); and
- Development requiring development assessment and consent under Part 4 of the EP&A Act (full assessment, including merit-based criteria).

Currently, complying development is restricted in scope and application to such development as alternations and additions to a dwelling. Its uptake rate is also relatively modest, with 22.5% of development approved by complying development certificates in 2011-2012.<sup>31</sup>

Additional categories are available for major development including State significant development, regional development, and State significant infrastructure.

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<sup>29</sup> Gurrans N, *Australian urban land use planning: principles, systems and practice*, Sydney University Press, 2011, p. 129

<sup>30</sup> Additional forms of development are State significant developments and State significant infrastructure.

<sup>31</sup> NSW Department of Planning and Infrastructure, [Local Development Performance Monitoring 2011-2012](#), March 2013

## 4.2 The proposed planning system

A guiding principle of the new system will be that the level of assessment required should be proportionate to the potential of the development to generate negative impacts.<sup>32</sup>

The White Paper outlines a five-track system for the assessment of development applications, and categorises development by which track it will fall into. These five tracks are: prohibited development; exempt development; complying development; code-assessable development; and merit-assessable development.<sup>33</sup> Some merit-assessable development can be identified as requiring assessment under an environmental impact statement (“EIS”). These “tracks” will be assessed under Part 4 of the Planning Bill and require formal development consent to proceed.

In addition to these five “assessment tracks” identified in the White Paper, five “categories” of development with additional assessment requirements are specified in Section 1.13 of the Planning Bill.

- State significant development;
- Regionally significant development;
- Environmental impact assessment (EIA) development under Part 5;
- State infrastructure development; and
- Public priority infrastructure.

State and regionally significant development are kinds of merit-assessable development and fall under Part 4 of the Planning Bill. Part 5 EIA development, State infrastructure development and public priority infrastructure are assessed under Part 5 of the Bill and thus are not considered merit-assessable development.

Development assessment is summarised below in Table 2. This table also shows the approvals process for State infrastructure development and public priority infrastructure. Information is drawn from the draft Bills, with discrepancies with the White Paper noted.

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<sup>32</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 15

<sup>33</sup> This excludes State significant development and State significant infrastructure, which is assessed by the Minister

Table 2: Categories of development

Development type	Typical developments	Method of assessment	Timeframe for assessment	Consent/assessing authority	Equivalent in current system	Notification requirements
<b>Prohibited</b>	Dependent on zone and local plan	Prohibited	-	-	-	-
<b>Exempt</b>	Non-structural alterations, change of use of retail, office, and business	No assessment required	-	None	Exempt (expanded range of exempt uses to be expanded)	None
<b>Complying</b>	Single-story dwellings, internal alterations, first floor addition	Compliance with relevant standards and requirements	Ten days	Council or accredited certifier	Complying (range of complying uses to be expanded)	Information only; Home owners encouraged to discuss proposals with neighbours
<b>Code-assessed</b>	Villas, town houses, mixed use development, residential flat building, commercial building  Only in nominated growth-areas (as of 19 September 2013)	Assessed against strict performance outcomes set out in code specified in local plan	25 days	Minister or public authority declared to be the consent authority by the planning control provisions of a local plan that apply to the development (or the council for the area concerned if there is no consent authority so declared for the development)  Code can stipulate that a development be assessed by an independent expert. White Paper notes that this “should” always be assessed by council officers <sup>34</sup> (as opposed to councillors)	No direct equivalent; many code-assessable developments likely to have been standard development assessment (now “merit-based” assessment)	Notification of receipt of application, no consultation required for standard code-assessment; consultation at council’s discretion for proposed alternative solutions

<sup>34</sup> NSW Government, *A New Planning System for NSW – White Paper*, April 2013, p. 116, p.137: “The great majority of applications will continue to be determined by council officers under delegation. This should include all development that is code assessed and complies with all acceptable solutions”.

Development type	Typical developments	Method of assessment	Timeframe for assessment	Consent/assessing authority	Equivalent in current system	Notification requirements
<b>Merit-based</b>	Developments not streamlined into other tracks (typically major or complicated developments)	Assessed against: <ul style="list-style-type: none"> <li>•Strategic objectives of local plan</li> <li>•Submissions</li> <li>•Environmental, social and economic impacts</li> <li>•Public interest</li> <li>•Relevant development assessment codes (as guidelines)</li> </ul> May require preparation of EIS <sup>35</sup> if identified in local plan as EIS-assessable	None specified	Minister or public authority declared to be consent authority in local plan	Development assessment	Scalable consultation requirements proportionate to likely and potential impacts (set out in regulations)
<b>Regionally significant development</b>	Development declared as regionally significant in a local plan	Assessed against: <ul style="list-style-type: none"> <li>•NSW planning policies, regional growth plans, and subregional delivery plans</li> <li>•Submissions</li> <li>•Likely environmental, social and economic impacts</li> <li>•Public interest</li> <li>•Relevant development assessment codes</li> </ul>	None specified	Regional Planning Panels	Regionally significant development	Not specified (to be provided in regulations)
<b>State significant development</b>	Development declared as state significant by local plan, or by Minister after receiving advice from PAC	May require preparation of EIS or statement of environmental effects Assessed against: <ul style="list-style-type: none"> <li>•NSW planning policies, regional growth plans, and subregional plans</li> <li>•Submissions</li> <li>•Environmental, social and economic impacts</li> <li>•Public interest</li> </ul>	None specified	Minister (White Paper states that this will be assessed by the PAC or DP&I officers)	Existing State Significant Development	Not specified (to be provided in regulations)
<b>State infrastructure development</b>	Development declared to be State infrastructure development by Minister or local plan	Assessed against: <ul style="list-style-type: none"> <li>•Director-General's report</li> <li>•Proponent's EIS</li> <li>•Advice provided by public authorities</li> <li>•Advice provided by PAC</li> <li>•Any environmental impact assessment undertaken by DP&amp;I</li> </ul>	None specified	Minister	State significant infrastructure	Not specified

<sup>35</sup> Environmental Impact Statement, prepared in accordance with regulations

Development type	Typical developments	Method of assessment	Timeframe for assessment	Consent/assessing authority	Equivalent in current system	Notification requirements
<b>Public priority infrastructure</b>	Development declared to be PPI by the Minister  Infrastructure works that are essential to the State's development	Project definition report by proponent required following Ministerial declaration of PPI Can be carried out without approval	Not required	Minister to identify location of infrastructure; no "approval" required	None	Project definition report exhibited for 28 days
<b>Environmental impact assessment development (under Part 5)</b>	Anything other than: <ul style="list-style-type: none"> <li>Public priority infrastructure</li> <li>Development requiring development consent</li> <li>Development requiring State infrastructure approval</li> <li>Prohibited development</li> <li>Exempt development</li> <li>Development carried out in accordance with a control order<sup>36</sup></li> <li>Development approved by the Minister under the EP&amp;A Act</li> </ul> EIS required for activities "likely to significantly impact environment", which can be specified in regulations	For development likely to significantly impact the environment, the determining authority is to obtain an environmental impact statement, and consider: Submissions in response to EIS Any relevant advice or recommendations from the PAC or Director-General  Director-General or PAC may examine EIS	None specified	"Determining authority" is the Minister or public authority by or on whose behalf the development is or is to be carried out or any Minister or public authority whose approval is required in order to enable the development to be carried out.	Part 5 Environmental Assessment	EIS to be exhibited for 28 days

<sup>36</sup> For example, a stop work order or fire control order.

### 4.3 Prohibited development

Prohibited development is that which is identified as such in the provisions of a local plan. Prohibited development may not be carried out “unless the carrying out of development is permitted by a strategic compatibility certificate, a State infrastructure approval, as public priority infrastructure or under any provisions of [the Planning Bill].”<sup>37</sup>

### 4.4 Exempt development

Exempt development is “development that is declared to be exempt development by the planning control provisions of a local plan because of its minor impact.”<sup>38</sup> Exempt development does not require development consent, environmental impact assessment, or other types of assessment in order to be carried out.

### 4.5 Complying development

Complying development is development that requires consent, and is identified as complying development in the provisions of a local plan. Complying development is approved by a certifier or council if it complies with standards for the relevant type of development specified in a local plan.

If complying development does not strictly meet all required standards, a council may, on the application of an applicant, issue a variation certificate stating that the deviation from standards is a permissible variation. The council must be satisfied that the non-compliance is not likely to have any significant additional adverse impact on surrounding development.<sup>39</sup>

### 4.6 Code-assessed development

Code assessment is one of the more significant reforms to development assessment proposed in the Green and White Papers. The original intent of the White Paper was that code-based development would be introduced across NSW, and 80% of all development would be assessed as either complying or code-based. In response to community concerns, on 19 September 2013 the Minister released a statement announcing that code-assessable development will be used only in nominated growth areas, and no target will be in place. Growth areas have not yet been specified.

Local plans will contain performance-based codes which will detail the requirements for certain kinds of development, against which these kinds of development will be assessed. These codes will derive from strategic and performance outcomes identified in the strategic planning process.

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<sup>37</sup> NSW Government, [Planning Bill 2013 – exposure draft](#), cl1.19(1)

<sup>38</sup> NSW Government, [Planning Bill 2013 – exposure draft](#), cl1.14(2)

<sup>39</sup> NSW Government, [Planning Bill 2013 – exposure draft](#), s4.8

The kinds of development for which a development code is prescribed may range from separate dwellings to larger mixed-use developments or industrial facilities.<sup>40</sup>

Development which is fully compliant with the relevant development code must be approved.

Code-assessment can form the basis for the approval of either part or all of a single development; those elements of a development that fail to meet the standards set out in the code, or are not identified as code-assessable, can be merit assessed.

It is the intent of the White Paper that code-based assessment will be conducted by council officers under delegated authority, rather than by elected councillors. However the *Planning Exposure Bill* does not preclude elected councillors from determining code-assessable development applications:

- (1) The consent authority for the purposes of development that requires development consent under this Part is as follows:

[...]

- (d) for [development other than complying, state significant, or regionally significant development] — a Minister or public authority declared to be the consent authority by the planning control provisions of a local plan that apply to the development (or the council for the area concerned if there is no consent authority so declared for the development).<sup>41</sup>

At this stage the nature of the standards that will be included in development codes is not clear. To date both numerical criteria and subjective outcomes have been cited as potential standards. By way of example, the White Paper points to overshadowing, privacy, height in line with neighbours, and how the building will look from the street and other public areas. It notes that “the code will require a judgement as to whether a proposal meets the standards as assessed by a planner working within a council.”<sup>42</sup> It is evident from examples given in the White Paper that such standards could be can be less “black and white” than those standards applicable to complying development, which will be governed by strict quantifiable guidelines such as height and setback limitations.

Under code assessment, the determination of appropriate development will move further up the strategic planning process, and ultimately rest with the planning body responsible for a development code. This may be either the council in question, or the subregional planning board on which a council will have only a single representative.

Development codes will be a part of local plans. While these are likely to be

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<sup>40</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 130

<sup>41</sup> NSW Government, [Planning Bill 2013 – exposure draft](#), s4.5

<sup>42</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p130

prepared by local authorities, this may not apply in all cases. The White Paper points out in this respect:

The NSW Government and Subregional Planning Boards may prepare development guides to facilitate code assessed development in designated areas of regional and subregional significance, such as major precincts and corridors of strategic importance. Following the Minister for Planning and Infrastructure's approval, these development guides will be inserted into a Local Plan to ensure legal effect.<sup>43</sup>

Clauses 4.17 and 4.18 of the *Planning Exposure Bill* deal with development assessment codes:

#### **4.17 Development assessment codes**

- (1) A development assessment code is a code for development set out in the development guide provisions of a local plan. More than one code may apply to the same development.
- (2) A development assessment code is to describe the performance outcomes for the development and identify any acceptable solutions for achieving those performance outcomes.
- (3) If the planning control provisions of a local plan identify development subject to code assessment, the relevant development assessment code applies to the determination of an application for development consent to carry out the development (subject to section 4.19 (1) (b)).
- (4) Development assessment codes and any such planning control provisions may describe or identify development to which they apply by reference to a kind of development, to development in a particular area or to any other aspect of development.

#### **4.18 Code assessment**

- (1) If an application for development consent adopts an acceptable solution for an aspect of development identified in an applicable development assessment code:
  - (a) the consent authority cannot refuse to grant development consent on grounds related to that aspect of the development, and
  - (b) the consent authority cannot impose conditions that are more onerous than the standards for that acceptable solution.
- (2) If an application for development consent proposes an alternative solution to the acceptable solution for an aspect of development identified in an applicable development assessment code and the alternative solution meets the performance outcome for that aspect of the development:
  - (a) the consent authority cannot refuse to grant development consent on

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<sup>43</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 99; the Minister's announcement on 19 September confirmed that councils will be able to modify codes to reflect their local area.



- grounds related to that aspect of the development, and
  - (b) the consent authority cannot impose conditions that are more onerous than the standards for that acceptable solution.
- (3) This section does not apply to development (or any aspect of development) that is subject to merit assessment.

#### 4.7 Merit-assessable developments

Merit-assessable developments are developments requiring consent which do not fall into the other streams for assessment. Currently merit-assessment (generally referred to as development assessment under the present system) makes up the majority of development applications.

In determining a merit-based development application, the consent authority is to take into account:

- (a) whether the development is consistent with the strategic context provisions of the local plan and the objectives of the land use zone of the land concerned (including proposed planning control provisions of the local plan that have been publicly exhibited under Part 1 of Schedule 2),
- (b) any submissions (or a summary of submissions) duly received during public exhibition under Part 1 of Schedule 2 in connection with the application,
- (c) the likely impacts of the development, including:
  - (i) any environmental impacts on the natural or built environment, and
  - (ii) any economic or social impacts in the locality,
- (d) the public interest (in particular whether any public benefit outweighs any adverse impact of the development).<sup>44</sup>

The White Paper comments that “the public interest test will be assessed against sustainable development objectives (that is, integrating social, environmental and economic objectives). A subset of this public interest test is a consideration of the cumulative impact of development.”<sup>45</sup> These criteria have not been included in the qualification of “public interest” reproduced above.

Following assessment of the merits of a proposed development, should parts of the development be found unacceptable, the consent authority will be obliged to notify the proponent how the proposal can be appropriately modified:

- (4) A consent authority must not refuse an application for development consent unless it has (in accordance with the regulations):

<sup>44</sup> NSW Government, [Planning Bill 2013 – exposure draft](#), cl4.19(2)

<sup>45</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 34

- (a) notified the applicant that it intends to refuse the application, and
- (b) notified the applicant of any changes to the application that the consent authority considers necessary before it will reconsider the application, and
- (c) considered any submissions made by the applicant in response to the proposed refusal.<sup>46</sup>

A local plan can declare certain categories of development as environmental impact statement (EIS) assessable development. An application for EIS assessable development must be accompanied by an EIS prepared by or on behalf of the applicant in accordance with regulations. Any submissions received during public exhibition must be forwarded to the Director-General.

#### Strategic Compatibility Certificate

The planning reforms will introduce a new mechanism known as strategic compatibility certificates, which will be issued by the Director-General. Their purpose is to permit development that is in accordance with strategic planning goals to be assessed in cases where lower-level strategic plans are not yet in place. In this way development that complies with strategic planning goals may be considered by a consent authority under the normal development assessment procedures even where such development is not permitted under local plans.

In order for a strategic compatibility certificate to be issued, a proposed development must be consistent with planning goals or principles set out in a regional growth plan or subregional delivery plan. This is in line with the new system's aims of facilitating a more strategic approach to planning and development.

The scope of strategic compatibility certificates has changed significantly between the Green and White Papers. The Green Paper proposed that certificates be issued in instances where there is "a strategy-consistent development proposal that will deliver metropolitan or regional strategic planning outcomes before the subregional planning process is complete." In such instances, it has said, the development "should be assessed primarily against those [*metropolitan and regional*] strategies, rather than out of date controls in the existing local land use plan."

The White Paper proposes limiting the scope of these certificates, stating that:

in response to submissions, it is proposed to restrict strategic compatibility certificates so that they will only be an interim approach until Subregional Delivery Plans and Local Plans are complete, or the program set out by the Subregional Delivery Plan has been implemented.<sup>47</sup>

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<sup>46</sup> NSW Government, [Planning Bill 2013 – exposure draft](#), cl4.16(4)

<sup>47</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 117

Relevant excerpts from the *Planning Exposure Bill* dealing with key aspects of strategic compatibility certificates are reproduced below.

#### **4.32 Prohibited development permissible with consent if strategic compatibility certificate issued**

- (1) A strategic compatibility certificate is a certificate issued by the Director-General that certifies that the carrying out of specified development on specified land is permissible with development consent under this Part, despite any prohibition on the carrying out of the development under the planning control provisions of the local plan.
- (2) A strategic compatibility certificate has effect as if it formed part of the planning control provisions of the local plan.
- (3) Despite anything to the contrary in the planning control provisions of the local plan, merit assessment under section 4.19 (Merit assessment) applies to the determination of an application for development consent made in reliance on the certificate. Those planning control provisions determine whether the development is EIS assessed development, regionally significant development or State significant development.

#### **4.33 Grounds on which certificate may be issued**

A strategic compatibility certificate may be issued for development only if the Director-General is satisfied that:

- (a) a regional growth plan or subregional delivery plan has been made that applies to the development, and
- (b) the planning control provisions prohibiting the development have not yet been amended to give effect to the relevant provisions of that plan, and
- (c) the development is consistent with that plan, and
- (d) the development will not have any significant adverse impact on likely future uses of the surrounding land.

### **4.8 State and regionally significant development**

The category of State significant development exists under the current system, and has been carried through to the proposed system. State significant development is that which is identified as such in a local plan, or declared to be State significant development by the Minister. The Minister can only declare development to be State significant after obtaining advice from the PAC about the State significance of the proposed development, and making this advice public; the Minister is not obliged to follow any recommendation that the PAC may make. Regionally significant development is development declared as such under a local plan. These streams of development have different consent authorities, but both are assessed against the same criteria specified in clause 4.19 (3) of the Planning Bill.

Clause 4.5 of the Planning Bill identifies the Minister as the consent authority for State significant development, although the White Paper comments that the PAC will assess “complex” State significant developments and DP&I officers will assess those that are “routine”. The same clause of the Bill identifies the consent authority for regionally significant development as the relevant regional planning panel.

Development that is State or regionally significant is merit-assessed, although Clause 4.19 (3) specifies the additional requirement that for these categories of development the consent authority is to consider “whether the development is consistent with applicable NSW planning policies, regional growth plans and subregional delivery plans.”

By way of contrast, in non-State significant merit assessment decision makers need to consider only “whether the development is consistent with the strategic context provisions of the local plan and the objectives of the land use zone of the land concerned”.

A number of concurrences and approvals under other Acts are not required for State significant development. These are:

- **Coastal Protection Act 1979** - Concurrence of Minister administering Act under Part 3
- **Fisheries Management Act 1994** - Permit referred to in section 201, 205 or 219
- **Heritage Act 1977** - Approval under Subdivision 1 of Division 3 of Part 4 or excavation permit under section 139
- **National Parks and Wildlife Act 1974** - Aboriginal heritage impact permit under section 90
- **Native Vegetation Act 2003** - Approval referred to in section 12 to clear native vegetation
- **Rural Fires Act 1997** - Bush fire safety authority under section 100B
- **Water Management Act 2000** - Approval under Part 3 of Chapter 3.<sup>48</sup>

#### 4.9 Part 5 EIS-assessable development

EIS-assessable development (referred to in the Planning Bill as “Part 5 environmental impact assessment development”) is development that requires approval under Part 5 of the Planning Bill, but not formal development consent under Part 4; complying, code-assessable and merit-assessable development (including State significant development) all fall under Part 4.

Development requiring the preparation of an EIS under Part 5 is that which is likely to affect the environment, but does not fall into one of the following categories:

- (a) development for the purposes of public priority infrastructure,

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<sup>48</sup> NSW Government, [Planning Bill 2013 – exposure draft](#), cl. 6.2

- (b) any act, matter or thing for which development consent or State infrastructure approval is required or has been obtained,
- (c) any act, matter or thing that is prohibited under the planning control provisions of a local plan,
- (d) exempt development,
- (e) development carried out in compliance with a development control order,
- (f) any project or development for which an approval from the Minister was obtained under the former Act,
- (g) development that is excluded from this Division by the regulations.<sup>49</sup>

As such, this assessment and approvals stream acts as a general “catch-all” for development which may negatively impact the environment but falls outside other assessment tracks.

Under Clause 5.4 (2), the regulations are able to identify development or classes of development that are likely to significantly affect the environment.

The primary difference between merit-assessable development requiring an EIS and Part 5 EIS-assessable development is the criteria against which the development is assessed. While merit assessment requires consideration of the public interest and compatibility with strategic plans, as outlined in Section 4.7 of this paper, Part 5 EIS-assessable development requires only that:

A determining authority is, in its consideration of any relevant development, to examine and take into account the matters affecting or likely to affect the environment because of the carrying out of that development.<sup>50</sup>

EIS-assessable development requires the preparation of an environmental impact statement, which considers potential impacts on the environment arising from the development. This must be publically exhibited for 28 days, with the determining authority taking into account any submissions received. The EIS may be reviewed by the Director-General or PAC.

#### **4.10 State infrastructure development**

State infrastructure development is identified as such in the planning provisions of a local plan, or declared by the Minister in a Ministerial planning order.<sup>51</sup> Unlike complying, code-assessable and merit-assessable development, State infrastructure does not require development consent under Part 4 in order to be carried out. Instead it requires the Minister’s approval, following a formal

<sup>49</sup> NSW Government, [Planning Bill 2013 – exposure draft](#), cl. 5.2 (1)

<sup>50</sup> NSW Government, [Planning Bill 2013 – exposure draft](#), cl. 5.3 (1)

<sup>51</sup> State infrastructure is considered in more detail in the Parliamentary Research Service publication, [NSW planning reforms: infrastructure](#).

application and a report by the Director-General.<sup>52</sup>

The Minister, when deciding whether or not to approve State infrastructure development, is to consider the Director-General's report, any recommendations of the PAC, and any advice provided by the Minister having portfolio responsibility for the proponent. The Minister is not bound by any such advice.<sup>53</sup>

The concurrence exemptions for State significant development identified in Section 4.8 also apply to State infrastructure development.

#### **4.11 Public priority infrastructure**

Public priority infrastructure is infrastructure that is considered essential to the economic, environmental or social well-being of the State, and is declared by the Minister.<sup>54</sup> Once public priority infrastructure has been declared, it can be carried out, with no additional approval or consent required.

A project definition report must be prepared before the development is carried out, and needs to contain a description of the project and as well as measures that will be taken to mitigate or avoid adverse impacts. The report must be publically exhibited for 28 days. The Director-General may order that a project definition report be revised to address any specific matters.

The concurrence exemptions for State significant development identified in Section 4.8 also apply to State infrastructure development.

#### **4.12 Submissions**

While submissions to the White Paper and Exposure Bills addressed almost all aspects of development assessment, the commentary examined below is limited to the most controversial elements of the proposed system and those most relevant to decision making. These were code-based assessment, merit assessment and strategic compatibility certificates.

A number of proposals addressed State significant development. The assessment process for this type of development is largely unchanged, and most submissions commented on how the existing process could be improved rather than on any concrete proposals. Consequently submissions relating to State significant development are not considered here. Submissions on State infrastructure development and public priority infrastructure are considered in the research service publication [NSW planning reforms: infrastructure](#).

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<sup>52</sup> NSW Government, [Planning Bill 2013 – exposure draft](#), cl. 5.11

<sup>53</sup> NSW Government, [Planning Bill 2013 – exposure draft](#), cl. 5.16

<sup>54</sup> Public priority infrastructure is considered in more detail in the Parliamentary Research Service publication, [NSW planning reforms: infrastructure](#).

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## Code Assessment

The proposed introduction of code assessment has been one of the most controversial aspects of the planning reforms, with stakeholders arguing very strongly both in favour of and against its introduction. It is likely that some of the intensity with which it is opposed in submissions results from the proposed 80% benchmark for complying and code-based assessable development; this target has now been abolished, and code-based assessment will be used only in certain growth areas.

Submissions from developer and industry groups are generally supportive of code-based assessment. Submissions examined from local government and community groups fall on a broader spectrum of opinion, from expressing caution to outright opposition.

The Urban Taskforce was representative of those in favour of the introduction of code-assessment, commenting that the Taskforce is:

a strong supporter of Code Assessable development. We argue that once communities have participated in the strategic planning phase of plan making and have agreed on the key drivers of the character of a precinct, including the setting of development standards... there is no reason why development could not be considered as code assessable and removed from the merit assessment stream.<sup>55</sup>

Similarly the Urban Development Institute of Australia comments that:

The expansion of Code Assessable Development is supported by the development industry. Allowing a greater number of building types to be included under the Code will ensure that low risk developments are able to proceed without a full development application.<sup>56</sup>

The introduction of code-assessable development is also supported fairly unequivocally in the submission of the Housing Industry Association and Property Council.

The Planning Institute of Australia also welcomes the introduction of code assessment. Their submission comments that

We support the intention to achieve the delivery of most development approvals through the code and complying tracks, in 10 and 25 day time frames, within 5 years.<sup>57</sup>

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<sup>55</sup> Urban Taskforce, [Delivering a Better Planning System for NSW: White Paper](#), June 2013, p. 28

<sup>56</sup> UDIA, [The Next Act: UDIA Response to the Planning White Paper](#), June 2013, p. 10

<sup>57</sup> Planning Institute of Australia, [A New Planning System for NSW: White Paper Submission](#), June 2013, p. 20

Several submissions identify potential risks that may eventuate if development codes are not carefully drafted and managed. The Law Society of NSW comments that there is a “risk of the community feeling excluded from decision making at a local level”, particularly if the 80% target were to be adopted.<sup>58</sup> ICAC points to the risk of corruption or abuse of the system if codes are not sufficiently clear:

The performance outcomes contained in local plans should be meaningful and measurable. Similarly, what is meant by acceptable solutions should be made clear... The alternative solution option provided in the code assessment pathway may encourage applications that seek unreasonable departures from key controls. The fact an applications cannot be refused on rounds related to an alternative solution that meets a performance outcome creates an additional incentive for proponents to manipulate alternative solution options.<sup>59</sup>

A number of submissions express concern that that this system will restrict a community’s ability to influence development that affects them. This concern is shared by the Environmental Defender’s Office, Better Planning Network, LGNSW, and the City of Sydney, and represented most trenchantly in the Better Planning Network submission which comments that code assessment will result in “limited assessment and no community consultation” for development proposals:

Many of these proposals will be high impact such as industrial buildings up to 20,000 sqm and proposals for 20 townhouse dwellings... Complying and code-assessable development must only be available for those types of development that are genuinely low impact... Letting individual developments proceed without community input will result in poorer design outcomes, reduced quality of life and residential amenity, impacts on our environment and heritage and increased community frustration with the planning system and the NSW Government.<sup>60</sup>

Similarly the City of Sydney, while supporting the overall concept of code-based assessment:

does not support the proposal that the community will be notified of a code assessment application but will not be given the opportunity to comment. Given the extent of code-assessed development expected by the White Paper, it is considered appropriate that some consultation be allowed in respect of those most likely to be affected, such as immediately adjoining neighbours.<sup>61</sup>

The Nature Conservation Council/Total Environment Centre expresses

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<sup>58</sup> Law Society of NSW, [Environmental Planning and Development Committee submission on A New Planning System for NSW – White Paper](#), 28 June 2013, p. 5

<sup>59</sup> NSW Independent Commission Against Corruption, [Submission Regarding a New Planning System for NSW \(White Paper and Accompanying Bills\)](#), June 2013, pp. 1-2

<sup>60</sup> Better Planning Network, [Submission on the White Paper: A New Planning System for NSW and Associated Planning Bills](#), June 2013, p. 9

<sup>61</sup> City of Sydney, [NSW Planning System White Paper and Draft Exposure Bills: Submission to the Department of Planning and Infrastructure](#), June 2013, p. 103



“significant concerns about the ability of code assessment to deliver acceptable environmental and social outcomes”, and comments that:

The types of development listed in the White Paper as examples of complying development and code development include industrial and commercial buildings, residential apartments, townhouses and villas, and subdivision of land. These types of development cannot be said to be genuinely low impact development... There is no mention in the White Paper that there will be any assessment of the environmental and social impacts of proposed development... Councils will be forced to approve development despite concerns that it, or the community, may have including, for example, concerns about health and safety. This is contrary to statements that local planning powers will be returned to councils and communities under the new planning system.<sup>62</sup>

Conversely the Property Council is of the view that some limitation of public input is appropriate for a code-based assessment stream, commenting that “once the standards are set, then for development that meets all of the standards, there should be no further community consultation.”<sup>63</sup>

#### Development of codes

Given that development codes will contain the criteria against which code-assessable developments are assessed, the making of these codes will be an important locus for decision-making power. At present the White Paper proposes that model guides be published by the Department of Planning, with scope for them to be altered to suit local conditions. The Ministerial Statement of October 2013 confirmed this would be the case.<sup>64</sup>

The Planning Institute is supportive of this proposal:

We also note at p. 132 of the White Paper the intention to develop “model development guides” and to use these as a form of template for the introduction of new local development guidelines and codes. We agree that where possible such guides could be developed for local use and adaptation on a regional or sub-regional basis... It must remain possible for local planning authorities to develop locally-relevant and responsive planning codes.<sup>65</sup>

Similarly the EDO, LGNSW and the City of Sydney emphasise the need for codes to be developed at the local level, rather than a one-size-fits-all approach. LGNSW comments that:

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<sup>62</sup> NSW NCC & Total Environment Centre, [Charting a new course: Delivering a planning system that protects the environment and empowers local communities](#), p. 27

<sup>63</sup> Property Council of Australia, [Delivering on the Promise: Submission to the NSW Government's White Paper – A New Planning System for NSW](#), June 2013, p. 40

<sup>64</sup> Hazzard B, [Government Listens to Community and Councils on Planning Bill](#), media release dated 19 September 2013

<sup>65</sup> Planning Institute of Australia, [A New Planning System for NSW: White Paper Submission](#), June 2013, p. 22

Development guides will replace council's Development Control Plans that provide the 'backbone' to local planning controls. The new system will enable the State Government to set up the framework and planning controls under proposed State "Model Development Guides" that councils will be encouraged to sign off. The fact that the Minister will be required to approve councils' Development Guides (as they will form part of the local plan) is another example of the top-down approach in this new system.<sup>66</sup>

In contrast, the Property Council is of the view that the use of State-wide standard development codes should be made mandatory for all councils. It identifies its concerns with council-determined development codes as follows:

- councils keen to force projects into merit assessment will prepare guides that are unreasonably restrictive and prevent access to code assessment tracks
- Development Guides will operate much like DCPs do today – replete with development controls that are often excessive and irrelevant
- this is exaggerated by the fact they will not be subject to the same external scrutiny as local land use plans, and
- without mandating model codes or guidelines, there will be limited consistency across local government.<sup>67</sup>

### Merit Assessment

The Planning Bill identifies considerations that should be taken into account by an authority in making a merit-based determination (see sections 4.7 and 4.8). A number of submissions make suggestions regarding additional factors that could be considered in the decision making process. These submissions were most likely to either recommend additional considerations that should be given legislative force, or critique the decision-making criteria set out in the Bill (in particular, the public interest clause).<sup>68</sup>

The Heritage Council comments that "the development assessment process must allow for the proper identification and assessment of the impacts of development on such items [*as heritage, including aboriginal heritage and unlisted heritage*]. The Planning Bill must be amended to include a requirement for consideration of cumulative impacts of development and ecologically sustainable principles."<sup>69</sup> The Better Planning Network expresses a very similar sentiment, commenting that "there must be a legal requirement in the Planning Bill to consider the cumulative impacts of development and Ecologically

<sup>66</sup> LGNSW, [Submission to the Planning White Paper and Exposure Bills](#), June 2013, p. 30

<sup>67</sup> Property Council of Australia, [Delivering on the Promise: Submission to the NSW Government's White Paper – A New Planning System for NSW](#), June 2013, p. 40

<sup>68</sup> This issue is considered separately from the objects of the Bill, which have been examined in the Parliamentary Research Service Paper, [NSW planning reforms: sustainable development](#).

<sup>69</sup> Heritage Council of NSW, [Submission to the White Paper and Draft Planning Bills 2013](#), June 2013, p. 10

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Sustainable Development principles as part of the development assessment process.”<sup>70</sup>

The public interest criterion in clauses 4.7 and 4.19 (see sections 4.7 and 4.8 of this paper) includes a previously unspecified qualification to the term “public interest” in mandating that a consent authority consider “particularly whether any public benefit outweighs any adverse impact of the development.” A number of submissions raise concerns about this qualification.

The Nature Conservation Council/Total Environment Centre joint submission states that:

We do not consider it appropriate to include this proposed amendment to the public interest criterion because:

- a body of case law as to what constitutes the ‘public interest’ already exists,
- this provision skews the definition of ‘public interest’ in favour of harmful development, by asking the decision maker to place an emphasis on whether a claimed public benefit is sufficient to warrant adverse impacts on the environment or local community,
- it could be said that the ‘public interest’ is dynamic and that what constitutes the public interest may change over time. Any attempt to define public interest could limit its future application, and
- certain elements that have been interpreted as being part of the public interest (such as consideration of ecological sustainable development and the impacts of climate change) should be addressed substantively and specifically by the planning system in other ways.<sup>71</sup>

The Property Council also expresses concerns about the public interest assessment clause, pointing out that:

Given the rigour that the new DA system will apply to determine permissible development, public interest assessment criteria poses an additional layer of complexity if not defined well.

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

If criteria for public interest assessment is to be developed, we recommend the criteria and underlying definitions are carefully devised and assessed in concert

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<sup>70</sup> Better Planning Network, [Submission on the White Paper: A New Planning System for NSW and Associated Planning Bills](#), June 2013, p. 10

<sup>71</sup> NSW NCC & Total Environment Centre, [Charting a new course: Delivering a planning system that protects the environment and empowers local communities](#), p. 33

with industry for a balanced approach.<sup>72</sup>

The Environmental Defender's Office recommends a number of other factors that should be introduced into the decision-making criteria under clause 4.19:

the suitability of the site for the development (and appropriate alternative options);

the cumulative impacts of past, present and likely future developments in the area;

climate change impacts – in particular:

- the development's likely contributions to climate change;
- the likely impacts of climate change on the development;
- the need for relevant conditions to address both mitigation and adaptation.

the public interest, specifically including relevant principles of ESD that should apply.<sup>73</sup>

The Office also recommends the removal of the “public benefit qualification” discussed above, on the basis that “this new requirement may skew the public interest test to favour the economic benefits of a project, rather than a more even-handed consideration of whether the proposal promotes ecologically sustainable development.”<sup>74</sup>

### Strategic compatibility certificates

Strategic compatibility certificates – which will allow the Director-General to declare a development compliant with a higher-level strategic plan and therefore able to proceed to development assessment and approval, even when prohibited under a local plan – are one of the more controversial proposals in relation to development assessment. Various submissions argue both against the certificates, and in favour of their ongoing use rather than on an interim basis as suggested in the White Paper.

Developers and industry groups are generally in favour of the certificates, seeing them as an efficient way to expedite appropriate development. The Urban Taskforce, Urban Development Institute of Australia, and the Property Council all support the introduction of SCCs. The Property Council, in

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<sup>72</sup> Property Council of Australia, [Delivering on the Promise: Submission to the NSW Government's White Paper – A New Planning System for NSW](#), June 2013, p. 41

<sup>73</sup> EDO NSW, [Submission on A New Planning System for New South Wales – White Paper](#), June 2013, p. 58

<sup>74</sup> EDO NSW, [Submission on A New Planning System for New South Wales – White Paper](#), June 2013, pp. 57-58

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supporting the certificates, also provides a number of recommendations regarding their use:

- Set clear guidelines for the use of strategic compatibility certificates – and keep them available as long as possible
- Integrate strategic compatibility certificates as a DA category of assessment
- Don't constrain the use of strategic compatibility certificates to wholly prohibited development
- Reinforce that strategic compatibility certificates override agreement, covenants or similar instruments, including those imposed by a council

We note that some opponents of SCCs claim this provision is akin to the former Part 3A system and will pre-empt strategic planning.

This is false.

The proposed system has sufficient checks and balances to be procedurally fair, respect local interests and involve wide consultation. We note:

- the draft legislation makes clear the Certificates are an interim measure and do not apply once controls have been amended to give effect to the strategy
- the development has to demonstrate that it is consistent with the strategy plan (i.e. a regional growth plan)
- councils must be consulted and their views considered before a certificate can be issued
- the relevant Planning Panel must be consulted and their advice considered before a decision can be made, and
- there will be mandatory community consultation as part of the process.
- Accordingly, we consider Strategic Compatibility Certificates are a legitimate (and necessary) tool to include in managing the transition and migration to the new planning system.<sup>75</sup>

The Urban Development Institute of Australia supports these certificates, and recommends that their use be extended from an interim measure to an ongoing one:

The industry sees Strategic Compatibility Certificates (SCCs) as an innovative approach to transitional issues that will arise during the implementation of the

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<sup>75</sup> Property Council of Australia, [Delivering on the Promise: Submission to the NSW Government's White Paper – A New Planning System for NSW](#), June 2013, p. 15

new planning system... However, inconsistency between regional, subregional and local plans will be unavoidable because of their different time periods for review. UDIA NSW recommends that the SCC be incorporated as a permanent planning tool that can be used when necessary.<sup>76</sup>

The Urban Taskforce also recommends the use of the certificates on an ongoing basis.

However a number of submissions oppose SCCs due to the significant degree of discretion that they provide to senior decision makers. The Total Environment Centre's submission addresses these concerns:

NSW Planning Policies and Regional Plans are non-statutory instruments and it is intended that they will be given effect through statutory controls set out in subregional delivery plans and local land use plans. It is inappropriate for development that would otherwise be prohibited or restricted by an existing environmental planning instrument to proceed before the statutory controls implementing these policies are introduced...

The strategic compatibility certificate proposals will also centralise power in the Director-General for Planning. The Director General's grounds for issuing a certificate are broad and discretionary. This raises a significant corruption risk, particularly given developers are likely to gain significant windfalls as the result of these decisions...

Provisions allowing the issuing of strategic compatibility certificates up until the point that planning control provisions in the local plan are amended appear in the Exposure Planning Bill. Further, these provisions are embedded in the legislation and have the potential to be manipulated by developers for years to come.

The White Paper also suggests that a higher level of community engagement will be required as part of the assessment of any subsequent development application permitted by the certificate, but there does not appear to be any mechanism in the Exposure Planning Bill requiring this higher level of community engagement.<sup>77</sup>

Other stakeholders, such as the City of Sydney, LGNSW, and Environmental Defenders Office, were opposed to the perceived loss of control that would result for the community and local authorities should the certificates be introduced. The City of Sydney, for example, comments that:

The proposed mechanism of **Strategic Compatibility Certificates** (division 4.7 in the Planning Bill) to be issued by the Director-General for prohibited development will if used, surely undermine the willingness of the community to participate in plan-making and severely undermine the entire planning proposal process, both of which is the basis of the White Paper. **This avenue for issuing discretionary 'rezoning' certificates should be removed** from the

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<sup>76</sup> UDIA, [The Next Act: UDIA Response to the Planning White Paper](#), June 2013, p. 9

<sup>77</sup> NSW NCC & Total Environment Centre, [Charting a new course: Delivering a planning system that protects the environment and empowers local communities](#), p. 29

legislation, or if retained in any interim measure, only applies in situations where there is no Standard Instrument LEP in force.<sup>78</sup>

Similarly the EDO submission expresses the view that:

the Planning Bill provides significant discretion to the Director-General of Planning, and no upfront consultation or appeal rights on whether a certificate should be issued. Other checks and balances are limited (see clauses 4.33-34). These Certificates will also circumscribe the powers and conditions of the consent authority (such as local councils) at the development approval stage (clause 4.36). In turn, this will limit the influence of community consultation.<sup>79</sup>

The Planning Institute occupies a more central position, noting a degree of caution from some of its members regarding certificates, but overall tentatively accepting their temporary use:

PIA supports the proposed use of strategic compliance certificates to facilitate good development as an interim arrangement only while the machinery of the new system is still being assembled... However PIA is concerned about the potential for the concept of SCCs to erode public trust and confidence in the planning system.<sup>80</sup> [*emphasis in original*]

## 5 DECISION-MAKING BODIES

One of the stated aims of the new planning system is to have a higher proportion of development approved by independent experts, including (but not limited to) development assessed by local councils.<sup>81</sup>

This stems from a fundamental principle set out in the Green Paper, stating that under the new system “robust and evidence based strategic planning will provide the foundation for certainty and integrity in decision making.”<sup>82</sup> With a greater emphasis on evidence-based strategic planning, the White Paper envisages that development assessment will increasingly become a technical (rather than political) exercise, of evaluating the extent to which a proposal meets predetermined planning goals and outcomes.

Under the current system a number of bodies constituted by independent experts are delegated assessment and decision-making powers for certain kinds of development, or on a case-by-case basis as determined by a consent authority. These bodies include:

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<sup>78</sup> City of Sydney, [NSW Planning System White Paper and Draft Exposure Bills: Submission to the Department of Planning and Infrastructure](#), June 2013, p. 14

<sup>79</sup> EDO NSW, [Submission on A New Planning System for New South Wales – White Paper](#), June 2013, p. 61

<sup>80</sup> Planning Institute of Australia, [A New Planning System for NSW: White Paper Submission](#), June 2013, p. 26

<sup>81</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 8

<sup>82</sup> NSW Government, [A New Planning System for NSW: Green Paper](#), July 2012, p. 18

- The Planning Assessment Commission (PAC), constituted by between four and nine members appointed by the Minister, which determines major project applications (including State Significant Development) referred to it by the Minister;
- Regional Planning Panels, constituted by the Minister on a regional basis and comprised of five members, which determine regional development;
- Independent Hearing and Assessment Panels, or “expert panels”, which have been established by a number of local councils for the purpose of assessing developments upon referral; the White Paper comments that “more than a quarter” of Sydney councils have established such panels.<sup>83</sup>

In respect to routine applications, the Minister and councils regularly delegate decision making powers to officers of the Department of Planning and Infrastructure and of local councils respectively.

The 2012 Independent Review commented that the current system of “having decisions made by councils (or their staff under delegation), by a Joint Regional Planning Panel (for larger, regional projects) or by a State body (presently the Planning Assessment Commission under delegation from the Minister) remains a generally appropriate model to follow.”

While the Independent Review rejected “the suggestion that all development decision making should be removed from elected councillors,” it also made the following cautionary comment:

It is important that decisions are made on proper planning grounds and not as a result of populism or political expediency. Thus, it is desirable that decisions are delegated as often as possible to council staff or to independent expert panels. If councillors do want to exercise this right, it is essential that they be properly prepared for this aspect of their responsibilities.<sup>84</sup>

It recommended that decision making be left with elected councils, but that the right to a JRPP review be available upon request (rather than a council-conducted review, as under the current system). The Independent Review also recommended that local councils be able to refer matters to JRPPs, for example in the case of a particularly controversial proposal.

In keeping with the aims of providing more efficient, certain and standardised decision making – and depoliticising the decision-making process – the White Paper has identified expanded roles for a number of independent bodies that assess development. All of these bodies operate under the existing planning system, but some will assume more comprehensive duties in the future.

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<sup>83</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 120

<sup>84</sup> NSW Planning System Review, [The Way Ahead for Planning in NSW: Recommendations of the NSW Planning System Review](#), May 2012, p. 93



Table 3: “Preferred decision making model”<sup>85</sup>

	Private proponents		Public proponents
	Complex	Routine	Infrastructure
State significant	Planning Assessment Commission <sup>86</sup>	Senior officers of DP&I	Minister for Planning and Infrastructure
Regional	Regional Planning Panel	Senior council staff	State agencies
Local	Independent Hearing and Assessment Panel	Senior council staff	Elected councillors

“Preferred” assessing authorities for different types of development, as identified in the White Paper, are shown above in Table 3. Decision making bodies identified in the White Paper and Exposure Bills are shown in Table 4. Information in Table 4 is drawn from both the White Paper and Bills.

<sup>85</sup> Reproduced from NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p.137

<sup>86</sup> At present, the PAC assesses applications from private proponents that have received more than twenty five public objections, that are objected to by the local council, or where a political donation has been made; the White Paper does not specify if these criteria will be changed

Table 4: Decision-making bodies

Body	Consent authority for	Composition	Role in decision-making	Change from current role
<b>Minister</b>	State significant development and other development as specified in local plan	Minister	<ul style="list-style-type: none"> <li>Can declare and approve State significant development</li> <li>Can declare and approve State infrastructure development</li> <li>Can declare public priority infrastructure</li> <li>Makes strategic plans, including local plans</li> <li>Can delegate strategic plan preparation</li> <li>Determines rezoning applications</li> <li>Appoints members of PAC and some members of RPPs and SPBs</li> <li>Can appoint RPP to replace council as consent authority</li> </ul>	See Section 3 of this paper
<b>Planning Assessment Commission</b>	<p>State significant development as delegated by Minister)</p> <p>White Paper comments that these are likely to be “complex or controversial developments”</p>	<p>Appointed by Minister, between 4 and 9 members</p> <p>Each member to have expertise in planning, architecture, heritage, the environment, urban design, land economics, traffic and transport, law, engineering, tourism or government and public administration.</p> <p>When appointing members the Minister is to have regard to the range of expertise on Commission</p>	<ul style="list-style-type: none"> <li>Review development at request of the Minister or DG</li> <li>Assumes functions of regional planning panel if there is an area where one has not been appointed</li> <li>Can assume plan-making functions of subregional planning board if appointed by Minister</li> <li>Can conduct or assist with gateway reviews (rezoning applications) if Minister requests</li> <li>Provides advice to Minister about State and regional significance of developments</li> </ul>	<p>Largely unchanged</p> <p>Proponents are able to seek a review of decisions made by PAC</p>
<b>DP&amp;I Staff</b>	<p>State significant development (as delegated by Minister)</p> <p>WP comments that these are likely to be non-complex or non-controversial developments<sup>87</sup></p>	Department of Planning and Infrastructure Officers	May act as consent authority for developments when delegated by Minister	Not clear – detail not provided

<sup>87</sup> Under the current system, DP&I staff assess major projects and State Significant Development that have received less than 25 objections, are not objected to by the relevant local authority, and do not have any declarable political donations.

Body	Consent authority for	Composition	Role in decision-making	Change from current role
<b>Regional Planning Panels (formerly JRPPs)</b>	Determination of regionally significant development	Three members – two appointed by Minister, one by relevant council	Consent authority for regionally significant development Assumes some functions of a council as specified by the Minister, should they determine that the council is not properly complying with its obligations Provide advice on strategic compatibility certificates Can conduct or assist with gateway reviews if Minister requests	Increase in number of panels Decrease in size from five members to three (previously three ministerial appointees and two council) Proponents are able to seek a review of decisions made by a RPP Minister can remove decision-making powers from councils and hand them over to regional panel if the council has “failed to comply with its obligations” (Sch. 10 Cl 10.1)
<b>Subregional Planning Board</b>	No development assessment role May prepare development codes against which code-assessable development is considered	Maximum four “state members” appointed by Minister Member for each council within the subregion <sup>88</sup> Chairperson appointed by Minister and approved by councils	Oversee preparation and delivery of subregional plans Track performance of plans Advise Minister on subregional planning issues May prepare development codes in areas of regional or subregional significance Input into Growth Infrastructure Plans	Did not exist under previous planning system
<b>Local council</b>	Developments for which there is no consent authority identified in the local plan Can be identified as consent authorities in local plan Likely to assess the majority of code- and merit-assessable development	Elected councillors; can delegate authority to council officers or IHAPs	May prepare local plans (which are made by the Minister)	Strict timeframes imposed on development assessment White Paper has goal of council officers assessing higher proportion of applications

<sup>88</sup> In the *Draft Metropolitan Strategy for Sydney*, subregions cover between three and seventeen LGAs.

Body	Consent authority for	Composition	Role in decision-making	Change from current role
<b>Independent Hearing and Assessment Panel (IHAP)</b>	Local development delegated by council (likely to be complex merit-based assessments)	<p>Can be constituted by councils to assess development applications; White Paper notes intention to encourage all merit assessment to be conducted by expert panels</p> <p>Members to have expertise in planning, architecture, heritage, the environment, urban design, land economics, traffic and transport, law, engineering, tourism or government and public administration.</p> <p>Can be formed by order of the Minister in the case of a council that is not meeting performance benchmarks</p>	Assess aspects or entirety of a development application	<p>DP&amp;I will “encourage” all councils to establish IHAPs, with the intent of having the majority of developments assessed by the panels</p> <p>White Paper comments that the Minister will require councils that consistently fail to meet benchmarks to establish independent determination panels (p. 137)</p>
<b>Council officers</b>	Local development delegated by council (likely to include routine local and regional development, and all code-assessable development)	Senior planning officers delegated by a council	Development assessment and approval Will assess and prepare reports into developments considered by regional planning panels	No significant change
<b>Accredited certifiers<sup>89</sup></b>	Complying development	The holder of a certificate of accreditation as a subdivision or building certifier under the Building Professionals Act 2005	Determination of complying development	Distinction drawn between building certifiers and subdivision certifiers

<sup>89</sup> See Parliamentary Research Service publication, [NSW planning reforms: building regulation and certification](#)

## 5.1 Submissions

The most significant changes made to decision-making bodies (that is, panels, boards, or committees, and excluding councillors or the Minister) are in independent hearing and assessment panels, and the creation of subregional planning boards. Submissions regarding these changes are considered in this section.

Relatively few submissions comment on the decision-making powers of the PAC or regional planning panels. This is likely the result of relatively minor changes being made to their role in decision-making. Consequently these bodies are not considered below. The powers of the Minister are considered in Section 3 of this paper, and those of certifiers are considered in the Parliamentary Research Service publication [NSW Planning Reforms: building certification and regulation](#).

### Subregional Planning Boards

Under the proposed planning system, a new type of strategic plan-making body, to be known as a subregional planning board, will prepare subregional delivery plans (including growth areas, development proposed for complying and code assessment, and how housing, employment and environmental targets are to be met). As such, these boards will have a significant say in defining acceptable development within growth areas where the code assessment track is employed. Subregional planning boards will be constituted by four State members, a chairman appointed by the Minister, and one member for each council within the subregion they represent. It is not yet clear how many council areas will be included in a subregion.

It is important to note that submissions are based on the assumption that 80% of development would be code-assessed. The Minister's announcement that code-assessable development will be restricted to growth areas may moderate any criticisms contained below.

While supporting subregional planning boards, the Planning Institute points out that:

The Subregional Delivery Plan will actually be a Plan facilitating development. The Plan will notionally be the product of the Board, rather than the work of the Department of Planning and Infrastructure prepared in consultation with the local councils. It will be more action generating as well as concentrating power towards the Board and away from individual councils.<sup>90</sup>

The composition of subregional planning boards is then critical to determining how much influence different level of government will have over subregional planning.

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<sup>90</sup> Planning Institute of Australia, [A New Planning System for NSW: White Paper Submission](#), June 2013, p. 15

The Environmental Defender's Office expresses concern about the constitution of these panels:

In terms of Board membership and control, EDO NSW welcomes the intention to legally separate Boards from Ministerial control. Nevertheless, the Minister will be able to appoint up to four 'State members'; plus a chairperson agreed to by the Local Government Association of NSW. Each local council will appoint a further representative. The balance between State and locally appointed Board members will not be clear until the size of subregions is publicised...

According to the Department's *Green Paper Feedback Summary*, a key concern raised in community submissions was the potential that 'Regional Planning Boards with developer participation will likely result in inappropriate rezonings being imposed on local communities.' However, the draft legislation does not rule out the appointment of industry representatives to subregional Boards.

Overall, amendments to the Planning Administration Bill may increase public trust in Subregional Planning Boards and other planning bodies by:

- ensuring that local rather than State members predominate Board membership;
- specifying particular agencies from which State-appointed members should be drawn (such as Local Land Services, Planning Department, Housing, Environment and Heritage), requiring representation from the general public, or otherwise addressing public concern or perceptions about potential 'developer participation' on Boards;
- removing the requirement that Deputy Chairs be a State member (Schedule 5, clause 5.4);
- further limiting the Minister's ability to remove members from office (clause 5.7(1))...<sup>91</sup>

Similarly, the City of Sydney comments that:

The size of Subregional Planning Boards will vary depending on the number of councils in any subregion. In this regard, the City of Sydney considers that Subregional Planning Boards should have at least the same number of local government representatives as State Government representatives in the interests of collaboration...

Section 23(4) of the Planning Administration Bill 2013 – Exposure Draft provides that a Subregional Planning Board is not subject to the direction or control of the Minister. Nonetheless, it may be abolished by the Minister and there is virtually no detail provided as to the circumstances in which this power may be exercised.<sup>92</sup>

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<sup>91</sup> EDO NSW, [Submission on A New Planning System for New South Wales – White Paper](#), June 2013, p. 43

<sup>92</sup> City of Sydney, [NSW Planning System White Paper and Draft Exposure Bills: Submission to](#)

The Property Council of Australia expresses similar, but opposing, concerns about the membership of boards:

Of critical importance to planning reform success is the role Subregional Planning Boards will play in strategic planning decisions for regions. Not only will they distribute regional growth targets in sub-regional plans, but also determine the infrastructure needed.

The proposed composition of Subregional Planning Boards means that all councils will have a seat at the table – out-numbering state-appointed or independent chairs. This risks unbalanced representation.<sup>93</sup>

The Urban Development Institute appears to be in favour of subregional planning boards with reduced government membership:

UDIA NSW is concerned about the membership of the Subregional Planning Boards. Ideally, the Boards are made up of state and local governments, private sector experts, community, and business representatives. However, the Boards outlined in the White Paper seem overly weighted with government representation, with no mention of industry, community or business involvement. This is an area which UDIA NSW suggests needs particular attention to ensure a more balanced membership.

While local government involvement is important, the effectiveness of the Subregional Planning Boards that include several councils is questioned. In the Central subregion, which includes 17 individual councils, it could potentially prove to be an unworkable melange of competing interests. Ensuring that the process is effective will depend heavily on the Chair that is appointed as well as the Minister.<sup>94</sup>

The Urban Taskforce, too, comments that “the State Government must be able to make decisions and must ensure that there is equal representation between state and local government on the planning boards.”<sup>95</sup>

### Independent Hearing and Assessment Panels

Independent hearing and assessment panels (IHAPs) exist under the current system, and can be appointed by councils to consider development applications; the White Paper notes that the use of IHAPs will be encouraged under the new planning system, and the Minister will “require councils that consistently fail to meet benchmarks to establish a determinative independent hearing and assessment panel to replace councillors in development assessment decision making.”<sup>96</sup>

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[the Department of Planning and Infrastructure](#), June 2013, p. 78

<sup>93</sup> Property Council of Australia, [Delivering on the Promise: Submission to the NSW Government's White Paper – A New Planning System for NSW](#), June 2013, p. 33

<sup>94</sup> UDIA, [The Next Act: UDIA Response to the Planning White Paper](#), June 2013, p. 7

<sup>95</sup> Urban Taskforce, [Delivering a Better Planning System for NSW: White Paper](#), June 2013, p. 15

<sup>96</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 137

Submissions generally perceive independent hearing and assessment panels as an effective way to determine certain categories of development applications, although many maintain some caveats about their use. Submissions were polarised over whether the use of independent hearing and assessment panels in assessing development applications should be mandated or left to the discretion of councils.

The Urban Taskforce is supportive of a greater use of IHAPs in the DA process, but is of the view that the proposed reforms do not go far enough:

The Green Paper made it very clear that the politics should be removed from planning. It is disappointing that the White Paper does not take this approach further. It seems that there has been a watering down of the use of independent panels in the decision making process...

We understand that the Department of Planning and Infrastructure will encourage councils to move towards the independent merit decision model to remove the politics from development control. It is unfortunate that this is not a requirement of the new planning system. However, we are encouraged that the Minister for Planning and Infrastructure will require councils that consistently fail to meet benchmarks to establish a determinative hearing and assessment panel to replace councillors in development assessment decision making.<sup>97</sup>

The Property Council, Urban Development Institute and Housing Industry Association are also supportive of IHAPs, with the Property Council expressing the view that the use of IHAPs instead of elected councillors should be mandatory under the new system.

In contrast, Local Government NSW is of the opinion that the adoption of IHAPs should be voluntary. The association is of the view that, given only 3% of DAs are referred to the full council, "it is illogical to deduce that the DA process is held up by matters being referred".<sup>98</sup> LGNSW is also opposed to the proposal for the Minister to mandate the use of IHAPs should councils fail to meet DA processing benchmarks.

The City of Sydney points out that "the ability of councillors, as elected representatives of the community, to be involved in decision-making is considered relevant and important. The City does agree that councillor involvement in decision-making should be structured and not be such that it adversely impacts on the efficiency of decision-making." It notes that the long-established Central Sydney Planning Committee (CSPC) is a working example of the IHAPs that the White Paper and Exposure Bills propose, and consequently that "the CSPC must be retained":

The CSPC is a working demonstration of what the White Paper and the Bills aim to achieve at a regional planning and approvals level, and that this

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<sup>97</sup> Urban Taskforce, [Delivering a Better Planning System for NSW: White Paper](#), June 2013, p. 10

<sup>98</sup> LGNSW, [Submission to the Planning White Paper and Exposure Bills](#), June 2013, p. 8



functionality is already able to be achieved within the terms of the current legal framework. It is an oversight that the CSPC, which has determined over \$28 billion worth of major development projects, is not acknowledged in the White Paper or the Bills.<sup>99</sup>

The Independent Commission Against Corruption provides comment on the role of experts generally in the proposed planning system, with an emphasis on minimising the potential for corrupt decision making. In addition to IHAPs, these comments refer to other circumstances in which expert assessments may be required (such as verifying acceptable alternatives in complying development):

The way experts are used in the system will also be crucial to their ability to enhance decision-making. Experts should be embedded in the system and not operate in isolation to the system's desired outcomes. This means they should not become the sole arbiters of merit in the absence of clear reference points... clear and measurable definitions are needed to establish the aims of the system and guide decision-making. Consequently, the Commission does not favour the suggestion that approval by an expert may in itself constitute an acceptable solution to a performance outcome. Referral to experts should be used as part of decision-making processes rather than a standalone solution to the effective operation of a performance based system.

To date, referrals to design review experts have introduced delays in the planning system and created coordination costs, however, it is possible that the involvement of experts could be used to reduce other steps in determination processes. An example would be establishing expert panels as final decision-makers and by-passing the involvement of elected officials.<sup>100</sup>

The Planning Institute provides a number of recommendations around IHAPs that would have ramifications for decision-making:

- Membership of expert panels should include community representatives along with relevant experts;
- The need for stringent procedures in relation to transparency, accountability, and probity in panel operation...

Most IHAPs presently make recommendations to the elected Council on development applications (rather than determine applications) and this seems to be the model still envisaged in the draft Administration Bill (s.27 (4)). This has the potential to slow the determination process, create confusion, and may erode confidence when elected representatives do not accept the recommendation of the IHAP. IHAPs, once established, should have the power to determine applications themselves, subject to the usual review and appeal rights.<sup>101</sup>

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<sup>99</sup> City of Sydney, [NSW Planning System White Paper and Draft Exposure Bills: Submission to the Department of Planning and Infrastructure](#), June 2013, p. 19

<sup>100</sup> NSW Independent Commission Against Corruption, [Submission Regarding a New Planning System for NSW \(White Paper and Accompanying Bills\)](#), June 2013, p. 3

<sup>101</sup> Planning Institute of Australia, [A New Planning System for NSW: White Paper Submission](#), June 2013, p. 25

## 6 APPEALS

Under the existing planning system, a range of appeal and review rights are available to proponents of development under Part 4 and, in the case of appeals, to third parties.

If a consent authority conducts a review of a determination, it then formally reconsiders the prior decision. An applicant is able to submit a proposal that has been modified to address the consent authority's earlier concerns. If the original determination was made by a delegate of the council, the review must be conducted by the council itself or another delegate.

Applicants are also able to appeal against a determination to the Land and Environment Court on the grounds of the merits of a proposal. Third parties who have formally objected to a development proposal can in some cases appeal to the Land and Environment Court against its subsequent approval. A second category of appeal, known as judicial review, can be brought against a determination on the grounds of legal error.

A summary of existing review and appeal rights is shown in Table 5.

**Table 5: Appeal rights in the current planning system**

	Review	Merit appeal rights	Timeframe for deemed refusal	Legislative provisions
<b>Can be sought against decisions made by:</b>	A council	A consent authority		EPAA s82A, s97
<b>Can not be made against:</b>	Development where consent authority is not a council; Complying development; Designated development; Integrated development; Crown developments	Designated development determined after a public hearing held by the PAC; complying development certificate		EPAA s82A
<b>Complying development</b>	No	No	10 days	EPA reg 130AA
<b>Council approval of development application</b>	Yes - applicant	Yes – applicant	40 days	EPAA s97, s98  Deemed refusal timeframe – EPA Reg cl 113
<b>Integrated development</b>	No	Yes - applicant	60 days	EPAA s97, s98  Deemed refusal timeframe – EPA Reg cl 113
<b>Designated development</b>	No	Yes – applicant and third parties that formally objected during exhibition period	60 days	EPAA s97, s98  Deemed refusal timeframe – EPA Reg cl 113

<b>State significant development</b>	No	Yes – applicant and third parties that formally objected during exhibition period (if the development would also be designated development but for s77a(2))	90 days	EPAA s97, s98  Deemed refusal timeframe – EPA Reg cl 113
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In many areas, appeal rights will be largely unchanged under the new planning system. The White Paper comments that:

Applicant and objector merit appeal rights will remain unchanged in the new development assessment system with parties having the standard six months to appeal. Objector appeal rights for EIS assessed development will be the same as the current appeal rights for designated development.<sup>102</sup>

The Minister’s September 2013 announcement of changes to the proposed planning system states that “appeal rights will remain as they are”.<sup>103</sup> It is not clear from this statement what elements of the review and appeals processes in the Exposure Bills will be modified, and what will remain the same. For example, this statement could refer to the right to lodge an appeal, or the process by which appeals are considered (with a new “very fast track” proposed); it is also not clear whether this statement also refers to review rights. Given this lack of clarity, this section reports on the review and appeals process as reported in the White Paper and Exposure Bills with the caveat that this may not be its final form.

Several changes to the appeals process were identified in the White Paper and Exposure Bills. The cumulative effect of these reforms is to widen the range of appeal rights available to proponents, and provide greater access to appeals and reviews by making the process faster, cheaper and less complex.

The White Paper’s approach to appeals should be seen in the context of its overarching goals, in particular its attempt to foster a “delivery culture” and provide greater certainty in the development assessment process.

Expanding access to appeals may encourage the lodgement of “speculative” applications in cases where their approval is uncertain, and may encourage assessing bodies to err on the side of leniency in borderline cases rather than risk the time and expense involved in an appeal. Expanding the appeals process may also assist in “depoliticising” the decision making process by providing greater access to the independent determination of applications by the courts, in cases where local concerns may influence a council’s decision against an application that is otherwise appropriate.

<sup>102</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p. 143

<sup>103</sup> Hazzard B, [Government Listens to Community and Councils on Planning Bill](#), media release dated 19 September 2013

The major changes made to appeals rights and processes under the new planning system are as follows:

- The NSW Land and Environment Court has recently (2011) introduced mandatory conciliation and arbitration counselling for certain types of development prior to a full court hearing. The LEC's experience with this process is that it often leads to cheaper, efficient and more expeditious resolutions.<sup>104</sup> The White Paper proposes expanding the range of development for which mandatory conciliation and arbitration is a part of the appeals process. It comments at various points that either "most" or "all" code-assessable development is likely to fall into this appeal track.<sup>105</sup>
- The White Paper proposes the creation of an additional "very fast track" appeals system in the Land and Environment Court for small developments (single residential dwellings and dual occupancies), on the basis that applicants are often deterred from seeking appeals by the costs involved and the complexity of the system. This regime will operate with commissioners as experts, who are able to make judgements on site or with minimal delay in Court.<sup>106</sup>
- Applicants will have the right to request a review of a decision from Regional Planning Panels and the Planning Assessment Commission; currently proponents only have the right of review for decisions made by councils.<sup>107</sup>

Several of these changes will need to be made through amendments to the *Land and Environment Court Act 1979*.

The appeal and review rights applicable to different types of development proposed under the new planning system are set out in Table 6 below.

One of the major differences between the current and proposed systems is the availability of review rights. Presently developers only have the right to request a review of an application where the decision has been made by a council. Under the proposed changes, proponents will be able to request reviews from a wider range of decision-making bodies. This represents a substantial reform as proponents have the ability (under both the current and proposed systems) to modify a proposal when requesting a review. Under the new system, these amendments cannot be so extensive that the proposal is no longer the same development.

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<sup>104</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p143

<sup>105</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, pp.146, 149

<sup>106</sup> NSW Government, [A New Planning System for NSW – White Paper](#), April 2013, p144

<sup>107</sup> NSW Government, [Planning Bill 2013 – exposure draft](#), April 2013, cl. 9.2

Table 6: Appeal and review rights for development approvals under the new planning system<sup>108</sup>

	Review	Merit appeal to LEC	Timeframe for deemed refusal <sup>109</sup>	Relevant legislative provisions
<b>Can be sought against decisions made by:</b>	A council, regional planning panel, or PAC	Any consent authority identified in Part 4 of the exposure bill <sup>110</sup>		cl. 9.2, cl. 9.6, s 4.5
<b>Cannot be made against:</b>	Complying development certificates EIS-assessed development Development requiring referrals Crown development Decision made after PAC public hearing	Decision made after PAC public hearing Complying development certificates Decision of council to issue or not issue variation certificate in relation to complying development		cl. 9.2, cl. 9.6
<b>Complying development</b>	No	No	10 days (25 if complying with variations) <sup>111</sup>	cl. 9.2, cl. 9.6 Timeframe from White Paper, will be enacted in regulation
<b>Code-assessable development</b>	Yes – applicant	Yes – applicant	25 days (60 if code-assessable with variations and community is consulted)	cl. 9.2, cl. 9.6 Timeframe from White Paper, will be enacted in regulation
<b>Merit-assessable development</b>	Yes – applicant	Yes – applicant	50 days	cl. 9.2, cl. 9.6 Timeframe from White Paper, will be enacted in regulation
<b>State significant development</b>	No	Yes – applicant, and if development is EIS-assessable third parties who formally objected during public exhibition	90 days	cl. 9.2, cl. 9.6 Timeframe from White Paper, will be enacted in regulation
<b>EIS-assessed development</b>	No	Yes – applicant and third parties who formally objected during the public	90 days	cl. 9.2, cl. 9.6, cl. 9.8 Timeframe from White

<sup>108</sup> Note: This table does not consider judicial review rights.

<sup>109</sup> Deemed refusal refers to the period within which, if no decision has been made, the development application is deemed to have been refused and an appeal can progress to the LEC. These timeframes are not specified in the legislation but will instead be contained in regulations; the timeframes given here are drawn from the White Paper and may change in the future.

<sup>110</sup> The Minister, a regional planning panel, councils and other public authorities as identified by a local plan; decisions made be made by other bodies such as independent expert panels or the PAC as specified in the *Planning Administration Bill*.

<sup>111</sup> Although the Planning Bill does not permit reviews or appeals for complying development certificates (cl. 9.2 and 9.6), the White Paper specifies a time frame for deemed refusal for complying development (p. 141).

		exhibition		Paper, will be enacted in regulation
<b>Decisions made by PAC after public hearings</b>	No	No	-	cl. 9.2, cl. 9.6

Cl. 9.3 of the Exposure Bill outlines the conduct of review:

- (1) An applicant may request a consent authority to review a determination or decision made by the consent authority. The consent authority is to review the determination or decision if duly requested to do so under this Division.
- (2) If there is a right of appeal to the Court against a determination, the determination cannot be reviewed under this Division:
  - (a) after the period within which such an appeal may be made has expired if no appeal was made, or
  - (b) after the Court has disposed of an appeal against the determination.
- (3) In requesting a review, the applicant may amend the proposed development the subject of the original application for development consent or for modification of development consent. The consent authority may review the matter having regard to the amended development, but only if it is satisfied that it is substantially the same development.
- (4) The review of a determination or decision made by a delegate of a council as the consent authority is to be conducted by the council or by another delegate of the council who is not subordinate to the delegate who made the determination or decision. The review of a determination or decision made by the council is to be conducted by the council and not by a delegate.
- (5) If an independent hearing and assessment panel acted as the delegate of the council as the consent authority in respect of a determination or decision subject to review under this Division, the panel is also to act as delegate of the council in reviewing the determination or decision.
- (6) If the Planning Assessment Commission acted as the delegate of the Minister as the consent authority in respect of a determination or decision subject to review under this Division, the Commission is also to act as delegate of the Minister in reviewing the determination or decision.

The new planning system will also see changes to appeal rights. In addition to the new appeals processes outlined above (mandatory conciliation and arbitration counselling, and a “very fast track”), the timeframe provided to consent authorities to consider an application before it is deemed to have been refused (thereby allowing appeals to be lodged) has been increased for several types of development. This includes EIS-assessable development and merit-assessable development.

Cl. 9.7 of the Exposure Bill outlines the right to appeal against a decision

regarding development consent:

- (1) An applicant for development consent who is dissatisfied with the determination of the application by the consent authority may appeal to the Court against the determination.
- (2) For the purposes of this section, the determination of an application by a consent authority includes:
  - (a) any decision subsequently made by the consent authority or other person of an aspect of the development that under the conditions of development consent was required to be carried out to the satisfaction of the consent authority or other person, or
  - (b) any decision subsequently made by the consent authority as to a matter of which the consent authority must be satisfied before a deferred commencement consent can operate.
- (3) An appeal under this section relating to an application for development consent to carry out EIS assessed development in respect of which an objector may appeal under this Division may not be heard until after the expiration of the period within which the objector may appeal to the Court.

Clause 10.12 of the Planning Bill contains exemptions for a number of planning functions, and declares others to be “not mandatory.” This clause provides exemptions from judicial review proceedings, and from third-party environmental appeal proceedings. Clause 10.8 of the Planning Bill defines third-party environmental appeal proceedings as “proceedings for an order under section 252 or 253 of the Protection of the Environment Operations Act 1997.”<sup>112</sup> Clause 10.12 is reproduced below.

- (1) Proceedings for an order under this Division, third-party environmental appeal proceedings or judicial review proceedings cannot be instituted in respect of any of the following (except in relation to an application made or approved by the Minister):
  - (a) the declaration of public priority infrastructure or any amendment or revocation of such a declaration,
  - (b) a breach of Division 5.3 of Part 5 (including in relation to a project definition report for any public priority infrastructure),
  - (c) a breach of this or any other Act arising in respect of the giving of an approval of the kind referred to in Table 2 to section 6.3 in relation to public priority infrastructure (or in respect of the conditions of such an approval).
- (2) The following provisions are not mandatory, and accordingly proceedings for an order under this Division, third-party environmental appeal proceedings or judicial review proceedings cannot be instituted to invalidate an instrument or decision under the planning legislation because of a breach of those provisions

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<sup>112</sup> Section 252 allows any person to bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the Protection of the Environment Operations Act or regulations. Section 253 allows any person to bring proceedings for an order to restrain a breach of any other Act that is causing or likely to cause harm to the environment.

- (or to prevent any such instrument or decision being made):
- (a) the provisions of Part 2 (other than a requirement of Part 1 of Schedule 2),
  - (b) any provisions of the planning legislation concerning the conditions precedent to the making, amending or replacing of the provisions of a local plan or of any other strategic plan or of any infrastructure plan (other than a requirement of Part 1 of Schedule 2),
  - (c) any provisions of Part 4 relating to development consent for State significant development (other than a requirement of Part 1 of Schedule 2),
  - (d) any provisions of Part 5 relating to approval for State infrastructure development (other than a requirement of Part 1 of Schedule 2).
- (3) This section applies despite any other provision of this Act or any other Act or law.

## 6.1 Submissions

Submissions comment on several aspects of the appeals and reviews process. This paper examines comments in regards to third-party appeal rights, the imbalance of review rights available to different parties, and the new proposed “very fast track” appeals process. It is important to note that these submissions were made prior to statements made by the Minister for Planning on 19 September that “appeal rights will remain as they are”.<sup>113</sup>

In addition to these areas, several submissions also addressed the provisions in section 10.12 of the *Planning Bill* reproduced above which would restrict the ability of the courts to consider judicial review proceedings in relation to a number of planning functions. Submissions that addressed this section of the Bill (Better Planning Network, City of Sydney, EDO, Nature Conservation Council, and the Law Society) see it as deeply problematic. The City of Sydney, EDO and Nature Conservation Council all recommend that clause 10.12 be deleted. The Law Society of NSW provides detailed commentary on this issue:

While the White Paper indicates that decision review rights remain largely unchanged, the Committee has serious concerns about the terms of proposed section 10.12 which significantly restricts the ability of the community to challenge plans and some decisions even in the case of legal error.

Subsection 1 excludes legal proceedings in respect of a declaration of public priority infrastructure or any amendment or revocation of such declaration. Subsection 2 provides that no proceedings can be instituted to invalidate an instrument or decision under the planning legislation because of a breach of those provisions including conditions precedent to the making, amending or replacing of the provisions for a local plan or any other strategic plan or of any infrastructure plan, and includes conditions precedent to the making of State significant development and the provisions of Part 5 relating to approval for State infrastructure development.

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<sup>113</sup> Hazzard B, [Government Listens to Community and Councils on Planning Bill](#), media release dated 19 September 2013



There appears to be a disconnect between the stated intention to continue the open standing provisions of the current Act as set out in the White Paper and the terms of the draft legislation...

The Committee also notes that a provision such as section 10.12 of the Planning Bill may be subject to constitutional challenge.<sup>114</sup>

### Third party appeal rights

Many submissions addressed the issue of third-party appeal rights under the new planning system, with a number of community groups and governmental authorities perceiving third-party access to appeals as strongly beneficial to a planning system. ICAC comments that:

Third party appeal rights deter corrupt approaches because there can be no guarantee that any favouritism sought will succeed. Third party appeal rights also create a perceived threat that corrupt conduct will be detected. Consequently, the opportunity for self interested behaviour is minimised. The ability to overturn unmeritorious decisions also helps participants maintain faith in the system by promoting certainty.<sup>115</sup>

The Heritage Council expresses the view that third-party appeal rights help to protect heritage places, while the Environmental Defenders Office calls them “a fundamental access-to-justice issue” which bolsters community confidence.<sup>116</sup>

The submissions of the NSW Aboriginal Land Council, the Environmental Defenders Office, ICAC, LGNSW, and the Nature Conservation Council/Total Environment Centre all argue for wider third-party review rights. The NCC/TEN joint submission is representative here:

#### **We strongly oppose provisions that seek to limit third party merit appeal rights or judicial review proceedings...**

The White Paper says applicant and merit appeal rights will remain unchanged in the new development assessment system (page 143, White Paper), and the right for any person to go the Land and Environment Court to remedy a breach of the Act (the open standing provision) will be continued (page 147, White Paper). However, the new planning system contains provisions that restrict third party appeal rights and the open standing provision:

- The Planning Bill continues to restrict appeal rights against decisions that have been made after a public hearing by the Planning Assessment Commission (section 9.6(3), Planning Bill). Such a restriction seeks to override judicial oversight of planning decisions, and reduces the transparency and accountability of decisions of the Planning

<sup>114</sup> Law Society of NSW, [Environmental Planning and Development Committee submission on A New Planning System for NSW – White Paper](#), 28 June 2013, pp. 5-6

<sup>115</sup> NSW Independent Commission Against Corruption, [Submission Regarding a New Planning System for NSW \(White Paper and Accompanying Bills\)](#), June 2013, p. 4

<sup>116</sup> EDO NSW, [Submission on A New Planning System for New South Wales – White Paper](#), June 2013, p. 86

Assessment Commission.

- More alarmingly, section 10.12 of the Planning Bill seeks to substantially limit judicial review proceedings to remedy an unlawful decision made with respect to (a) the making or amending of local plans and strategic plans; (b) approval of State significant development and State significant infrastructure; and (c) implementation of the Public Participation Charter.
- Section 10.12 also seeks to limit third party environmental appeal proceedings under the Protection of the Environment Operation Act 1997 to remedy breaches of any Act where there is a likelihood of environmental harm.
- The restrictions imposed by section 9.6(3)<sup>117</sup> and 10.12 significantly curtail the ability for third parties to remedy poor or unlawful decisions, and breaches of the planning legislation. This is contrary to the premise of increasing accountability in the NSW planning system. The amendments also seek to give effect to Recommendation 16 of the Independent Commission against Corruption in its report *Anti-corruption safeguards and the NSW planning system* (February 2013).<sup>118</sup>

The Better Planning Network argues that third-party merit appeal rights should be expanded so that they are available for all developments:

As recommended by ICAC, third party merit-based appeal rights must be available in relation to all developments, including state significant development. As extensively documented, third party review rights clearly do not result in a deluge of cases coming before the court...

There should also be a right for any person to go to the Land & Environment Court and seek judicial review in relation to ALL of the provisions of the Planning Bill, including decisions by the Minister and his delegates...

Limiting judicial review and third party appeal merit appeals rights is contrary to the promise made by the Government that accountability and transparency would be improved in the new planning system and severely undermines community confidence in this system, the NSW Department of Planning and Infrastructure, the Minister for Planning and Infrastructure and the NSW Government as a whole.<sup>119</sup>

ICAC also forms the view that third party appeal rights should be expanded, commenting that “the limited availability of third party appeal rights under the proposed system means that an important disincentive for corrupt decision

<sup>117</sup> Clause 9.6 (3) prevents appeals against the decision of a consent authority for development heard by the Planning Assessment Commission, for a complying development certificate, or for a variation certificate.

<sup>118</sup> NSW NCC & Total Environment Centre, [Charting a new course: Delivering a planning system that protects the environment and empowers local communities](#), p. 37

<sup>119</sup> Better Planning Network, [Submission on the White Paper: A New Planning System for NSW and Associated Planning Bills](#), June 2013, p. 10

making is absent.”<sup>120</sup>

Other submissions were less supportive of broad access to third-party appeal rights. The Housing Industry Association was circumspect, taking the position that:

Third party appeals on legal and administrative process are acknowledged as a democratic right in the new system, however there needs to be a framework or process to limit and scrutinize vexatious appeals, to require such appeals to be specific about particulars. In a third party appeal, should The Land and Environment Court of NSW find a breach in the process in part of a Development Application (DA) assessment or determination, which is not critical to the development outcome, it would be a more proportionate and constructive response for the Court to specify a remedy for the breach in the processing of the DA rather than merely find the whole DA invalid and refuse the proposal.<sup>121</sup>

The NSW Business Chamber recommends additional restriction of third-party appeals, so as not to place additional burdens upon development:

Put simply, without a major projects approval process that provides certainty for potential investors, major projects are likely to move interstate or overseas.

The Chambers recommend that amendments be made to legislation to ensure that appeal rights by activists and single issue interest groups are not unnecessarily broadened. Under the White Paper reforms, any state significant development that requires an environmental impact statement will trigger objector rights of appeal. This appears to unnecessarily expand appeal rights, particularly for activists groups who wish to manipulate the planning process.<sup>122</sup>

In regards to third party appeal rights available for State significant development, the NSW Minerals Council states that:

Over a number of years various independent processes have been introduced to ensure that projects are determined on their merits alone. This includes PAC reviews and PAC determinations.

These processes lead to greater transparency in decision making, but also lengthen the approval process.

Reduction in third party merit appeal should be a natural consequence of additional oversight; however this has not been the case. Merit appeals for SSD projects have not been considered at all by the Planning System Review to date. The consequence is that projects such as Ashton Coal Operation's South East Open Cut can be supported by DP&I, go through two PAC determinations

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<sup>120</sup> NSW Independent Commission Against Corruption, [Submission Regarding a New Planning System for NSW \(White Paper and Accompanying Bills\)](#), June 2013, p. 4

<sup>121</sup> Housing Industry Association, [Submission by the Housing Industry Association to the White Paper: A New Planning System for NSW](#), June 2013, p. 7

<sup>122</sup> NSW Business Chamber & Sydney Business Chamber, [Submission: New Planning System for NSW White Paper](#), June 2013, p. 4

and still be subject to a third party merit appeal to the Land and Environment Court.<sup>123</sup>

Both the Better Planning Network and Environmental Defenders Office perceive a disparity between appeal rights available to the community and to proponents of development, and argue that as a result the system is weighted in favour of the developer:

most importantly, there is a fundamental imbalance in relation to **merits review and appeal rights** as proposed. While there are expanded rights for proponents and developers, community review and enforcement rights are restricted by the draft legislation... This is not a fair trade-off. In a new and untested system, it is absolutely essential to ensure that there are checks and balances in the legislation to guarantee due process and accountability. Absence of these safeguards has the potential to undermine the integrity of the proposed system...

The ongoing imbalance of merit appeal and review rights in the Planning Bill will continue to undermine community confidence... Developers will have less incentive to genuinely engage in strategic planning if they know they can 'push the envelope' through review and appeals – without corresponding rights for later community involvement.<sup>124</sup>

### Very fast track appeals

Several submissions commented on the proposed introduction of a “very fast track” appeals process for small developments. LGNSW is of the opinion that this change would unfairly favour developers:

*[These]* changes clearly favour the proponent. It would be reasonable for this predevelopment approach for appeals to be matched by providing similar rights to communities. It is reasonable to expand the very fast track appeal system to enable communities to be able to access the courts on applications that are considered unreasonable under the merits track.<sup>125</sup>

The Housing Industry Association, for its part, was broadly supportive of the proposal:

The proposed changes to further improve the appeals process through the Land & Environment Court for small scale residential development is considered worthwhile. Whilst overall the number of appeals is low when compared to the approvals granted each year, delays in determining disputes over small scale residential developments directly affect home owners and are part of the broader reforms needed to help improve housing affordability in NSW. Any reforms that can assist give faster decisions through the appropriate

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<sup>123</sup> NSW Minerals Council, [NSW Planning System Review: White Paper and Draft Legislation Submission](#), p. 16

<sup>124</sup> EDO NSW, [Submission on A New Planning System for New South Wales – White Paper](#), June 2013, p. 5

<sup>125</sup> LGNSW, [Submission to the Planning White Paper and Exposure Bills](#), June 2013, p. 42

appeal mechanism is considered appropriate.<sup>126</sup>

The Law Society, while neither supporting nor opposing the proposal, cautioned that in its current form the appeals track would likely result in unfavourable and unworkable results:

The Committee considers that the current mandatory conciliation and hearing (quick-stream appeal) process has worked well. The Committee is concerned, however, that the very quick-stream appeal system proposed in the White Paper will not bring about the just, quick and effective resolution of the residential development appeals for which it is proposed. The ability to achieve a just outcome is seriously compromised by the mooted turn-around time of five days. This timeframe should be reconsidered.<sup>127</sup>

## 7 CONCLUSION

Ultimately the success or otherwise of this or any planning system will depend on the quality of the decisions made and the processes by which those decisions are reached. A major feature of those processes, if they are to attract and maintain community confidence and support, must be their transparency, accountability and consistency. It is issues of this fundamental sort that the current review of the planning system in NSW has sought to address.

Inevitably, given the complexity of the planning system, the issues involved and the different and contrasting interests at stake, from industry, the community, local government and others, the new planning system proposed in the White Paper has met with varying responses.

While it may not be possible to satisfy all concerns and every interest, the changes already flagged by the Minister for Planning in September 2013 recognise that certain legitimate community concerns needed to be addressed. The introduction of legislation is imminent and, as noted in this paper, many aspects of the precise operation of the proposed system must wait until regulations and strategic plans are made. Difficult issues yet to be dealt with relate to the scope of ministerial discretion, the factors to be considered in decision making, as well as the details relating to code assessment and appeal rights.

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<sup>126</sup> Housing Industry Association, [Submission by the Housing Industry Association to the White Paper: A New Planning System for NSW](#), June 2013, pp. 6-7

<sup>127</sup> Law Society of NSW, [Environmental Planning and Development Committee submission on A New Planning System for NSW – White Paper](#), 28 June 2013, p. 6