



SYDNEY COASTAL COUNCILS GROUP INC.

councils caring for the coastal environment

SUBMISSION

A New Planning System for NSW White Paper and draft Planning Bills

June 2013

Prepared by: Sydney Coastal Councils Group Incorporated (SCCG)

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Submitted (via email) to: New Planning System Team
Department of Planning and Infrastructure
newplanningsystem@planning.nsw.gov.au

Contact details: **Stephen Summerhayes** | Senior Coastal Projects Officer

Sydney Coastal Councils Group Inc.

councils caring for the coastal environment

Level 14, Town Hall House, 456 Kent Street

GPO Box 1591, SYDNEY NSW 2001

t: +61 2 9246 7326 | f: +61 2 9265 9660 |

e: stephen@sydneycoastalcouncils.com.au



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INTRODUCTION

1. Sydney Coastal Councils Group Incorporated (SCCG)

The SCCG is a voluntary Regional Organisation of Councils (ROC) representing 15 Sydney coastal councils (www.sydneycoastalcouncils.com.au/). We are the peak NSW local government association representing coastal councils and the third largest NSW ROC based upon population¹. We have over 20 years' experience in providing leadership through a coordinated approach to sustainable coastal management.

In relation to significant coastal policy and legislative initiatives we make comprehensive submissions which harness the individual and collective knowledge of our Member Councils, a suite of technical and academic experts as well as other stakeholders. Consultation is undertaken through workshops, information sessions and publications. Accordingly, we are uniquely able to play a key role in the delivery of a strategic and sustainable planning system, especially in relation to the coasts².

2. Scope of this submission

This Submission addresses matters of concern pertaining directly or indirectly to the area in which we have specific knowledge and expertise, namely the urban coastal environment and is to be considered in that context. This Submission echoes recommendations we continue to promote, for example, in our Strategic Plan and in relation to related Government 'reforms' such as the NSW Coastal Management Reforms 2010 (www.sydneycoastalcouncils.com.au/sites/default/files/sccgpackage2010.pdf). It incorporates input from our Full Group and Technical Committee, and should be read together with our submission on the [New Planning System for NSW Green Paper](#).

Please note that the fact that we have not specifically addressed all elements in the Paper is not, unless otherwise stated or clear from the context, to be construed as an endorsement or rejection thereof.

¹ Gooding, A. 2012. A Comparative Analysis of Regional Organisations of Councils in NSW and Western Australia, Australian Centre of Excellence for Local Government, University of Technology Sydney.

² A reference to 'coasts' in this Submission includes estuaries.

3. Structure of this submission

This Submission is organised into five chapters:

Ch 1 COASTAL MANAGEMENT
Ch 2 ENVIRONMENT, SUSTAINABILITY & ESD
Ch 3 STRATEGIC PLANNING
Ch 4 COMMUNITY CONSULTATION
Ch 5 REVIEWS, APPEALS & ENFORCEMENT

Chapters are divided into sections. Issues that we have identified appear at the beginning of each section. The provision(s) of the Bill addressed, our recommendations, shaded red, and the context including the rationale upon which such recommendations are based, follow. The detail enables third parties to understand the thrust of the recommendations. A Summary of Recommendations appears after this Introduction.

CHAPTER
SECTION
- Issue
- Provision(s) of the Bill
- Recommendation(s)
- Context

Interpretation

Emphasis has been added to certain extracts by bolding text.

In this Submission:

'**EPAA**' means the Environmental Planning and Assessment Act 1979

'**Metro Strategy**' means the Draft Metropolitan Strategy for Sydney to 2031

'**New System**' means the New Planning System for NSW as articulated in the Papers and the Bill.

'**The Bill**' means the draft Planning Bill 2013.

'**Strategic Plans**' has the same definition as in s.1.7(1) of the Bill.

SUMMARY OF RECOMMENDATIONS

CHAPTER 1 COASTAL MANAGEMENT	
1.1	<ol style="list-style-type: none"> 1. Effective stakeholder consultation take place in relation to the proposed NSW Planning Policies addressing coastal management and natural hazards prior to the government giving notice of its intention to introduce the Bill. 2. The New System take into consideration applicable legislation (e.g. <i>Local Government Act 1993</i>, <i>Coastal Protection Act 1979</i>, <i>Protection of the Environment Operations Act 1997</i>, <i>Threatened Species Act 1995</i>, <i>Native Vegetation Act 2003</i>, <i>Water Management Act 2000</i>, reforms such as the current Coastal Reforms, and incorporate existing coastal management and hazard management policies and instruments, namely: <ul style="list-style-type: none"> SEPP 71 Coastal Protection SEPP 14 Coastal Wetlands SEPP 26 Littoral Rainforests SEPP 50 Canal Estates NSW Coastal Policy NSW Coastal Design Guidelines [former] NSW Sea Level Rise Policy NSW Coastline Hazard Policy 3. Planning decisions must take account of <ol style="list-style-type: none"> a) the vulnerable parts of the coastal zone and associated ecosystems and ecological processes as well as special richness, assemblages and connectivity; b) the integrity of coastal land systems; c) coastal values and a sense of place; d) up-to-date science and scientific projections; and, in the context of ESD, <ol style="list-style-type: none"> e) beach amenity and public access to beaches; f) recreation, tourism and commercial activities which are consistent with ESD.
1.2	<ol style="list-style-type: none"> 1. Strategic plans addressing land in the coastal zone must take into account coastal hazards. Hazard information must be updated at intervals according to the nature of the hazard and risks, made publicly available and incorporated into Strategic Plans as soon as practicable thereafter. 2. Section 733 of the <i>Local Government Act, 1919</i> be reviewed and updated to ensure that councils and council officers are afforded immunity from liability in respect of advice or anything done or omitted to be done in good faith in respect of natural hazards.
1.3	The Bill include a section analogous in operation to s.79C(1)(a)(v) of the EPAA.
CHAPTER 2 THE ENVIRONMENT, SUSTAINABILITY AND ECOLOGICALLY SUSTAINABLE DEVELOPMENT	
2.1	<ol style="list-style-type: none"> 1. The Bill: <ol style="list-style-type: none"> a) prescribe sustainable development as: <ol style="list-style-type: none"> i) a primary objective in all strategic plans ii) a mandatory relevant consideration that is applied (rather than merely considered) and taken into account by decision-makers b) provide guidance on the additional weight or priority to be given to the environment over other relevant matters. 2. All development must: <ol style="list-style-type: none"> a) be ecologically sustainable, that is, ecological sustainability is considered in relation to all decisions (rather than environmental imperatives being balanced against socio-economic considerations) b) meet minimum environmental standards c) identify and protect environmentally sensitive areas d) apply a values-based approach (see Section 3.1). 3. The concept of sustainable development must be clearly defined, incorporating: <ol style="list-style-type: none"> a) the ESD principles detailed in:

	<ul style="list-style-type: none"> i) S. 6(2) of Protection of the Environment Administration Act 1991 ii) NSW Whole of Government Sustainability Principles 2006 iii) S.4 of Commissioner for Environmental Sustainability Act 2003 (Vic); <p>b) in relation to land in the coastal zone:</p> <ul style="list-style-type: none"> i) the principles of integrated coastal [zone] management ii) the Sydney Regional Coastal Management Guiding Principles articulated in Section 4.2 of the SCCG Strategic Plan 2010-2014.
2.2	<ol style="list-style-type: none"> 1. Clear guidance be provided regarding priorities for the use of environmental resources and matters of socio-cultural significance. 2. Areas of cultural, heritage and environmental value or significance must be identified and protected (including those areas protected by existing SEPPs). 3. Strategic plans must be responsive to the character and environmental values of a place. 4. Strategic plans must protect the integrity of coastal systems, its ecosystems and ecological processes as well as species richness, assemblages and connectivity. Protection must be able to accommodate changes in species distributions as a result of climate change.
2.3	<ol style="list-style-type: none"> 1. Developments that have potentially significant adverse environmental impacts be subject to the EIS Assessed Development provisions of the Bill. 2. Development be restricted within environmentally sensitive areas – strong mechanisms must exist to ensure robust and ongoing protection for environmentally sensitive areas.
2.4	<ol style="list-style-type: none"> 1. The actual and reasonably foreseeable future cumulative impacts of a proposed development be a mandatory relevant consideration in Strategic Plans and that must be taken into account by decision-makers. 2. The precautionary principle apply to cumulative impacts. 3. Developers submit a Cumulative Impact Assessment prepared by an independent expert.
2.5	<ol style="list-style-type: none"> 1. Climate change considerations (including climate change impacts, projections, mitigation and adaptation) be: <ul style="list-style-type: none"> a) a mandatory relevant consideration in the preparation of Strategic Plans; b) incorporated into Strategic Plans; c) a mandatory relevant consideration by decision-makers in relation to development applications. 2. Section 733 of the <i>Local Government Act, 1919</i> be reviewed and updated to ensure that councils and council officers are afforded immunity from liability in respect of advice or anything done or omitted to be done in good faith in respect of climate change.
2.6	<ol style="list-style-type: none"> 1. Details of the development that can occur, if any, in each of the new 'amalgamated' land use zones must be provided to enable meaningful consultation on this element of the New System. 2. Land use zones must maintain or improve existing environmental and heritage protections.
2.7	<p>Environmental Impact Statements be prepared by independent consultants who:</p> <ul style="list-style-type: none"> a) are relevantly qualified and experienced b) are members of a relevant professional association c) possess professional indemnity insurance d) undertake continuing professional development each year e) adhere to a code of conduct and practice.
CHAPTER 3 STRATEGIC PLANNING	
3.1	<ol style="list-style-type: none"> 1. The addition of Planning Principles that implement a values based and outcomes directed approach. 2. The addition of Planning Principles that individually address ESD, cumulative impacts and climate change (see Sections 2.1, 2.4 and 2.5) and require Strategic Plans to be

	<p>based upon clear, objective and specific criteria using the best scientific information available.</p> <ol style="list-style-type: none"> 3. The nature and type of evidence required in preparing strategic plans be clearly detailed. 4. Guidance be provided on the priority attributable to each Principle. 5. Free and ready access to necessary data and information together with ongoing development of datasets.
3.2	Regional Growth Plans adopt a regional 'ecosystem approach' which includes environmental targets identified in relevant Regional Conservation Plans (prepared under Regional Strategies) and Catchment Action Plans (prepared under the <i>Catchment Management Authorities Act 2003</i>).
3.3	Code and complying development tracks must only be available for development that is legitimately low impact.
3.4	Non-complying development be merit assessed under s.4.19 of the Bill.
3.5	Alternative solutions in relation to code development be merit assessed under s.4.19 of the Bill.
3.6	Regional planning panels also contain a community representative and sufficient additional members to ensure the panel possesses expertise in planning and related fields including urban design, heritage, social science, energy efficiency and the environment.
3.7	<ol style="list-style-type: none"> 1. Where the Director-General proposes to issue a strategic compatibility certificate authorising development which is contrary to the Local Plan, the Director-General must first consult with the community and consider the opinion of the local council. 2. The nature and results of community participation, submissions received, the reasons for a decision and how participation influenced the decision be made publicly available. 3. The power to grant strategic compatibility certificates be limited to the transition period of the new Act.
3.8	<ol style="list-style-type: none"> 1. Community consultation take place in relation to all State Infrastructure Development, State Significant Development and Public Priority Infrastructure. 2. The concepts of State Infrastructure Development, State Significant Development and Public Priority Infrastructure be clearly and fully defined (i.e. describing the nature and scope of the development). 3. Ministerial approval be capable of judicial review by third parties.
3.9	<ol style="list-style-type: none"> 1. Where the Minister proposes to exercise a discretion to: <ol style="list-style-type: none"> a) make, amend or replace any provisions of a local plan b) 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 c) make or amend a strategic plan. <p>community participation take place prior to the exercise of that discretion.</p> 2. The nature and results of community participation, submissions received, the reasons for a decision and how participation influenced the decision must be made publicly available. 3. Ministerial discretion be capable of judicial review by third parties.
3.10	<ol style="list-style-type: none"> 1. Councils be provided with adequate resources to achieve the approval targets. 2. Time not run until participation has taken place in relation to all Strategic Plans, model development codes and other machinery underpinning the New System and capacity has been provided in relation thereto.
CHAPTER 4 COMMUNITY CONSULTATION	
4.1	<ol style="list-style-type: none"> 1. The mandatory requirements for community participation in Part 1 of Schedule 2 of the Bill must clearly articulate minimum requirements for community participation for each type of Strategic Plan. 2. The nature and results of community participation, submissions received, the reasons for

	a decision and how participation influenced the decision must be made publicly available.
4.2	<ol style="list-style-type: none"> 1. The Department of Planning and Infrastructure forthwith release for consultation its Guideline document on preparing Community Participation Plans. The Guideline must address notification, provision of information, the decision making process, reasons for decisions, the manner in which submissions have been considered, and appeal rights. 2. The Department of Planning and Infrastructure prepare a model Community Participation Plan which can be adopted and/or modified by councils to suit their individual circumstances.
CHAPTER 5	REVIEWS, APPEALS AND ENFORCEMENT
5.1	<ol style="list-style-type: none"> 1. Judicial review be available to third parties in relation to: <ol style="list-style-type: none"> a) State Significant Development; b) EIS assessed development irrespective of whether they objected during its public exhibition; c) development which exceeds applicable development controls (including performance criteria) or which modifies an existing consent; d) spot rezoning. 2. Third parties have the right to participate in a Review. The nature and results of such participation, submissions received, the reasons for a decision and how participation influenced the decision be made publicly available. 3. Section 10.12(2) of the Bill be deleted.

1.1 NSW Planning Policies

Issue

The proposed NSW Planning Policies addressing coastal management and natural hazards have not been released. This creates uncertainty as to the manner in which the coast and coastal hazards will be managed. The New System cannot be fully understood in the absence of these policies.

Provision(s) of the Bill

Part	Section	Subject
3 Strategic Planning	3.8	Implementation of NSW planning policies regional growth plans and subregional delivery plans

Recommendations

1. Effective stakeholder consultation take place in relation to the proposed NSW Planning Policies addressing coastal management and natural hazards prior to the government giving notice of its intention to introduce the Bill.
2. The New System take into consideration applicable legislation (e.g. *Local Government Act 1993*, *Coastal Protection Act 1979*, *Protection of the Environment Operations Act 1997*, *Threatened Species Act 1995*, *Native Vegetation Act 2003*, *Water Management Act 2000*, reforms such as the current Coastal Reforms, and incorporate existing coastal management and hazard management policies and instruments, namely:
 - SEPP 71 Coastal Protection
 - SEPP 14 Coastal Wetlands
 - SEPP 26 Littoral Rainforests
 - SEPP 50 Canal Estates
 - NSW Coastal Policy
 - NSW Coastal Design Guidelines
 - [former] NSW Sea Level Rise Policy
 - NSW Coastline Hazard Policy
3. Planning decisions must take account of:
 - a) the vulnerable parts of the coastal zone and associated ecosystems and ecological processes as well as special richness, assemblages and connectivity;
 - b) the integrity of coastal land systems;
 - c) coastal values and a sense of place;
 - d) up-to-date science and scientific projections;
 and, in the context of ESD,
 - e) beach amenity and public access to beaches;
 - f) recreation, tourism and commercial activities which are consistent with ESD.

Context

The coast is where people want to live, work and play. Pressures upon valuable coastal resources are increasing yet the manner in which the New System will manage them remains unclear.

The Bill creates a hierarchy of plans (s.3.8) – see Figure. In relation to NSW Planning Policies, the Green Paper says:

*NSW Planning Policies will articulate the NSW Government's policy direction and position on major planning issues—such as housing and housing affordability, employment, mining, **coastal planning**, conservation—and will inform strategic*



plans at all levels³.

Further:

*NSW Planning Policies will be introduced to provide plain English, clear and practical high level planning direction for key policy areas which are of interest to the state. These policies will provide the policy setting and framework for planning outcomes to be delivered in regional, subregional, and local plans. The policies will guide spatial and sectoral planning outcomes in key areas such as: ... **Coastal Management**⁴.*

The White Paper says:

It is intended that the NSW Planning Policies will be prepared for a small number of core planning issues of significance to the state. They will focus on addressing fundamental drivers of change such as population growth, demographic trends and structural shifts in the economy. While the final list of initial policies will be resolved in due course, the following presents an indicative list of potential planning policies:

...

environment and conservation, including biodiversity, water quality, air quality and waste pollution

...

hazards, including bushfire, flooding and coastal hazards ...⁵

The 2011 Australian State of the Environment Report In Brief notes that *the future of our coasts depends on whether government and governance arrangements can be developed that **allow a much more strategic approach to managing coastal resources, over spatial scales that match the scale of the challenges***. At a council level, it further notes that *[l]ocal governments are expressing concern about the lack of guidelines, standards and national strategic approaches to address coastal development, growing populations and environmental impacts*⁶. The lack of information surrounding the content of the proposed Planning Policies does nothing to allay these concerns.

Notwithstanding the 'high level planning direction' to be provided by the Policies, no details of the content of the policies have been released for consultation. Consultation should be conducted before steps are taken to introduce the Bill into Parliament. The proposed coastal Policy must address the complexity and dynamic nature of coasts⁷, requiring effective consultation including through engagement, participation, evaluation, communication and the provision of appropriate information.

No information has been provided on how existing coastal management frameworks, many of which have evolved over many years, will be incorporated into the New System. Existing key coastal planning instruments must be incorporated in the proposed policies. Integrated and strategic coastal planning requires a continuous, adaptive and systematic process applying a long-term vision of ecological sustainability. We and many other stakeholders have contributed considerable time and effort in contributing to the existing frameworks and these frameworks (and their embodied intellectual capital) must be incorporated into the New System rather than 'reinventing the wheel'.

³ Green Paper at 27.

⁴ Green Paper at 37.

⁵ White Paper at 69.

⁶ At 49.

⁷ Marcucci, D.J., James D. Brinkley, J.D. and Jordan, L.M. 2012. A Case for Coastal Theory with Lessons from Planning Theory. *Coastal Management*, 40:401–420.

1.2 Major hazards

Issue

The Bill does not require assessments for major hazards to be undertaken at regular intervals and incorporated into Strategic Plans.

Provision(s) of the Bill

Not addressed in the Bill.

Recommendations

1. Strategic plans addressing land in the coastal zone must take into account coastal hazards. Hazard information must be updated at intervals according to the nature of the hazard and risks, made publicly available and incorporated into Strategic Plans as soon as practicable thereafter.
2. Section 733 of the Local Government Act, 1919 be reviewed and updated to ensure that councils and council officers are afforded immunity from liability in respect of advice or anything done or omitted to be done in good faith in respect of natural hazards.

Context

The Draft Metropolitan Strategy for Sydney to 2031 states:

Currently, if natural hazards are considered in relation to land use, the approach tends to be hazard-specific and boundary-specific, which does not give us the full picture of the implications in relation to land use, especially at the metropolitan scale. The NSW Government aims to increase the number of floodplain risk management plans available as a way to improve our understanding.

To assist, the NSW State Emergency Management Plan and its relevant sub-plans will be integrated with strategic land use planning decisions. This connected approach will improve decision-making about infrastructure location and the way we manage the consequences of natural hazards.⁸

Further, under the Metro Strategy, the policy position in relation to natural hazards is:

- a) *Natural hazards will be considered and planned for at an early stage.*
- b) *Development, particularly infrastructure, will be avoided in locations at risk from natural hazards unless the risks are demonstrated to be manageable⁹.*

This policy position is yet to be translated into the New System.

1.3 Coastal zone management plans

Issue

Under s.79C of the EPAA, consent authorities must consider any applicable coastal zone management plan (CZMP) when assessing development of land in the coastal zone. This section has not been incorporated into the Bill, potentially allowing development contrary to a CZMP.

Provision(s) of the Bill

Not addressed in the Bill.

Recommendation

The Bill include a section analogous in operation to s.79C(1)(a)(v) of the EPAA.

⁸ Metro Strategy at 61.

⁹ Metro Strategy at 61.

Context

Section s.79C(1) of the EPAA states:

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

(a)(v) *the provisions of any **coastal zone management plan** (within the meaning of the Coastal Protection Act 1979)*

The primary purpose of a CZMP is:

*[T]o describe proposed actions to be implemented by a council, other public authorities and potentially by the private sector to address priority management issues in the coastal zone over a defined implementation period.*¹⁰

Under s.55C of the *Coastal Protection Act 1979*, a CZMP must address a number of matters including:

- a) protecting and preserving beach environments and beach amenity
- b) emergency actions carried out during periods of beach erosion
- c) ensuring continuing and undiminished public access to beaches, headlands and waterways
- d) the management of risks arising from coastal hazards
- e) the management of estuary health and any risks to the estuary arising from coastal hazards
- g) the impacts from climate change on risks arising from coastal hazards and on estuary health.

CZMPs are therefore crucial strategic documents in the management of the coast. Millions of dollars have been invested in the development of CZMPs: they involve considerable investment of time and resources to develop, including those of stakeholders during consultation phases. Their strategic and other value must be recognised and utilised.

If CZMPs are not considered when determining a development application, the New System will fail to deliver an integrated and strategic framework.

¹⁰ Guidelines for Preparing Coastal Zone Management Plans 2010, pg. 1, available www.environment.nsw.gov.au/resources/coasts/101019GdlnsCZMPs.pdf

2.1 Ecological sustainable development

Issue

'Ecologically Sustainable Development' (ESD) is not part of the New System. Therefore, the well-developed concepts of the precautionary principle, polluter pays and conservation of biodiversity and ecological integrity are not expressed. The concept of 'sustainability' is retained but is undefined, potentially diluting environmental protections. By referring to 'sustainable development' rather than ESD, the Bill uses a distinct linguistic framework to that contained in existing environmental legislation and creates uncertainty as to the meaning intended.

Provision(s) of the Bill

Part	Section	Subject
N/A		The Purpose of the Bill on the cover page.
1 General	1.3(1)	Object of Act
	1.3(2)	Object of Act

Recommendations

1. The Bill:
 - a) prescribe sustainable development as:
 - i) a primary objective in all strategic plans
 - ii) a mandatory relevant consideration that is applied (rather than merely considered) and taken into account by decision-makers
 - b) provide guidance on the additional weight or priority to be given to the environment over other relevant matters.
2. All development must:
 - a) be ecologically sustainable, that is, ecological sustainability is considered in relation to all decisions (rather than environmental imperatives being balanced against socio-economic considerations)
 - b) meet minimum environmental standards
 - c) identify and protect environmentally sensitive areas
 - d) apply a values-based approach (see Section 3.1).
3. The concept of sustainable development must be clearly defined, incorporating:
 - a) the ESD principles detailed in:
 - i) S. 6(2) of Protection of the Environment Administration Act 1991
 - ii) [NSW Whole of Government Sustainability Principles 2006](#)
 - iii) S.4 of Commissioner for Environmental Sustainability Act 2003 (Vic);
 - b) in relation to land in the coastal zone:
 - i) the principles of integrated coastal [zone] management
 - ii) the Sydney Regional Coastal Management Guiding Principles articulated in Section 4.2 of the [SCCG Strategic Plan 2010-2014](#).

Context

'Sustainability' is mentioned in the opening paragraph of the Bill:

*An Act relating to planning and **sustainable growth** in New South Wales.*

It is also referred to in the Objects, in the context of sustainable development:

1.3(1) The object of this Act is to promote the following:

*(a) economic growth and environmental and social well-being through **sustainable development***

...

The concepts of sustainability, sustainable growth and sustainable development are undefined which creates uncertainty, lack of consistency and can lead to disputes, ultimately leaving it to the courts to interpret. Sustainable development must be predicated on a clear understanding of what it is¹¹ and how it can be achieved. The Bill states how sustainable development can be achieved within an economic paradigm:

*s.1.3(2) **Sustainable development** is achieved by the integration of economic, environmental and social considerations, having regard to present and future needs, in decision-making about planning and development.*

Sustainability is a notoriously difficult, slippery and elusive concept to pin down' with 'at least 80 different, often competing and sometimes contradictory, definitions.'¹² Further, as noted by Jepson (2004):

*Despite strong evidence of the need to more fully balance the needs of society and economy with those of the environment as is called for under sustainable development, **opinion remains divided regarding what sustainability is and how it should be used as a conceptual guide for the formulation of public policy***¹³.

The White Paper refers to the definition of sustainable development adopted by the World Commission on the Environment in its 1987 report by the Brundtland Commission, Our Common Future¹⁴:

Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

For present purposes, this is an inadequate definition: it fails to incorporate the needs of the environment¹⁵ and has been 'resisted and contested by many commentators¹⁶'. Accordingly, the Bill's failure to articulate what is meant by sustainable development is a retrograde step and imposes a further obligation on the Court to 'turn soft law into hard' to fully delimit its elements¹⁷.

The failure to encapsulate ESD reverses the advances made by the EPAA. It is open to argument that the elements of ESD such as inter-generational equity, conservation of biological diversity and ecological integrity and improved valuation, pricing and incentive mechanisms are not considerations under the New System. ESD is essential to protect an area's unique natural and cultural characteristics and the New System should take a leadership approach in this regard. Communities have the power to substantially alter the environment and that power should be exercised wisely for the benefit of future generations and the environment.

¹¹ E.g. Keiner, M. 2003. Reemphasising Sustainable Development – The Concept of 'Evolutionability'. *Environment, Development and Sustainability* 6, 379-392.

¹² Williams, C.C. and Millington, A.C. 2004. The Diverse and Contested Meanings of Sustainable Development. *The Geographical Journal* 170, 2, 99-104.

¹³ Jepson, E.J. 2004. Human Nature and Sustainable Development: A Strategic Challenge for Planners. *Journal of Planning Literature* 19, 3.

¹⁴ White Paper at 16.

¹⁵ Jepson, E.J. 2004. Human Nature and Sustainable Development: A Strategic Challenge for Planners. *Journal of Planning Literature* 19, 3.

¹⁶ Williams, C.C. and Millington, A.C. 2004. The Diverse and Contested Meanings of Sustainable Development. *The Geographical Journal* 170, 2, 99-104.

¹⁷ See for example, Preston, B.J. 2009. Jurisprudence on Ecologically Sustainable Development: Paul Stein's Contribution. A paper presented at the Symposium in honour of Paul Stein AM.

The legislature must give decision-makers a clear conceptual framework of the meaning intended to be ascribed to the words 'sustainable development' and how it differs, if at all, to ESD. ESD is defined in s.6(2) of the *Protection of the Environment Administration Act 1991*:

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

- (a) *the precautionary principle-namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.*
In the application of the precautionary principle, public and private decisions should be guided by:
 - (i) *careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and*
 - (ii) *an assessment of the risk-weighted consequences of various options,*
- (b) **inter-generational equity**-namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,
- (c) **conservation of biological diversity and ecological integrity**-namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,
- (d) **improved valuation, pricing and incentive mechanisms**-namely, that environmental factors should be included in the valuation of assets and services, such as:
 - (i) *polluter pays-that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,*
 - (ii) *the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,*
 - (iii) *environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.*

An object of the EPAA is to encourage ESD (s.5(a)(vii)) as defined above. As clearly enunciated by Preston J:

[T]he concept of ecologically sustainable development is not about sustained developed in the sense of sustained growth. Rather, implementation of ESD involves "viewing development as a level, a static concept, rather than a (seemingly necessary) rate of change, as denoted by the concept of growth"¹⁸.

We subscribe to the deductive and logical 'stronger' sustainability paradigm, that is, that ecosystems provide unique, essential and irreplaceable services and non-use values; environmental resources are finite and should be preserved and maintained. Natural and manmade capital must be viewed as complimentary rather than interchangeable. Growth, including in relation to material consumption, cannot continue indefinitely without ecosystem impacts. Once ecosystems are lost, they are lost forever. In addition, once a development is in place, the stressors it imposes upon natural systems cannot simply be reversed. Even when considered from an economic perspective, impacts upon the environment jeopardise the trillions of dollars in ecosystem services that the natural environment provides worldwide. The New System must protect natural systems and processes which form part of society's common goods.

Therefore, sustainable development is more than simply an exercise in balancing economic, social and environmental concerns (often termed, 'the Triple Bottom Line'). The sustainability of the environment must be considered in relation to all decisions, rather than environmental imperatives being balanced against socio-economic considerations. Social needs and economic opportunities must be bound by the limits of supporting ecosystems. Short-term economic and social considerations must not be prioritised at the environment's expense. Where social or environmental considerations are determined to significantly outweigh environmental ones the decision-makers' reasoning must be clearly communicated and supported by the community.

¹⁸ Preston, B.J. 2009. Jurisprudence on Ecologically Sustainable Development: Paul Stein's Contribution. A paper presented at the Symposium in honour of Paul Stein AM

Sustainable growth must centre upon improved well being above the acquisition of material goods and concomitant depletion of natural resources. It should maximise the flow of resources including water, sewage, energy, food and people. This will, for example, reduce dependence on costly long-distance inputs. The building and construction industry are two of the most intensive end users of environmental resources and one of the largest polluters requiring improved environmental responsibility¹⁹. The New System can provide this.

The New System must build resilience (see section 2.5) rather than focus upon economic growth (see section 2.2). A focus upon economic growth can undermine the natural systems and cultural places we take for granted and depend upon (which in turn will have a negative impact upon economic development). The relationship of people with the natural environment, particularly the coast is central to the process of urbanisation and enhancing well-being and thus must be considered in development. Planning decisions should adequately consider the environment, heritage and how these interact with our quality of life.

In a coastal context, we also advocate integrated coastal management, widely considered a 'unifying approach for coastal planning and management²⁰'. Integrated coastal management incorporates this notion of sustainability.

2.2 Prioritising environmental, social and economic values

Issue

Economic growth is the key driver of the New System. Decision-makers have broad discretions and may place undue weight on economic considerations. Social and environmental considerations are not prioritised which can reduce liveability/quality of life and create communities lacking 'a sense of place'.

Provision(s) of the Bill

Part	Section	Subject
1 General	1.3(1)(a)	Object of Act
3 Strategic Planning	3.3	The strategic planning principles

Recommendations

1. Clear guidance be provided regarding priorities for the use of environmental resources and matters of socio-cultural significance.
2. Areas of cultural, heritage and environmental value or significance must be identified and protected (including those areas protected by existing SEPPs).
3. Strategic plans must be responsive to the character and environmental values of a place.
4. Strategic plans must protect the integrity of coastal systems, its ecosystems and ecological processes as well as species richness, assemblages and connectivity. Protection must be able to accommodate changes in species distributions as a result of climate change.

Context

The White Paper states that:

*The main purpose of the planning system is to promote **economic growth** and development in NSW for the benefit of the entire community, while protecting the environment and enhancing people's way of life²¹.*

¹⁹ Ding, G.K.C. 2008. Sustainable Construction—The Role of Environmental Assessment Tools. *Journal of Environmental Management* 86, 451–464.

²⁰ Westcott, G. 2004. The Theory and Practice of Coastal Area Planning: Linking Strategic Planning to Local Communities. *Coastal Management*, 32, 95–100. Van de Weide, J. 1993. A Systems View of Integrated Coastal Management. *Ocean & Coastal Management* 21, 129–148.

²¹ White Paper at 5.

The Bill emphasises:

- Principle 1:* Strategic plans should promote the **State's economy and productivity** through facilitating housing, retail, commercial and industrial development and other forms of economic activity, having regard to environmental and social considerations.
- Principle 10:* Local Plans should facilitate development that is consistent with agreed strategic planning outcomes and should not contain overly complex or onerous controls that may adversely impact on the **financial viability** of proposed development²².

The words 'economic growth' appears in the White Paper 14 times. It is also an object of the Bill²³. The words 'Environment' and 'Assessment' have been removed from the title of the Bill reinforcing the emphasis on development.

The concept of economic growth does not take into account environmental impacts or the depletion of natural resources and thus the way growth will impact upon the quality of life. Economic growth is the increase over time in the value of goods and services produced, and is usually measured in terms of gross national product. Growth is not a proxy for a better society: economic growth may be highly skewed, for example, merely increasing the incomes of high earners. Improvements in such things as environmental security, literacy and healthcare do not necessarily flow from economic growth. A more worthy goal is economic development prioritising qualitative rather than quantitative change, for example, an increase in such things as living standards, well-being and choice.

In terms of priorities for the use of coastal resources, O'Donnell and Gates 2013 state:

[C]urrent (and newly proposed) legislative and policy frameworks do not provide clear guidance regarding priorities for the use of coastal resources. This has meant that coastal councils faced with the impacts of sea level rise (amongst, for many, a myriad of other coastal issues) have not been afforded State government support in the form of clear policy and regulation, leaving their planning and development decisions open to potential legal challenge, and local level policy to develop in an ad hoc manner.²⁴

The New System fails to provide such guidance.

Environmental and cultural considerations to be elevated above pure economic benefit. Decisions must be based upon values rather than on consumerist motivations. Environmental quality contributes to a sense of place and is at the core of healthy, sustainable communities.

Communities are complex interconnected systems requiring a holistic approach to development. An urban planning and design process is required that is 'responsive to the character of a place'²⁵. A community's concept of place considers its identity in relation to the physical environment derived from a complex pattern of conscious and unconscious ideas, beliefs, preferences, feelings, values, goals and behavioural tendencies²⁶.

²² The Bill, s.3.3.

²³ The Bill at s.1.3(1)(a).

²⁴ O'Donnell, T. & Gates, L. 2013. (2013) Getting the balance right: A renewed need for the public interest test in addressing coastal climate change and sea level rise.30 EPLJ 220.

²⁵ Coastal Council 2003. Coastal Design Guidelines for NSW, pg. 2.

²⁶ Fresque-Baxter, J.A. and Armitage, D. 2012. Place Identity and Climate Change Adaptation: A Synthesis and Framework for Understanding. Climate Change.

2.3 Developments may be approved despite significant adverse external impacts

Issue

Development that fall outside a code because it has significant adverse external impacts may still be approved under the merit assessment provisions.

Provision(s) of the Bill

Part	Section	Subject
4 Development (other than infrastructure) assessment and consent	4.19(b)	Merit assessment

Recommendations

1. Developments that have potentially significant adverse environmental impacts be subject to the EIS Assessed Development provisions of the Bill.
2. Development be restricted within environmentally sensitive areas – strong mechanisms must exist to ensure robust and ongoing protection for environmentally sensitive areas.

Context

The White Paper states:

Developments assessed through a full merit assessment are those that:

- *are not for core uses within the zone but are still permissible with consent*
- *may have significant adverse external impacts which cannot be code assessed (for example, those on some environmentally sensitive land)*
- *may not fully align with the strategic planning but remain permissible with consent in the zone*
- *generally do not fit within the performance criteria for development within that zone²⁷.*

The merit assessment provisions of the Bill apply to the determination of a development where, *inter alia*, the development (or an aspect thereof) is code assessable, but does not comply.²⁸

Ecosystem functions and processes and their biodiversity require adequate protection. The only way to afford this is to have potential significant adverse environmental impacts fully assessed and considered.

2.4 Cumulative impacts

Issue

The development assessment provisions do not consider cumulative impacts. Impacts can compound and/or interact producing effects greater than their sum. As a result, communities may end up with characteristics and 'liveability' far removed from those envisioned.

Provision(s) of the Bill

Part	Section	Subject
4 Development (other than infrastructure) assessment and consent	4.19(2)(d), (3)(d)	Merit assessment

Recommendations

1. The actual and reasonably foreseeable future cumulative impacts of a proposed development be a mandatory relevant consideration in Strategic Plans and that must be taken into account by decision-makers.

²⁷ White Paper at 134.

²⁸ The Bill, s.4.19(1)(b).

2. The precautionary principle apply to cumulative impacts.
3. Developers submit a Cumulative Impact Assessment prepared by an independent expert.

Context

A cumulative impact results from the combined impacts of a single activity or multiple activities. The impacts from an individual development may not be significant but when they interact or are combined with other impacts, those effects can be significant. In the US, it has been defined for the purpose of legislation: the impact on the environment which results from the incremental impact of an action when added to other past, present or reasonably foreseeable future actions and can result from individually minor but collectively significant actions taking place over a period of time²⁹. Climate change and habitat fragmentation are examples of cumulative impacts.

Unless cumulative impacts are considered, the full nature and implications of a development cannot be considered.

The White Paper states:

Importantly, by considering impacts upfront and holistically, it can also capture the cumulative impacts of different options. For example, an assessment of the traffic, noise or air quality impacts of proposed development in total, rather than on a project by project basis.³⁰

This process is not iterative and will not capture unanticipated cumulative impacts.

Further, in relation to merit assessment, the White Paper states that cumulative impacts will be considered under a 'public interest test'³¹. However, in the Bill, public interest is only considered in relation to merit assessed development³². The sections do not guarantee mandatory consideration of cumulative impacts and, further, leaves it up to the decision-maker to turn his or her mind to it.

2.5 Climate change

Issue

Neither the strategic planning nor the development assessment provisions of the New System consider climate change or its effects such as sea level rise. This erodes community resilience.

Provision(s) of the Bill

Part	Section	Subject
4 Development (other than infrastructure) assessment and consent	4.19(2)(d), (3)(d)	Merit assessment

Recommendations

1. Climate change considerations (including climate change impacts, projections, mitigation and adaptation) be:
 - a) a mandatory relevant consideration in the preparation of Strategic Plans;
 - b) incorporated into Strategic Plans;
 - c) a mandatory relevant consideration by decision-makers in relation to development applications.
2. Section 733 of the *Local Government Act, 1919* be reviewed and updated to ensure that councils and council officers are afforded immunity from liability in respect of advice or anything done or omitted to be done in good faith in respect of climate change.

²⁹ The US National Environmental Policy Act of 1969, available <http://ceq.hss.doe.gov/>

³⁰ White Paper at 89.

³¹ White Paper at 134.

³² The Bill, s.4.19(2)(d), (3)(d).

Context

A community's resilience is determined by its capacity to respond to, withstand, and recover from stressors (to 'bounce back'). Stressors can be social, economic, political, cultural or environmental or a combination thereof. Drought is an example of an environmental stressor.

Communities can act in the face of potential stressors if they have been provided with relevant knowledge and information. Communities that are able to anticipate change, embrace opportunities and respond appropriately are more resilient. Building resilience is a continual process, not a single outcome.

A characteristic of a resilient community is one that develops and implements climate change strategies that facilitate necessary adaptation and/or transformational changes. The New System is an ideal vehicle to foster resilience: McDonald notes:

[L]and use planning will be the most effective tool by which to reduce exposure and sensitivity to extreme whether [sic] events.³³

Incorporating climate change considerations in NSW legislation is not novel. For example, the objects section of the *Coastal Protection Act 1979* provide that:

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

...

*(h) to encourage and promote plans and strategies for adaptation in response to coastal **climate change impacts**, including projected sea level rise ...³⁴*

Climate change is also mentioned in the Metro Strategy which states that the policy position in relation to natural hazards is:

- a) *Minimise impacts of climate change in communities.*
- b) *Plan for a resilient built environment that can adapt to a changing climate³⁵.*

However, this policy position has not been translated into the New System. It is possible that climate change is considered under the public policy provisions of the Bill (e.g. s.4.19), but this, as with cumulative impacts, requires the concept to be in the contemplation of the decision-maker and only applies to merit assessed development. The government must provide appropriate compulsion, guidance, frameworks and resources for consistent decision-making in relation to climate change in order to build community resilience.

2.6 Land use zones

Issue

Land use zones are reduced from 36 to 13 with an increase in the permissible uses within a zone. Existing environmental zones are bundled into broader zones which may water down existing protection and create uncertainty.

Provision(s) of the Bill

Part	Section	Subject
4 Development (other than infrastructure) assessment and consent	4.19(2)(a)	Merit assessment

Recommendations

1. Details of the development that can occur, if any, in each of the new 'amalgamated' land use zones must be provided to enable meaningful consultation on this element of the New System.
2. Land use zones must maintain or improve existing environmental and heritage protections.

³³ McDonald J. 2011. The Role of Law in Adapting to Climate Change. *Climate Change* 2, 283–295.

³⁴ s.3(h).

³⁵ Metro Strategy at 62.

Context

The current Standard Instrument [Land Use Matrix](#) has four **environmental** zones:

- E1 National Parks and Nature Reserves
- E2 Environmental Conservation
- E3 Environmental Management
- E4 Environmental Living

Levels of protection vary according to the particular zone. The White Paper proposes that Local Plans will have fewer and broader open zones³⁶. The environmental zones will be amalgamated with other zones:

Environment Protection and Hazard Management:	E1 National Parks and Nature Reserves, E2 Environmental Conservation and W1 Natural Waterways
Rural	RU2 Rural Landscape, RU6 Transition and E3 Environmental Management)
Residential	R1 General Residential, R2 Low Density Residential, R3 Medium Density Residential, R5 Large Lot Residential, RU5 Village and E4 Environmental Living)

In relation to merit assessed development, under s.4.19(2)(a) of the Bill, (other than for State or regionally significant development), a consent authority must take into consideration 'whether the development is consistent with the strategic context provisions of the local plan and the objectives of the **land use zone** ...'

The White Paper notes:

*The final list of zones is not included in the legislation and will be developed with councils and key stakeholders subject to consultation in the coming months.*³⁷

Without the benefit of the 'final list' and the elements of each, it is not possible to properly comment on the effectiveness of combining zones.

2.7 Capacity of consultants

Issue

Consultants who prepare Environmental Impact Statements are not required to possess particular expertise and/or qualifications. Developers can prepare and assess their own environmental impact statements. This raises an apprehension of bias.

Provision(s) of the Bill

Part	Section	Subject
4 Development (other than infrastructure) assessment and consent	4.20(1)	EIS assessed development that is not State significant development-additional requirements
4 Development (other than infrastructure) assessment and consent	4.30(1), (2)	Environmental impact assessment for, and consent to, State significant development etc
Part 5 Infrastructure and environmental impact assessment	5.4	Determining authority to obtain and consider EIS for relevant development likely to significantly affect the environment
Part 5 Infrastructure and environmental impact assessment	5.13	Environmental impact assessment requirements for approval
Part 6 Concurrences, consultation and other legislative approvals	6.6(5)(b)	Concurrence of or consultation with responsible Department administering threatened species legislation if a Minister is not consent authority or determining authority

³⁶ White Paper at 94.

³⁷ White Paper at 96.

Recommendations

Environmental Impact Statements be prepared by independent consultants who:

- a) are relevantly qualified and experienced
- b) are members of a relevant professional association
- c) possess professional indemnity insurance
- d) undertake continuing professional development each year
- e) adhere to a code of conduct and practice.

Context

The White Paper notes that '*stakeholders expressed differing views about the proposal to accredit consultants preparing environmental impact statements*' and that there would be '*a number of practical issues to be addressed to ensure any accreditation scheme is credible and comprehensive.*'³⁸ It does not mention whether those against accreditation comprised a particular stakeholder group such as environmental consultants or developers. The practicalities of accreditation have been overcome in other contexts³⁹.

Ensuring contractors are relevantly qualified and experienced will help ensure consistency in the application of the New System by consultants. Requiring consultants to engage in a course of continuing education will ensure expertise keeps pace with developments in the industry. The possession of insurance will help provide a safety net, for example, in the case where negligent advice is given.

The White Paper states:

*Key changes to development assessment processes will generate savings to the community and business of some \$174 million per annum. These changes will mean NSW has the most competitive development assessment system in Australia. **Decision making by experts will ensure decisions are made on merit, removing the risk of bias.***⁴⁰

And:

*Under the new planning system, self assessments will identify the risk of impacts and emphasise the need for good quality assessment for high risk, high impact aspects of major infrastructure development.*⁴¹

The Bill addresses this matter in sections 4.20(1):

An application for development consent for EIS assessed development must be accompanied by an environmental impact statement **prepared by or on behalf of the applicant** in accordance with the regulations.

The regulations have not been released for comment. Self assessment of high impacts creates rather than eliminates an apprehension of bias. The regulations must therefore adequately address this situation.

³⁸ Page 138.

³⁹ E.g. accreditation of land auditors under the *Contaminated Land Management Act 1997*.

⁴⁰ White Paper at 27.

⁴¹ White Paper at 142.

3.1 Values based outcomes

Issue

The Planning Principles that guide the preparation of strategic plans do not have clear goals and objectives to achieve environmental or social outcomes (e.g. improved water quality, maintenance of heritage).

Provision(s) of the Bill

Part	Section	Subject
1 General	1.7	Strategic plans and planning control provisions
3 Strategic Planning	3.3	The strategic planning principles

Recommendations

1. The addition of Planning Principles that implement a values based and outcomes directed approach.
2. The addition of of Planning Principles that individually address ESD, cumulative impacts and climate change (see Sections 2.1, 2.4 and 2.5) and require Strategic Plans to be based upon clear, objective and specific criteria using the best scientific information available.
3. The nature and type of evidence required in preparing strategic plans be clearly detailed.
4. Guidance be provided on the priority attributable to each Principle.
5. Free and ready access to necessary data and information together with ongoing development of datasets.

Context

Ten strategic Planning Principles guide the preparation of strategic plans:⁴²

Principle 1:	Strategic plans should promote the State’s economy and productivity through facilitating housing, retail, commercial and industrial development and other forms of economic activity, having regard to environmental and social considerations.
Principle 2:	Strategic plans are to be integrated with the provision of infrastructure.
Principle 3:	Strategic plans are to guide all decisions made by planning authorities and allow for streamlined development assessment.
Principle 4:	Strategic planning is to provide opportunities for early community participation.
Principle 5:	Planning authorities and State agencies are to co-operate constructively in the preparation and implementation of strategic plans.
Principle 6:	Strategic plans should reflect agreed planning outcomes in setting the planning vision for an area.
Principle 7:	Strategic plans are to be standardised, easy to use and available online.
Principle 8:	There should be monitoring and reporting of strategic planning outcomes.
Principle 9:	Strategic plans are to be based on evidence, set realistically deliverable targets and take account of economic, environmental and social considerations.
Principle 10:	Local plans should facilitate development that is consistent with agreed strategic planning outcomes and should not contain overly complex or onerous controls that may adversely impact on the financial viability of proposed development.

A **strategic plan** is a NSW planning policy, a regional growth plan, a subregional delivery plan, or a local plan.⁴³

Principle 9 says:

⁴² The Bill, s.3.3.

⁴³ The Bill, s.1.7(1).

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

No information is provided on the evidence which will be required. Further, the requirement to ‘take account of economic, environmental and social considerations’ does not provide adequate community and environmental protection and provides no guidance on the priority to be attributed to each (see sections 2.1 and 2.2 above). An outcomes-driven strategy will improve the New System. Examples of such strategies include the ‘priorities for Sydney Harbour’ detailed in the Metro Strategy, namely:

- increase opportunities for recreational access to the foreshore and waters, including those offered through harbourside property regeneration
- improve water quality and protect biodiversity⁴⁴.

The quality of strategic plans will also depend upon access to transdisciplinary knowledge (e.g. humanities, engineering, history, natural and social sciences) and relevant data (made freely available in readily accessible formats). The government must ensure that facilities are in place to provide this support.

3.2 Establishment of environmental targets

Issue

There is no requirement in the Bill for Regional Growth Plans to include environmental targets identified in Regional Conservation Plans or Catchment Action Plans.

Provision(s) of the Bill

Part	Section	Subject
3 Strategic planning	3.4(2)	Preparation and content of NSW planning policies
	3.5(2)(d)	Preparation and content of regional growth plans

Recommendation

Regional Growth Plans adopt a regional ‘ecosystem approach’ which includes environmental targets identified in relevant Regional Conservation Plans (prepared under Regional Strategies) and Catchment Action Plans (prepared under the *Catchment Management Authorities Act 2003*).

Context

The White Paper states:

*Detailed planning policies and actions will be provided on environment and natural resource issues, including environmental targets from plans such as **Regional Conservation Plans or Catchment Action Plans**, where appropriate, and the identification of conservation areas. Further efforts will be made to address and resolve environmental issues that would traditionally be subject to concurrences or referrals.⁴⁵*

Housing and employment targets are emphasised in the White Paper (e.g. at page 79). Under section 3.4(2) of the Bill, a draft NSW planning policy is to contain principles and policies in relation to strategic planning for the State, including:

- (a) planning for infrastructure, and
- (b) development assessment, and
- (c) other planning related matters.

Under section 3.5(2)(d) of the Bill, a draft Regional Growth Plan is to identify targets for achieving the planning outcomes for the region (including housing, employment and environmental targets). However, no mention is made of Regional Conservation Plans or Catchment Action Plans.

⁴⁴ Metro Strategy at 21.

⁴⁵ White Paper at 86.

An ecosystem approach is necessary to fully understand the biophysical and socioeconomic interrelationships of a region and, utilising participatory processes, devise better and well informed goals.

3.3 'Low impact' development may actually be 'high impact'

Issue

Code or complying 'tracks' may allow approval of developments characterised as high impact.

Provision(s) of the Bill

Part	Division	Subject
4 Development (other than infrastructure) assessment and consent	4.3	Complying development
	4.4	Code and merit assessment

Recommendation

Code and complying development tracks must only be available for development that is legitimately low impact.

Context

Development 'with low impacts on neighbouring properties' can be determined under the complying development track. Applications under this track are determined by a council or certifier⁴⁶. Councils have no alternative but to approve developments that meet the requirements. Examples provided in the White Paper of *low impact* complying development include:

- new two-storey houses
- industrial building up to 20,000m²
- first floor additions
- granny flat up to 60m² on a lot with a minimum area of 450m²

Furthermore, Code assessment is likewise expressed to be in respect of low impact development:

Code assessment for low impact development only.

Code assessment is proposed for development that strictly aligns with a strategic plan and will have no significant impacts⁴⁷.

Examples provided of *low impact* code assessable development (and thus with no significant impacts) include:

- villas, townhouses or row houses (20 or less) in an appropriate zone
- land subdivision
- additions to a house in a heritage conservation area⁴⁸

Depending upon a citizen's relationship and proximity to a development, the types of development falling within the code or complying tracks may be far from 'low impact', especially when considered cumulatively.

⁴⁶ White Paper at 127; The Bill s.4.5(1)(a).

⁴⁷ White Paper at 31.

⁴⁸ White paper at 130.

3.4 Approval of non-complying development where there is no significant adverse impact on development

Issue

Non-complying development can be approved where the non-compliance with the standard or requirement has no 'significant adverse impact **on development** on the surrounding land'. No protection is afforded to 'undeveloped' surrounding land or the environment. The community has no right to comment on the non-complying variations.

Code or complying 'tracks' may allow approval of developments characterised as high impact.

Provision(s) of the Bill

Part	Section	Subject
4 Development (other than infrastructure) assessment and consent	4.8(2)	Variations from complying development standards and requirements

Recommendation

Non-complying development be merit assessed under s.4.19 of the Bill.

Context

Section 4.8(2) of the Bill provides:

*A council may issue a variation certificate for an aspect of a development if it is satisfied that non-compliance with the standard or requirement is not likely to have any significant additional adverse impact **on development** on the surrounding land.*

The use of the words 'on development' is ambiguous. It may mean an existing state of growth or the capability of being developed in the future. Irrespective, the environmental, social and economic impacts of the non-compliance must be assessed and taken into consideration.

3.5 Code development 'solutions' are acceptable if they meet performance outcomes

Issue

Code development which is not an 'acceptable solution' but proposes an 'alternative solution' must be approved if it 'meets the performance outcome' in the Code. What constitutes 'acceptable solutions' and relevant 'performance outcomes' are not specified.

Provision(s) of the Bill

Part	Section	Subject
4 Development (other than infrastructure) assessment and consent	4.17(2)	Development assessment codes
	4.18(2)	Code assessment

Recommendation

Alternative solutions in relation to code development be merit assessed under s.4.19 of the Bill.

Context

Section 4.17(2) of the Bill provides:

A development assessment code is to describe the performance outcomes for the development and identify any acceptable solutions for achieving those performance outcomes.

Section 4.18(2) provides:

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 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.

The New System should promote innovation in design, such as those that incorporate mitigation strategies for carbon pollution associated with construction and activities. The State Environmental Planning Policy (Sustainability Index – BASIX) 2004 should be updated, enhanced and integrated to ensure that development minimises energy through the efficient allocation of resources, reducing embodied energy and water, and implementing other measure to achieve effective and efficient short and long term use of natural resources such as reuse and recycling. In addition, it should integrate the New Australian Standard for Climate Change Adaptation for Settlements and Infrastructure (AS5334).

3.6 Capability of regional planning panels

Issue

Regional planning panels will consist of three members, two appointed by the Minister and one appointed by the local council. There is no community representation. The panel may fail to possess the necessary suite of expertise.

Provision(s) of the Bill

Planning Administration Bill

Part	Section	Subject
5 Regional Planning Panels	18	Regional planning panels
	19(2)	Members of panels

Recommendation

Regional planning panels also contain a community representative and sufficient additional members to ensure the panel possesses expertise in planning and related fields including urban design, heritage, social science, energy efficiency and the environment.

Context

Regional Planning Panels will be established under the *Planning Administration Bill 2013* (s.18) and consist of two members appointed by the Minister and one nominee of an applicable council (s.19).

Section 19(2) of the Planning Administration Bill provides:

Persons appointed or nominated as members of a regional planning panel are to be persons who have expertise in planning or related fields (such as architecture, heritage, the environment, urban design, land economics, traffic and transport, law, engineering, tourism or government and public administration).

Of these 12 listed disciplines, it is possible that each panel members possesses expertise in the same discipline denying the panel the benefit of broad knowledge and skills.

3.7 Strategic compatibility certificates - development contrary to a community's wishes

Issue

Strategic compatibility certificates issued by the Director-General permit development contrary to a local plan.

Recommendations

1. Where the Director-General proposes to issue a strategic compatibility certificate authorising development which is contrary to the Local Plan, the Director-General must first consult with the community and consider the opinion of the local council.
2. The nature and results of community participation, submissions received, the reasons for a decision and how participation influenced the decision be made publicly available.
3. The power to grant strategic compatibility certificates be limited to the transition period of the new Act.

Context

Section 4.32(1) of the Bill provides:

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.

The section echoes the former Part 3A of the EPAA. Unfettered discretion afforded to decision-makers creates a system that lacks the pillars of good governance such as transparency, accountability etc.

The White Paper says:

Following submissions on the Green Paper, it is proposed to narrow the scope of strategic compatibility certificates so that they will only be an interim measure.⁴⁹

However, no such limitation appears in the Bill.

3.8 Ministerial approval without consultation

Issue

The Minister may approve State Infrastructure Development, State Significant Development and Public Priority Infrastructure without community consultation. Approval can be given despite the provisions of the *Coastal Protection Act 1979*, *Fisheries Management Act 1994*, *Heritage Act 1977*, *National Parks and Wildlife Act 1974*, *Native Vegetation Act 2003*, *Rural Fires Act 1997* and the *Water Management Act 2000*.

Provision(s) of the Bill

Part	Section	Subject
4 Development (other than infrastructure) assessment and consent	4.5(1)(b)	Consent authorities
	4.6(2)	Delegation of consent authority functions
5 Infrastructure and environmental impact assessment	5.10(3)	Declaration of State infrastructure development
	5.11(1)	State infrastructure development not subject to Part 4 or to prohibitions or restrictions in planning control provisions
	5.23(1)	Declaration of public priority infrastructure

⁴⁹ White Paper at 145.

	5.27	Application of provisions of this Act to public priority infrastructure
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Recommendations

1. Community consultation take place in relation to all State Infrastructure Development, State Significant Development and Public Priority Infrastructure.
2. The concepts of State Infrastructure Development, State Significant Development and Public Priority Infrastructure be clearly and fully defined (i.e. describing the nature and scope of the development).
3. Ministerial approval be capable of judicial review by third parties.

Context

Section 6.2 of the Bill provides that certain approvals required under the *Coastal Protection Act 1979*, *Fisheries Management Act 1994*, *Heritage Act 1977*, *National Parks and Wildlife Act 1974*, *Native Vegetation Act 2003*, *Rural Fires Act 1997* and the *Water Management Act 2000* are not required for the carrying out of development to which the Division applies (namely State Infrastructure Development, State Significant Development and Public Priority Infrastructure, s6.1(1)(a)).

State infrastructure development

This is defined as *development declared by the planning control provisions of a local plan (or by the Minister under section 5.10) to be State infrastructure development*⁵⁰. This does not define the nature or substance of what state infrastructure development actually is.

Relevant sections of the Bill are as follows:

Section 5.10(3):

The Minister may, by Ministerial planning order, declare specified development on specified land to be State infrastructure development.

Section 5.11(1):

State infrastructure development does not require development consent under Part 4 to be carried out.

State significant development

This is defined as *development requiring development consent declared by the planning control provisions of a local plan (or by the Minister under section 4.29) to be State significant development*⁵¹, which likewise is not very helpful in delimiting what it actually is.

Under s.4.5(1)(b), the Minister is the consent authority for state significant development. Section 4.6(2) provides:

The Minister is required to delegate to the Planning Assessment Commission the functions of determining an application for development consent to any State significant development if the development would have been wholly prohibited but for planning control provisions of a local plan made by the Commission under delegation from the Minister.

Public priority infrastructure

Public priority infrastructure is undefined. Section 5.23(1) states:

The Minister may, by Ministerial planning order, declare that particular development is public priority infrastructure for the purposes of this Act.

Under s.5.27 most provisions of the Bill do not apply to public priority infrastructure.

⁵⁰ The Bill, Schedule 1.

⁵¹ The Bill, Schedule 1.

3.9 Ministerial approval without consultation

Issue

The Minister has broad discretions to:

- a) make, amend or replace any provisions of a local plan
- b) 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
- c) make or amend a strategic plan.

Decisions made by the Minister do not require community consultation and can operate contrary to a community's expressed wishes.

Provision(s) of the Bill

Part	Section	Subject
3 Strategic planning	3.7(2)	Making of NSW planning policies, regional growth plans and subregional delivery plans
	3.9(3)	Provisions relating to NSW planning policies, regional growth plans and subregional delivery plans
	3.12(1)	Making, amending or replacing provisions of local plans
	3.13(4)	Relevant planning authority for provisions of local plan
	3.14	Making or amendment of provisions of local plan without planning proposal etc and directions to relevant planning authorities
	3.24(1)	Making of planning control provisions by Minister

Recommendations

1. Where the Minister proposes to exercise a discretion to:
 - a) make, amend or replace any provisions of a local plan
 - b) 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
 - c) make or amend a strategic plan.community participation take place prior to the exercise of that discretion.
2. The nature and results of community participation, submissions received, the reasons for a decision and how participation influenced the decision must be made publicly available.
3. Ministerial discretion be capable of judicial review by third parties.

Context

Key sections of the Bill are as follows:

Section 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.

Section 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 the environment or adjoining land,
- (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.

Section 3.12(1):

The Minister may, in accordance with this Part, make, amend or replace any provisions of a local plan.

Section 3.13(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).

Section 3.14:

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:

Section 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.

Decisions of this nature, made in the absence of public participation, will not reflect community aspirations and values and is likely to neglect significant local knowledge.

3.10 Onerous performance targets

Issue

Within 5 years, councils that do not achieve a target of 80% for code and complying assessment approvals will have the model development guides (which are not yet available for consultation) applied to them.

Provision(s) of the Bill

Part	Section	Subject
3 Strategic planning	3.5(2)	Preparation and content of regional growth plans

Recommendations

1. Councils be provided with adequate resources to achieve the approval targets.
2. Time not run until participation has taken place in relation to all Strategic Plans, model development codes and other machinery underpinning the New System and capacity has been provided in relation thereto.

Context

Under s.3.5(2) of the Bill, 'a draft regional growth plan is to identify ...:

- (d) targets for achieving the planning outcomes for the region (including housing, employment and environmental targets),
- (e) actions required to be undertaken by planning authorities to achieve those targets,
- (f) the basis on which planning authorities are to monitor and report on performance against those targets,

...

The White Paper provides:

Within three years of the start of the new development assessment system, 50 per cent of all approvals should come from either the complying or code tracks. Within 5 years, 80 per cent of all approvals should come from those tracks.⁵²

And:

Councils that delay making development guides will have the model development guides applied to them.

Within 5 years of the legislation beginning, councils that do not reach the target approval share for code and complying assessment will have the model development guides applied to them.⁵³

Achievement of these goals is unrealistic, especially without adequate staffing, training and other resources. Model development guides may not correspond with development guides developed by councils in consultation with their community. Approvals should not take precedence over appropriate consideration of environmental and social considerations. Administrative savings are meaningless if accompanied by a lack of faith in the system caused by the system failing to consider these matters.

⁵² White Paper at 123.

⁵³ White Paper at 132.

4.1 Limiting community participation

Issue

The New System shifts key community consultation away from development assessment to strategic planning. Communities that do not participate at the 'early stages' may lose the opportunity to comment on subsequent development that impacts upon them, producing communities that are disconnected and lack confidence in the System. Communities have limited rights to comment on code and complying development applications.

Provision(s) of the Bill

Part	Section	Subject
2 Community participation	2.4	Community participation plans
Schedule 2		

Recommendations

1. The mandatory requirements for community participation in Part 1 of Schedule 2 of the Bill must clearly articulate minimum requirements for community participation for each type of Strategic Plan.
2. The nature and results of community participation, submissions received, the reasons for a decision and how participation influenced the decision must be made publicly available.

Context

The New System represents a 'shift to a more strategic planning system, with upfront community engagement in the development of plans at all levels'⁵⁴. That is, the New System transfers community participation to the early strategic planning phases. Further,

Community participation methods will vary depending on the decision to be made. Sometimes a high level of community participation will be appropriate, for example in the development Subregional Delivery Plans. Other times will be a low level of community participation, for example for development that complies with the rules already established upfront community involvement. For example, development that is complying development or code assessment which all the standards that are set out in Local and development guides developed with community, will only be notified for information. Community views will not be sought on individual applications. Chapter 6 Development Assessment contains more detail on the proposed notification and consultation requirements all types of development assessment.⁵⁵

The nature of the participation that will be undertaken will be detailed in a Community Participation Plan to be prepared by Councils and other planning authorities (s.2.4). Part 1 of Schedule 2 of the Bill sets out the mandatory requirements for community participation. Part 1 has four divisions. These address exhibition periods and notification requirements, but do not provide any details of the actual 'participation'.

Local Plans will identify the relevant assessment track for different development. Development types for exempt and complying development will be initially identified on a state wide basis. Development types for code assessment will be developed by councils (within the frameworks of higher order plans/policies).

Strategic planning is fundamental to creating robust development frameworks, but checks and balances at the assessment stage are still required. The participation elements of the Bill provide no requirement that strategic planning decisions actually reflect community aspirations and feedback. Further, it may be overly optimistic to expect communities to participate in relation to strategic planning, because it relates to hypothetical future development and in relation to matters which have no current direct nexus with their property (as opposed to, for example, a development application lodged by a neighbour seeking to build a strata complex).

⁵⁴ White Paper at 122.

⁵⁵ White Paper at 47.

4.2 How will the Community Charter operate?

Issue

There is uncertainty as to how the Community Charter will operate in practice and as to the content of Community Participation Plans. There is no right to compel compliance with the Community Charter (see section 5.1).

Provision(s) of the Bill

Part	Section	Subject
2 Community participation	2.1	The Community Participation Charter
	2.4(2)	Community participation plans

Recommendations

1. The Department of Planning and Infrastructure forthwith release for consultation its Guideline document on preparing Community Participation Plans. The Guideline must address notification, provision of information, the decision making process, reasons for decisions, the manner in which submissions have been considered, and appeal rights.
2. The Department of Planning and Infrastructure prepare a model Community Participation Plan which can be adopted and/or modified by councils to suit their individual circumstances.

Context

A Community Participation Charter is dealt with early in the Bill (s.2.1) and sets out seven principles which can be summarised as:

- Opportunity to participate
- Access to information
- Participation at strategic planning stages
- Right to be informed
- Proportionality
- Inclusive participation
- Transparent decisions

Councils must prepare a Community Participation Plan that provides guidance on how they will undertake community participation in accordance with the Community Participation Charter (s.2.4(2)).

Councils require guidance and resources to prepare Community Participation Plans and to determine what provisions to include at each stage in the planning process.

There should be consistency among councils regarding the form and content of Community Participation Plans. The Department of Planning and Infrastructure is to prepare a Guideline which sets out key standards that planning authorities are to meet in preparing their Community Participation Plans⁵⁶. The efficacy of the Charter cannot be ascertained until the details of the Guideline have been released and considered.

The Charter must identify and fulfil the broad public interest rather than merely consider powerful and vocal interests. The community must be apprised of the role its decisions will play in delivering (or failing to deliver) sustainable development and how decisions can have cumulative and far-reaching direct and indirect impacts. It must understand how environmental problems relate to economic and social issues. There must be a deliberative and inclusionary procedures combined with the promotion of environmental citizenship above short term economic gain.

⁵⁶ White Paper at 47.

5.1 Restricted rights of review, appeal and enforcement

Issue

Review and appeal rights have been restricted and there is an imbalance between the appeal rights of developers and third parties. Certain elements of the Bill are 'not mandatory' restricting the efficacy of these sections achieving their aims.

Provision(s) of the Bill

Part	Division	Subject
9 Reviews and Appeals	9.3	Appeals – development consents
9 Reviews and Appeals	9.2	Reviews
Part	Section	Subject
10 Enforcement	10.12(2)	Exclusion of legal proceedings

Recommendations

1. Judicial review be available to third parties in relation to:
 - a) State Significant Development;
 - b) EIS assessed development irrespective of whether they objected during its public exhibition;
 - c) development which exceeds applicable development controls (including performance criteria) or which modifies an existing consent;
 - d) spot rezoning.
2. Third parties have the right to participate in a Review. The nature and results of such participation, submissions received, the reasons for a decision and how participation influenced the decision be made publicly available.
3. Section 10.12(2) of the Bill be deleted.

Context

The Bill increases review rights for developers and dilutes those for communities. For example Proponents can appeal decisions relating to rezoning, strategic compliance certificates and code assessed development, whilst residents cannot. To foster accountability and transparency, there must be an appropriate balance between the appeal rights of developers and residents.

Section 10.12(2) of the Bill provides:

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 (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) [Community Participation],*
- (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) [Strategic Planning],*
- (c) *any provisions of Part 4 relating to development consent for State significant development (other than a requirement of Part 1 of Schedule 2) [SSD],*
- (d) *any provisions of Part 5 relating to approval for State infrastructure development (other than a requirement of Part 1 of Schedule 2) [SID].*

This section significantly restricts the community's standing to ensure that the planning system is achieving what is expected, such as adhering to a Community Participation Charter.

Thank you in anticipation for considering our submission. We look forward to hearing how our submission influenced (1) the planning review and (2) your response to consultation on the White Paper and draft Planning Bills.

Yours sincerely,



SYDNEY COASTAL COUNCILS GROUP INC.

Per: Cr. Cathy Griffin
Chairperson



Sydney Coastal Councils Group Inc.

councils caring for the coastal environment

Level 14, Town Hall House

456 Kent Street

GPO Box 1591

SYDNEY NSW 2001

t: +61 2 9246 7326

f: +61 2 9265 9660

e: info@sydneycoastalcouncils.com.au

w: www.sydneycoastalcouncils.com.au.com.au